# *BACON's*

# ABRIDGMENT.

By GWILLIM.

VOL. V.

A

# NEW ABRIDGMENT OF THE LAW.

By MATTHEW BACON,
OF THE MIDDLE TEMPLE, ESQ.

*THE FIFTH EDITION, CORRECTED;*
WITH CONSIDERABLE ADDITIONS,
INCLUDING THE LATEST AUTHORITIES;
By HENRY GWILLIM,
OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

*IN SEVEN VOLUMES.*

VOL. V.

LONDON:
PRINTED BY A. STRAHAN,
LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;
For T. Cadell, C. Dilly, G. G. and J. Robinson, J. Johnson, R. Baldwin, A. Strahan, W. Otridge, E. and R. Brooke, F. and C. Rivington, J. Butterworth, E. Newbery, W. Clarke and Son, J. Stockdale, T. Payne, J. Walker, R. Baniſter, R. Pheney, T. N. Longman, R. Bickerſtaff, and J. White.
1798.

FH
MVSEVM
BRITANNICVM

# Mortgage.

(A) Of the Original and ſeveral Kinds of Mortgages.

(B) What ſhall be deemed a Mortgage, or an Eſtate redeemable.

(C) Of the Nature of a Mortgage, as to the diſtinct Intereſts of the Mortgagor and Mortgagee.

(D) Of the legal Performance of the Condition.

(E) Of the Equity of Redemption and Foreclоſure: And herein,

1. Who may redeem, and by whom the Mortgage Money ſhall be paid.
2. To whom the Mortgage Money ſhall be paid.
3. Of the Precedency and Right of Redemption, where there are ſeveral Mortgagees or Incumbrancers: And herein of their Remedies againſt each other, as well as againſt the Mortgagor.
4. How far the Purchaſing in a precedent Mortgage or Incumbrance will protect ſuch Purchaſer, and entitle him to a Precedency of Redemption.
5. Of the Equity which muſt be done by him, who would redeem, to the Perſon againſt whom a Redemption is prayed.
6. At what Time the Redemption muſt be.
7. Of the Manner of Redeeming and Foreclоſing.

(F) Mortgagees and their Aſſignees, how to account, and what Allowances to make.

## (A) Of the Original and ſeveral Kinds of Mortgages.

Camæus, 11, 12.

THE notion of mortgaging and redemption ſeems to be of *Jewiſh* extraction, and from the *Jews* derived to the *Greeks* and *Romans*: the plan of the *Moſaic* law conſtitutes a juſt and equal agrarian, that the lands may continue in the ſame tribes and families, and the people might not be diverted by any exotick acts and inventions from the exerciſe of agriculture, in which innocent employment they were to be continually educated; and therefore whoever were compelled by want to ſell, could tranſfer no eſtate in the lands farther, than to the next general jubilee, which returned once in fifty years; wherefore they computed till the jubilee, and according to the diſtance from thence, ſuch was the intereſt that could be transferred to the buyer. But the vendor had power at any time to redeem, paying the value of the lands to the jubilee. But though he did not redeem at the year of jubilee, yet the lands then came back again free to the vendor and his heirs.

Juſtin. 592.

But our notion of mortgaging and redemption ſeems to have come more immediately from the civil law, and therefore it will be neceſſary herein to conſider the diſtinctions in that law between pledges and things hypothecated.

The *pignus* or pledge was, when any thing was obliged for money lent, and the poſſeſſion paſſed to the creditor.

*Vide* tit. Bailment.

The *hypotheca* was, when the thing was obliged for money lent, and the poſſeſſion remained with the debtor. Now in caſe of goods pignorated, the creditor was obliged to the ſame diligence in keeping them, as he uſed about his own; ſo that if the goods were loſt by the negligence of the creditor, an action lay as for a depoſit; for the property being transferred to the creditor for a particular purpoſe, he was to keep them as his own.

Digeſt. lib. 20. tit. 6. Corvin. 269, 270, 271.

If the debtor did not redeem the thing pledged, the creditor was to foreclose the redemption of the debtor; and if the money was not paid, the creditor had his *actio pignoritia*, or *hypothecaria*, which, when he had purſued, and obtained ſentence thereon, he might ſell the pledge as his own property. But there was this difference between the *actio pignoritia* and *hypothecaria*; that the *actio pignoritia* was only on the perſon of the debtor to foreclose him, becauſe the *pignus* was already in the poſſeſſion of the creditor; but the *actio hypothecaria* was *tam in rem, quam in perſonam*, and was given *ad pignus proſequendum contra quemcunque poſſeſſorem*; becauſe herein the creditor had not the poſſeſſion of the pledge, but it remained to the debtor. Until ſentence was obtained in theſe actions, the creditor could not obtain the property of the pledge; and if the money was paid before ſentence, the pledge was ſubject to redemption; and where the ſame thing was pledged to ſeveral, thoſe were ſaid to be *potiores in pignore* to whom the things were firſt hypothecated.

Digeſt. lib. 20. tit. 6.

If the money was tendered or paid to the creditor, the contract of pignoration was diſſolved, and the debtor might have the pledge back,

back, as a thing lent. This ſeems to have introduced the notion among us of the debtor's right to redemption. And with them the uſucaption, or the right of preſcription, did not extinguiſh the pledge, unleſs a ſtranger had held it for thirty years, or the debtor had held it for forty years.

In the feudal law the rule was, *Feudalia, invito domino, aut agnatis, non recte ſubjiciuntur hypothecæ, quamvis fructus poſſe eſſe, receptum eſt.* And the reaſon of this rule was, becauſe the feud was filled with a tenant from the lord's original bounty, on whom he depended for his perſonal ſervice in war and peace; and therefore the feudiary could not obtrude a tenant on him without his leave, who might be leſs capable of thoſe ſervices; and as the tenant could not originally alien without licence, ſo he could not mortgage. Corvin. 268.

But, when a licence of alienation was given about the time of *H.* 3., and it became a maxim in law, that the purity of a fee-ſimple imported a power of diſpoſing of it as the owner pleaſed; there were two ways of mortgaging lands introduced, which *Littleton* diſtinguiſhes by the names of *vadium vivum* and *vadium mortuum*.

The *vadium vivum* is, where a man borrows 100 *l.* of another, and makes an eſtate of lands to him, till he hath received the ſaid ſum of the iſſues and profits of the lands; and it is called *vadium vivum*, becauſe neither the money nor the land dieth; for the lands are conſtantly paying off the money, and the lands are not left as a dead pledge, in caſe the money be not paid. This ſeems to have been the ancient way of pledging lands; for they held, that lands could not be hypothecated; and therefore they uſed to ſubject the *uſufructus*, which continued originally during the life of the feudiary; but when there was a free liberty given of alienation, then the feudiary could pledge the *uſufructus* of the land at pleaſure. But becauſe, in this way of pledging, the lender received his money by degrees, and in ſmall parcels, which was very troubleſome; and thoſe that put money to uſury, are generally willing to receive the whole in a groſs ſum; therefore this way of pledging is now out of uſe. Co. Lit. 205. *Vide* Mad. Formulare, 136.

The *vadium mortuum* is ſo called by *Littleton*, becauſe it is doubtful, whether the feoffor will pay the money at the day limited or not; and if he do not pay, then the land, which is but in pledge upon condition, for the payment of the money, is taken from him for ever, and ſo dead to him; and if he do pay it, then the pledge is dead to the tenant of the land. Lit. § 332. Co. Lit. 205.

Of theſe mortgages there are again two ſorts; 1*ſt*, Of the freehold and inheritance; and 2*dly*, Of terms for years. Mad. 318, 319.

1*ſt*, Of the freehold and inheritance; and here the ancient way was to make a charter of feoffment, on condition, that if the feoffor, or his heirs, paid the ſum to the feoffee, or his heirs, he ſhould re-enter and re-poſſeſs; and ſometimes the condition was contained in the charter of feoffment, and ſometimes it was defeazanced by another charter, as may be ſeen in the old forms.

Co. Lit. 226, 227. For as a man might annex a condition to his feoffment, for *cujus eſt dare, ejus eſt diſponere*, ſo he might annex a condition by another deed, bearing date and executed at the ſame time; for, being executed at the ſame time, it is really but one and the ſame diſpoſition, *quæ incontinenti fiunt ineſſe videntur*. A defeazance or condition annexed indeed after the feoffment executed comes too late, becauſe the livery *coram paribus* atteſting the infeudation, in which there is no condition, the tenant muſt hold the land according to the tenure of the inveſtiture: but rents, annuities, or warranties, that are things executory, may be defeated by defeazances made at the time of their creation, or any time after; becauſe there is not any neceſſity of the notoriety of livery to make an inveſtiture; and therefore, being created by deed only, they may be defeated or deſtroyed by deed alone.

Co. Lit. 221, 222. Theſe ſorts of conveyances were ſubject to theſe inconveniencies; that if the money were not paid at the day, ſo that the eſtate became abſolute, the eſtate was thenceforth ſubject to the dower of the feoffee, and all other his real charges and incumbrances; for though if the feoffor performed the condition, then he might re-enter, and re-poſſeſs himſelf in his former eſtate, and, conſequently, was in above all the charges and incumbrances of the feoffee; yet, if he did not literally perform the condition, by payment of the money at the day, then, the eſtate was legally ſubject to the charges and incumbrances of the feoffee, though the money were afterwards paid, and the eſtate re-conveyed to the feoffor.

Hard. 465. But the courts of equity, as they grew in power, have ſet this matter right, and have maintained the right of redemption, not only againſt tenant in dower, and the perſons who come in under the feoffee, but even againſt the tenant by the courteſy, and lord by eſcheat, that are in the *poſt*; becauſe the payment of the money doth, in the conſideration of equity, put the feoffor in *ſtatu quo*, ſince the lands were originally only a pledge for the money lent.

As to mortgages by way of creating terms, this was formerly by way of demiſe and re-demiſe. As for example; *A.* borrowed money of *B.*, thereupon *A.* would demiſe the land to *B.* for a term of 500, *&c.* years abſolutely, with common covenants againſt incumbrances, and for farther aſſurance, and then *B.* would the day after re-demiſe to *A.* for 499 years, with condition, to be void on non-payment of the money at the day to come: this manner of mortgaging came in after the 21 *H.* 8. *c.* 15. for falſifying recoveries, when there was a fixed intereſt ſettled in terms for years and was eſteemed beſt for the mortgagor, to avoid all manner of pretenſion from the incumbrances and dower of the feoffee in mortgage; and was reputed beſt for the mortgagee, to avoid the wardſhip and feudal duties of the tenure, and was only inconvenient in this; that if the ſecond deed were loſt, there appeared to be an abſolute term in the mortgagee.

But the common method now is this, *viz.* by a demiſe of the land for a term, under a condition to be void on the payment of

the mortgage-money and intereſt; and a covenant is inſerted at the end of ſuch deeds, that, till the default ſhall be made in the payment of the money, the mortgagor ſhall receive the rents, iſſues, and profits, without account.

This has been ruled to create a tenancy at will (*a*) to the mortgagee; but if the mortgagor dies, the tenancy at will is determined, till there is a receipt of intereſt from the heir, which ſeems to make him alſo tenant at will to the mortgagee. Raym. 147. [(*a*) The mortgagor is only *like* a tenant at will to the mortgagor: his *legal* intereſt is inferior to that of a ſtrict tenant at will. Dougl. 22. 282-3.]

But now the laſt and beſt improvement of mortgages ſeems to be, that in the mortgage deed of a term for years, or the aſſignment thereof, the mortgagor ſhall covenant for himſelf and his heirs, that, if default be made in the payment of the money at the day, then he and his heirs will, at the coſts of the mortgagee and his heirs, convey the freehold and inheritance of the mortgaged lands to the mortgagee and his heirs, or to ſuch perſon or perſons (to prevent merger of the term) as he or they ſhall direct or appoint; for the reverſion, after a term of 50 or 100 years, being little worth, and yet the mortgagee, for want thereof, continuing but a termor, and ſubject to forfeiture, *&c.* and not capable of the privileges of a freeholder; therefore, where the mortgagor cannot redeem the land, it is but reaſonable the mortgagee ſhould have the whole intereſt and inheritance of it, to diſpoſe of as abſolute owner.

[Great inconvenience having been ſuffered by mortgagees, from the difficulty and delay attending bills to foreclose, a mode of contracting has been invented, by which the mortgagor may, after a given time, procure his principal and intereſt, by a ſale of the mortgaged eſtates, without being under the neceſſity of applying to a court of equity. This is done by taking a conveyance of the fee to truſtees in truſt for the mortgagee for a term of years ſubject to redemption, with remainder to the truſtees in truſt, in default of payment at the time ſtipulated, to ſell the eſtate, and to apply the purchaſe-money, after defraying the expences incurred in diſcharging the truſt, in payment of the mortgage-money, and intereſt, and then to pay over the reſidue to the mortgagor.] 1 Pow. Mortg. 12.

## (B) What ſhall be deemed a Mortgage, or an Eſtate redeemable.

HEREIN we may obſerve in general, that whatever clauſes or covenants there are in a conveyance, though they ſeem to import an abſolute diſpoſition or conditional purchaſe; yet, if, upon the whole, it appears to have been the intention of the parties, that ſuch conveyance ſhould only be a mortgage, or paſs an eſtate redeemable, a court of equity will always conſtrue it ſo. Vern. 183. 268. 394. Prec. Chan. 95.

As, where the condition of a mortgage is, that the mortgagor ſhall redeem during his life, or that the mortgagor and the heirs Vern. 33. 190. 2 Chan. Ca.

147. S. C. Howard v. Harris. of his body ſhall redeem, yet equity will admit the general heir of ſuch mortgagor to a redemption; becauſe this can be no purchaſe, ſince there is a clauſe of redemption; and when the land was originally only a pledge for money, if the principal and intereſt be offered, the land is free; and it would be very hard, that it ſhould be in the power of the ſcrivener, or griping uſurer, by ſuch impertinent reſtrictions, to elude the juſtice of the court.

Vern. 488. Willet v. Winnel. If *A.* mortgage lands to *B.* worth 15 *l. per annum*, for ſecuring 200 *l.*, and at the ſame time *B.* enter into a bond conditioned, that if the 200 *l.* and intereſt is not paid within a year, then he to pay to *A.*, his executors or adminiſtrators, the further ſum of 78 *l.* in full for the purchaſe of the premiſes, *&c.*, and *A.* die within the year, and the 200 *l.* with intereſt not being paid at the day, the heir of *B.* pay the 78 *l.* the next day after the mortgage is forfeited to the adminiſtrator of *A.*, yet *A.*'s heir may redeem, paying the 200 *l.* and likewiſe the 78 *l.* that was paid the adminiſtrator.

2 Vern. 84. Man'ove v. Ball. So, where *A.* for 550 *l.* made an abſolute aſſignment of a church leaſe for three lives to *B.*, and *B.* by writing under his hand agreed, that if *A.* paid 600 *l.* at the end of the year, *B.* would re-convey; *B.* died, leaving *C.* his ſon and heir; two of the lives died, and the leaſe was twice renewed by *C.* and his father: though it was near twenty years ſince the conveyance was made, yet the Maſter of the Rolls decreed a redemption on payment of the 550 *l.* and the two fines.

2 Vern. 520. Jennings v. Ward. *A.* lends money to *B.* to carry on certain buildings, and takes a mortgage from him to ſecure 1600 *l.* with intereſt; and, by another deed executed at the ſame time, takes a covenant from *B.* that he ſhould convey to him, if he thought fit, ground-rents to the value of 1600 *l.* at the rate of twenty years purchaſe; and, on a bill brought to redeem, the Maſter of the Rolls decreed a redemption on payment of principal, intereſt, and coſts, without regard to that agreement, but ſet aſide the ſame as unconſcionable; for a man ſhall not have intereſt for his money and a collateral advantage beſides for the loan of it, or clog the redemption with any bye agreement.

Bowen v. Edwards, 1 Rep. Ch. 222. 13 Car. 2. [Again, where the plaintiff being ſeiſed in fee of the lands in queſtion worth 200 *l. per annum*, mortgaged the ſame in 1637, to the defendant's father for 250 *l.* and agreed and alſo ſealed a deed for the abſolute ſale thereof, if the money were not paid at the end of ſeven years; a redemption was decreed, notwithſtanding; for the defendant's father, having exhibited a bill againſt the plaintiff for the land or the money, made it evident that it was only a mortgage originally, and being ſo at firſt, the ſubſequent agreement could not alter it.

And although a mortgagee have a power to mortgage or to ſell the lands mortgaged abſolutely, in caſe of failure of payment at a given time, a court of equity will, nevertheleſs, conſider any conveyance by him to be ſubject to redemption, if it be evident from the *res geſtæ*, that the vendee did not depend upon the power; as, if the equity of redemption be excepted in the conveyances. Thus,

Thus, a conveyance of lands was made, by leaſe and releaſe, by *A.* to *B.* and his heirs, and by a defeazance bearing date with the releaſe, it was agreed that if *A.* repaid 1000*l.* *&c.* borrowed of *B.*, within a year from the date of the indenture, then *B.* ſhould re-convey to him; but if he failed to pay the money within the year, then *B.* ſhould mortgage, or abſolutely ſell the lands, free from redemption, and out of the money raiſed by ſuch mortgage or ſale, pay the ſaid 1000*l.* *&c.* and intereſt, and be accountable for the overplus to *A.* and his heirs. A fine was alſo levied to *B.* in order to bar *A.*'s wife of dower. Afterwards, the money not being paid at the time ſtipulated, *B.* agreed to convey the eſtate for a certain ſum of money, and in the agreement, and alſo in the conveyances, an exception was made, and in ſuch exception the defeazance was mentioned. And afterwards a queſtion aroſe, Whether the purchaſer had an abſolute eſtate, or an eſtate redeemable? And it was contended that he had an abſolute eſtate, for that the eſtate conveyed to *B.* was an abſolute eſtate, and though there was a defeazance executed at the ſame time, yet that was to have operation only within a twelvemonth, after which period, *B.* was inveſted with a power to ſell abſolutely free from all equity of redemption; conſequently, it then became a truſt for *B.* to ſell, and where an eſtate was conveyed to truſtees to ſell, the vendee, by virtue of ſuch ſale, had an abſolute fee, free from all charges and power of redemption. And the fine, it was ſaid, paſſed the right of the then owners in the eſtate, and made it abſolute. But it was anſwered, and reſolved by the court, that the eſtate was redeemable, for the eſtate conveyed by *A.* to *B.* was, in its nature, a mortgage to him, and though the money was not paid within the year, yet the mortgagor might ſtill have redeemed at any time while the eſtate continued in *B.*; and then, though *B.* had a power on non-payment within the year, to mortgage or ſell in order to raiſe the money lent, and to be accountable for the overplus, it was not then to be conſidered what he might have done, but what he *had* done; and it was evident, that it was not *B.*'s intention to convey an abſolute and indefeazible eſtate, for he had not conveyed it abſolutely, and free from the equity of redemption; but had inſiſted upon having the defeazance inſerted. If then, as was the caſe, *B.* on non-payment of the money within a year, ſtood as a truſtee for *A.* ſubject to the defeazance, his (*B.*'s) vendee coming in with notice of that truſt, would ſtand in his place, and muſt be conſidered as taking the conveyance, liable, in equity, to the performance of the truſt; and the fine made no difference, for it only operated to ſtrengthen the eſtate and free it from the dower of the wife, but it confirmed it *in ſtatu quo*, and did not diſcharge it from the equity of redemption to which it was before liable.

Croft v. Powell, Comyns, 603.

It ſeems queſtionable whether a power of redemption can be ſet up upon a ſubſequent agreement, made after an abſolute conveyance executed; for if it be a mortgage, it muſt be ſo *ab initio* on the original agreement. And therefore, where one having the reverſion expectant upon the determination of a leaſe for life, in an

*Vide* Copleſtone v. Boxwill,

1 Chan. Ca. 1. 3 Salk. 241.

eſtate worth 1000 *l. per annum*, conveyed it in fee to *W. R.*, in conſideration of 1000 *l.* and no more, and the tenant for life died, a pretence was ſet up that this conveyance was no more than a mortgage, becauſe *W. R.* had declared *that he did not* know how long he ſhould enjoy the eſtate, and that he would take his money again with intereſt: *ſed dubitatur per curiam*; and one reaſon was, becauſe matter ſubſequent will not make it a mortgage, if it was not ſo upon the original agreement.

But although courts of equity will not ſuffer the mortgagee to clog the redemption with any ſtipulation for a purchaſe, at a ſpecifick price agreed upon at the time of the loan, becauſe the admiſſion of ſuch a practice would furniſh an inlet to great fraud and impoſition upon the mortgagor; yet, a mere agreement that, in caſe of ſale, an opportunity of pre-emption ſhould be given to the mortgagee, would, it ſeems, be decreed; but it muſt be claimed at a reaſonable time; for, where *A.*, the plaintiff's brother, died, having previouſly mortgaged lands to *B.* by deed, containing covenants to re convey upon ſix months notice of payment of the principal and intereſt, and that in caſe the eſtate ſhould be ſold, *B.* ſhould have the pre-emption; *B.* got the counterpart into his hands after *A.*'s death; then the plaintiff gave him ſix months notice that he would pay off the mortgage, which he refuſed to accept; upon which, the plaintiff exhibited his bill for a re-conveyance of the eſtate, having entered into articles for the ſale of it; *B.* in his anſwer, inſiſted on the covenant for pre-emption; but it appearing that neither the plaintiff nor purchaſer knew any thing of this covenant, the counterpart of the deed having been in *B.*'s cuſtody; that the plaintiff, on application for it, had been denied it, the mortgagee inſiſting only on payment, alleging the ſecurity was too narrow for the money lent, and threatening to foreclose, never having mentioned his claim to pre-emption until after the eſtate was ſold; it was ſaid, he ought not to ſet it up to the prejudice of the purchaſer, having had time to claim it, if he had pleaſed, before the eſtate was ſold; and it was decreed accordingly.

Orby v. Trigg, 2 Eq. Ca. Abr. 599. 24. S. C. 9 Mod. Ca. in Law and Eq 2.

A diſtinction hath been made by the court of Chancery, between contracts originally founded upon lending and borrowing money, with an agreement for a purchaſe in a certain event, and caſes where, after a mortgage, a new agreement hath been entered into and executed by the parties for an abſolute purchaſe, although there be a ſubſequent declaration that the mortgagor may have his eſtate upon payment of intereſt, principal, and coſts; or, where a releaſe of the equity of redemption is given with a collateral agreement to re-convey, upon repayment of the purchaſe-money; and, in the latter caſes, it hath been determined that no repurchaſe ſhall be had, unleſs upon ſtrict performance of the conditions ſtipulated. Thus, *A.* a joint-tenant with *B.* her ſiſter, made an abſolute conveyance to *C.* in fee for 104 *l.* which was admitted to be intended only as a mortgage; ſome time after, in 1708, thoſe deeds were cancelled, and then *A.* in conſideration of 184 *l.* (including the 104 *l.* paid by *C.*) conveyed

Barrel v. Sabine, 1 Vern. 268.

Cotterel v. Purchaſe, Ca. temp. Talb. 61.

veyed the eſtate *ut ſupra*, but with a farther covenant not to agree to any partition without *C.*'s conſent. *B.* was in poſſeſſion till 1710, when *C.* ejecting her out of the moiety, enjoyed it quietly till 1726, at which time *A.* brought a bill for redemption, to which *C.* pleaded himſelf an abſolute purchaſer. The receipts given for the money, mentioned it to be purchaſe-money. In 1710, there was an agreement that *A.* might have the eſtate again, if deſired, on payment of principal, intereſt, and charges. It was firſt heard before the Maſter of the Rolls, who diſmiſſed the bill. Afterwards it came on before Lord Chancellour *Talbot*, who obſerved the caſe was very dark; the firſt deed was admitted to be a mortgage, the ſecond was made in the ſame manner, excepting the covenant reſpecting the partition, which was the darkeſt part of the caſe; for to ſuppoſe that it was an abſolute conveyance, and to take a covenant from one who had nothing to do with the eſtate, made both the covenant and parties vague and ridiculous; but that it would be equally ſo, if the deed was ſuppoſed to be an actual coveyance, ſo that it was of no great weight, and ought to be laid out of the queſtion; that he was inclined, upon the whole, to think the conveyance in 1708 was at firſt an abſolute conveyance. The agreement, in 1710, for the repurchaſe, ſhewed it was not redeemable at firſt; the acquieſcence of ſixteen years upon *C.*'s poſſeſſion, was a ſtrong evidence of it; and his Lordſhip, upon the circumſtances of the caſe, affirmed his Honour's decree.

So, lands in *Wales* were mortgaged for 400*l.* and afterwards, neither principal nor intereſt being paid at the time limited, the mortgagee brought an ejectment, got poſſeſſion of the premiſes, and then obtained a releaſe of the equity of redemption from the mortgagor, upon payment of 350*l.* more; a note was given at the time of executing the releaſe, that the releaſee, on payment of the 750*l.* and all charges of repairs within a year by the releaſor, ſhould ſell and convey to him the premiſes. Payment having been neglected for ſixteen years, redemption was not allowed, the note being conſidered as an original agreement between the parties to ſell and convey the premiſes upon the terms therein mentioned, but not that the releaſor ſhould be at liberty to redeem the ſame.] Endſworth v. Griffith, 15 Vin. Abr. 468. pl. 18. 2 Eq. Ca. Abr. 595. pl. 6. 1 Brown's Parl. Ca. 149.

But if a man borrows money of his brother, and agrees to make him a mortgage, and that, if he has no iſſue male, his brother ſhall have the land; ſuch an agreement, made out by proof, will be decreed in equity. Vern. 193. *per* North, L. K.

*A.*, in conſideration of 1000*l.*, made an abſolute conveyance to *B.* of the reverſion of certain lands after two lives, which, at that time, were worth little more; and by another deed, of the ſame date, the lands were made redeemable any time during the life of the grantor only, on payment of 1000*l.* and intereſt; *A.* died, not having paid the money; and it was held by my Lord *Nottingham*, that his heir might redeem, notwithſtanding this reſtrictive clauſe; and that it was a rule, *once a mortgage and always a mortgage*, and that *B.* might have compelled *A.* to redeem in his lifetime, or have foreclоſed him. But, on a re-hearing, Lord Keeper *North* Vern. 7. 214. 232. Newcomb v. Bonham, 2 Vent. 364. S. C. where it is ſaid, that Lord North's decree was affirmed in the Houſe of Lords.

*North* reverſed the decree on the circumſtances of this caſe; for it appeared by proof, that *A.* had a kindneſs for *B.*, and that he had married his kinſwoman, which made it in the nature of a marriage ſettlement: he likewiſe held, that *B.* could not have compelled *A.* to redeem during his life, which made it the more ſtrong.

[Another exception hath been made to this general rule, namely, where a conditional conveyance is made, to be void upon payment of a ſum certain, within a ſtipulated time, in contemplation of a ſettlement, or family proviſion. Thus, *A.* ſeized of a copyhold in fee, ſurrendered it, upon his marriage, to the uſe of himſelf and his wife in ſpecial tail, remainder to her in fee, upon condition that, if he paid 50*l.* at a day certain, to the daughter that the wife had, then the whole ſurrender would be void. The day elapſed, the 50*l.* not paid, and the huſband died without iſſue. On a bill to redeem, brought by his heir againſt a purchaſer from the wife, the defendant pleaded that he was a purchaſer for a valuable conſideration without notice; and it was reſolved, that this was not originally deſigned for a mortgage, but that the party, by ſettling it thus, had left it in his election, either to perform the condition by paying the money, or to let the ſettlement ſtand; he had choſen the latter, and the plea was allowed.

King v. Bromley, 2 Eq. Ca. Abr. 595. 8.

One, upon his marriage, covenanted that his wife ſhould be paid 1000*l.*, within two years after his death, and, for performance thereof, entered into a ſtatute; but, prior to the covenant and ſtatute, he had mortgaged part of the lands for 500*l.* for certain years. Afterwards he deviſed theſe lands to his wife and her heirs, if the 1000*l.* were not paid to her, according to the marriage-covenant, ſhe paying off the ſaid 500*l.* He died, leaving his wife executrix, to whoſe hands aſſets came; the 1000*l.* not being paid to the wife, ſhe paid off the 500*l.* and had the mortgage-lands aſſigned to her. She then conveyed over the mortgage-lands in fee by fine and deed. The queſtion was, Whether the heir of the covenantor could redeem, paying the 1000*l.* and the 500*l.* with intereſt upon diſcount of the profits? And the Lord Chief Baron was of opinion he could not; for the deviſe to the wife was abſolute, if the 1000*l.* were not paid at the time appointed.

Sir Nich. Wooliton v. Aſton, Hardr. 511.

A diſtinction hath been likewiſe taken, between mortgages, and defeazible purchaſes, ſubject to repurchaſes within a *time limited*, where the intereſt is taken by way of rent-charge; for, in the latter caſes, the ſtipulations made between the parties muſt be ſtrictly adhered to, or the eſtate of the grantee will become abſolute. Thus, *I. S.* granted a rent-charge in fee of 48*l.* a year to *B.*, upon condition, that if *I. S.* ſhould, at any time, give notice to pay in the conſideration-money (being 800*l.*) by inſtalments, *viz.* 100*l.* at the end of every ſix months; and ſhould, purſuant to ſuch notice, pay the ſame and intereſt *at any time during his lifetime*, then the grant to be void. There was no covenant for *I. S.* to pay the money, and the rent-charge was much leſs than what the intereſt came to (intereſt being then 8 *per cent.*); *B.* had conveyed it

Floyer v. Levington, 1 P. Wms. 268.

it over after *I. S.*'s death, to a *purchaſer with collateral ſecurity* for quiet enjoyment, and the *purchaſer* had afterwards made a marriage ſettlement upon it. The queſtion was, Whether it was redeemable after ſixty years? And it was decreed, by Lord *Cooper*, that it was not. His Lordſhip obſerved, it was material that at the time of making the mortgage, intereſt was at 8 *per cent.*, the rent-charge, therefore, was much leſs than the intereſt of the money; conſequently, the payment of the rent-charge could not be taken as the payment of the intereſt; that ſeveral circumſtances occurred in this caſe, which, though each of them ſingly might not be of force to bar the redemption, yet, joined together, were ſtrong enough to prevail over it; that *the mortgagee ſeemed to have allowed a conſideration* for purchaſing the equity of redemption after the death of the mortgagor; firſt, by taking the rent of 48 *l. per annum*; ſecondly, by agreeing to have his money by inſtalments; thirdly, by leaving it only at the election of the mortgagor, whether he would redeem or not; that there could be no reaſon given why ſuch a contingent right of redemption might not, upon fair and equitable terms, be purchaſed; that length of time, where ſo great as in the preſent caſe, was a good bar of redemption of a rent-charge, as well as of land; and that the mortgagor was not bound to pay the money by any covenant.

The reporter obſerves upon the laſt caſe, that it was thought length of time was the principal objection to the redemption; but, in the caſe of *Mellor* v. *Lees*, which came on before Lord Chancellour *Hardwicke*, upon an appeal from the rolls, the doctrine that ſuch limited agreements for redemption, or rather repurchaſe, were legal, was confirmed. In this caſe a mortgage was made of an eſtate by the plaintiff's grandfather, *Thomas Mellor*, in 1689, to *John* and *James Whitehead*; the *Whiteheads* afterwards, on the 5th of *June* 1689, mortgaged the ſame eſtate to *Cartwright* and *Haywood*, and their heirs, for ſecuring 200 *l.*, to which *Thomas* and his ſon, *John Mellor*, were parties; and *Cartwright* and *Haywood*, in order to ſecure themſelves the intereſt, made a leaſe to the plaintiff's father, and to his aſſigns, dated the 12th of *June* 1689, for five thouſand years, at the rate of 12 *l.* a year, for the three firſt years, and 10 *l.* a year for the remainder of the term; *and if, in the ſpace of three years*, the 200 *l.* was paid with intereſt, then the premiſes were to be reconveyed. Receipts had been given ſometimes for intereſt, and ſometimes for a rent-charge; the laſt receipt was in 1730. The 200 *l.* lent, was money left under one *Sutton*'s will in 1687, and directed to be laid out in the purchaſe of lands in fee, in *Lancaſhire* or *Cheſhire*; the rents to be applied towards clothing twenty-four aged and needy houſekeepers. The eſtate, at the time of the mortgage, was worth 500 *l.* only, but was now valued at 900 *l.* The plaintiff, on the 20th *January* 1738, had given notice that he would pay in the money; but the defendant, a new truſtee of the charity, had refuſed to take it, inſiſting that it was an abſolute purchaſe. And it was ſo decreed by *Forteſcue*, Maſter of the Rolls, which decree was upon appeal to the Chancellour confirmed, his Lordſhip ſaying, that

2 Atk. 494.

that the bill was properly diſmiſſed at the Rolls, not ſo much upon general rules, as upon the particular circumſtances of the caſe, and the ſimilitude of it to the caſe of *Floyer* v. *Levington*.

Taſburgh v. Echlin et al. 4 Brown's Parl. Ca. 342.

It ſeems, from the determination in the caſe of *Taſburgh* and *M'Namara* v. Sir *Robert Echlin et al.* that ſuch a contract reſpecting lands, limiting the payment of the money advanced and intereſt thereupon *to a particular period*, would be conſidered in the nature of a conditional purchaſe, and no redemption allowed thereof, after the time ſtipulated.

This caſe came before the Houſe of Lords upon an appeal from a decree made by the Lord Chancellour of *Ireland*, in the year 1732, on the following circumſtances, *viz.* King *James* I. by his letters patent under the great ſeal, dated the 17th of *June* 1608, granted divers lands to *John King* and *John Bingley*, and their aſſigns, for 116 years, to commence from the 18th of *May* then laſt paſt, at a certain yearly rent. The reſidue of this term, by deed dated the 26th of *May* 1677, became veſted in *John Taſburgh*, father of *Henry Taſburgh*, the appellant in the cauſe. King *Charles* I. by his letters patent, dated the 25th of *March* 1647, granted the ſame premiſes to Sir *Maurice Euſtace* and his heirs at a like rent, but without reciting or taking any notice of the term of 116 years. Sir *Maurice*, by his will dated the 20th of *June* 1665, deviſed the premiſes, *inter alia*, to his nephew Sir *John Euſtace* in fee; who by virtue thereof, or as heir at law of the teſtator, became entitled to the reverſion and inheritance of the premiſes, expectant on the determination of the term of 116 years. The premiſes being only of the clear yearly value of 200 *l.*, Sir *John*, in conſideration of 200 *l.*, paid him by the ſaid *John Taſburgh*, did by leaſe and releaſe, dated the 30th and 31ſt of *May* 1681, grant and convey the ſame to *Charles Taſburgh* and his heirs, in truſt for *John Taſburgh*; in which indenture of releaſe there was a proviſo to the following effect, *viz.* that if Sir *John Euſtace*, his heirs, executors, or adminiſtrators, ſhould pay to *Charles Taſburgh*, his executors, adminiſtrators, or aſſigns, at the end of five years, to be accounted from the date of the releaſe, the ſum of 200 *l.* with full intereſt for the ſame, at the rate of 10 *l. per cent. per annum*, according to the cuſtom of the kingdom of *Ireland*; that then it ſhould be lawful for him and his heirs, into the premiſes to reenter, and the ſame to repoſſeſs and enjoy as in his and their former right. But if Sir *John*, his heirs, executors, or adminiſtrators, ſhould fail in payment of the money with intereſt, at the time limited, that then the eſtate of the ſaid *Charles Taſburgh* ſhould be abſolute and indefeazible, as well in equity as in law; and that Sir *John*, his heirs and aſſigns, ſhould, on failure of payment as aforeſaid, be for ever debarred from all right and relief in equity, againſt the tenor of the ſaid releaſe. And Sir *John* did thereby, for himſelf and his heirs, releaſe unto *Charles Taſburgh*, his heirs and aſſigns for ever, all his right in equity to redeem the premiſes, in caſe of failure of payment as aforeſaid: and there was no covenant in the deed, on the part of the grantor, to repay the 200 *l.*, or the intereſt thereof, as is uſual in mortgages. The five

years

years mentioned in the proviſo being elapſed, and no part of the 200*l.*, or the intereſt thereof having been paid, *John Taſburgh* (having no remedy at law to compel the payment, the eſtate being only a reverſion expectant upon the determination of a term of which there were then 43 years unexpired) exhibited a bill, in *April* 1687, in the name of *Charles Taſburgh*, againſt Sir *John Euſtace*, ſetting forth the nature of the conveyance, and praying payment at a certain day, or that the conditional eſtate of *Charles Taſburgh* in the premiſes (in caſe it ſhould be adjudged to be a defeazible or redeemable eſtate) ſhould be made abſolute to him and his heirs; and that in that caſe Sir *John Euſtace* might be foreclоſed of all right or equity of redemption of the premiſes, and might make farther abſolute conveyances and aſſurances to the ſaid *Charles Taſburgh*, according to the tenor and true meaning of the indentures of leaſe and releaſe. Sir *John*, being ſerved with a *ſubpœna* to anſwer this bill, ſtood out all proceſs of contempt to a ſequeſtration, and in *May* 1688, appeared by his ſix clerk, and prayed a commiſſion for taking his anſwer in *England*, which was granted by conſent. But it was ordered that, unleſs the ſame was returned by the 22d of *June* following, the cauſe ſhould be ſet down to be heard, and the bill taken *pro confeſſo*. Sir *John* having neglected to anſwer at the time limited, farther time was given him; but he ſtill neglecting to anſwer, a decree was made the 11th *December* 1688, that he ſhould be foreclоſed, unleſs the principal, intereſt, and coſts were paid before the 11th *December* 1689. Afterwards Sir *John Euſtace* returned to *Ireland*, and lived until the year 1706, when he died without iſſue; but he never took any one ſtep to impeach theſe proceedings or decree; nor did he ever attempt to ſeek a redemption of the premiſes, but acquieſced under the decree for 18 years. *Henry Taſburgh*, the appellant, ſucceeded to his eſtate on the death of his father, in 1691, and entered thereupon. And not imagining that, after an acquieſcence of 34 years under the decree, any perſon would ſet up a claim thereto under Sir *John Euſtace*, he by indenture, dated the 24th of *April* 1722, in conſideration of a fine of 300*l.*, demiſed the ſame to the appellant *George M'Namara* for the term of 31 years, at the clear yearly rent of 250*l.* But the value of lands in *Ireland* riſing conſiderably, a bill was exhibited in the court of Chancery there, in *September* 1723, by ſeveral perſons in right of their wives, (nieces and coheireſſes of Sir *John Euſtace*,) alleging, that the decree of foreclоſure was obtained by ſurpriſe, fraud, and impoſition; and praying it might be reverſed. Afterwards, in *April* 1729, the appellant *Henry* put in a plea and anſwer to this bill, (which having abated, they claimed a right to revive,) inſiſting on the title as before ſet forth; and farther pleading the leaſe and releaſe executed, in 1681, by Sir *John Euſtace*, the declaration of truſt executed by *Charles Taſburgh*, the decree of foreclоſure, and the proceedings had in that cauſe, and the great length of time and acquieſcence under that decree. And *George M'Namara* denied notice of the reſpondents' title, and inſiſted, that he was a purchaſer, for a valuable conſideration, of his ſaid

term

term without any notice. But it was decreed, that upon the respondents paying the appellant *Henry* the principal, interest, and costs due to him, he should reconvey the same; and as to *M'Namara*, an issue was directed to be tried, whether he, at any time, and when, had notice that the coheiresses of Sir *John Eustace* had or claimed any and what right to the lands in question, after the lease to *King* and *Bingley* should expire? From this decree an appeal was brought, when it was ordered and adjudged, that the proceedings, orders, and decrees complained of by the appellant should be reversed, and the respondents' bill dismissed.]

Preced. Chan. 160. Jory v. Cox.

But though these and such like restrictions are relieved against, to make them answer the primary intention of the parties; yet, if *A.* on a mortgage lends money at 5 *l. per cent.*, but agrees in the deed, that, if the money were paid within three months after it became due, he would accept of 4 *l. per cent.*, and the mortgagor neglects to pay the interest within the time, equity will not relieve him, but he must pay 5 *l. per cent.*; for though the court relieves against unreasonable penalties, yet this is not so, for the mortgagee might have refused to lend his money under 5 *l. per cent.*

Chan. Rep. 52.

So, if the mortgagee devises, that the mortgagor should be remitted part of his mortgage-money, provided he pays the principal and interest within three days after his decease; if the condition be not performed, the remittance is lost; because this being a voluntary bounty, and not *ex debito justitiæ*, the party must take it as it is limited, for *cujus est dare, ejus est disponere*; and the court cannot relieve in this case after the day.

2 Salk. 449. pl. 1. Lord Ossulston v. Lord Yarmouth. 2 Atk. 331. Thornhill v. Evans, S. P.

But where in a mortgage there was a proviso, that, if the interest was behind six months, then the interest should be accounted principal, and carry interest; this, by my Lord *Cowper*, was decreed to be a vain clause, and of no use; and he said, that no precedent had ever carried the advance of interest so far: and that an agreement, made at the time of the mortgage, will not be sufficient to make future interest principal; but, to make interest principal, it is requisite that interest be first grown due, and then an agreement concerning it may make it principal.

Strode v. Parker, 2 Vern. 316. Holles v. Wyse, 2 Vern. 289. Nichols v. Maynard, 3 Atk. 520.

[But where, on a bill to foreclose a mortgage, the interest, by the deed, was to be 5 *per cent. per ann.*, payable half-yearly, and if not paid by the space of two months after the time of payment, *then* to be raised to 5 *l.* 10 *s. per cent. per ann.* for increase of interest; the interest being run greatly in arrear, the question was, After what rate it should be computed on redemption of the mortgage? And it was decreed to be computed at the rate of 5 *per cent. per ann. only*: for, where the interest was to be increased, if not paid at the day, that was but in the nature of a penalty, and relievable in equity.

Marquis of Halifax v. Higgens, 2 Vern. 134.

But it seems, that if there be a covenant for payment of the additional 1 *per cent.*, the court will not relieve against it. Thus, where money was lent on mortgage at 5 *per cent.*, and the mortgagor covenanted to pay 6 *per cent.* if he made default in payment of interest for the space of sixty days, after the time of payment; the court decreed, that, from default made, the mortgagor should

pay 6 *per cent.*: for that this covenant was the agreement of the parties, and not to be relieved againſt as a penalty. Pre. Ch. 161.

And, if an indulgence be given by the mortgagee, ſuch agreement will be good to raiſe the intereſt, upon the ground of forbearance; ſuch additional intereſt not being conſidered, in that caſe, as a penalty, but as a liquidated ſatisfaction fixed and agreed upon by the parties. So, where a mortgage was given, in *Ireland*, to truſtees, by way of ſecuring debts to creditors, and no money actually paſſed, but the ſum nominally lent was to be paid by inſtalments; an agreement that the intereſt of thoſe ſums ſhould riſe, on non-payment at the time appointed, or within three weeks after, from 5 to 8 *per cent.*, was held good, upon an appeal to the Houſe of Lords. Burton et al. v. Slattery, 3 Brown's Parl. Ca. 68.

And, in a ſimilar caſe, where a long arrear of intereſt had accrued, and the mortgagee had ſent an account thereof to the mortgagor, who returned an anſwer, admitting the account, *deſiring forbearance*, and promiſing to make ſatisfaction for the ſame; Lord Chancellour *Parker* allowed the additional 1 *per cent.* reſerved, as a ſatisfaction; ſaying, that though the proviſo, obliging the party to pay 6 *per cent.*, was generally looked upon as a penalty, and *in terrorem*, and therefore to be relieved againſt, if only a very ſhort lapſe had happened; yet it might not be relievable againſt, in caſe of a long arrear of intereſt; and that if no reſervation of 6 *per cent.* had been made, and a great arrear of intereſt had incurred, the court, on ſuch a promiſe, in writing, to make a ſatisfaction for forbearance, would have given the mortgagee ſome allowance in that reſpect.] Brown v. Barkham, 1 P. Wms. 652.

## (C) Of the Nature of a Mortgage, as to the diſtinct Intereſts of the Mortgagor and Mortgagee.

THE mortgagor before forfeiture, and whilſt it remains uncertain whether he will perform the condition at the time limited, or not, hath the legal eſtate in him: alſo, after forfeiture he hath an equity of redemption; ſo that he is ſtill conſidered as owner and proprietor of the eſtate, until the equity of redemption be foreclоſed, and therefore may make (*a*) leaſes, or (*b*) any ſettlement thereof, which will bind his equity of redemption.

[(*a*) The mortgagor being conſidered in the nature of a tenant at will, it follows, that if he makes a leaſe ſubſequent to the mortgage, the mortgagee may treat the leſſee as a wrong-doer, or not, at his election. Cro. Ja. 660. Cro. Car. 303. If the mortgagee permits the leſſee to enjoy his leaſe, the mortgagor may, thenceforth, be conſidered as a receiver of the rent, or, in ſome ſort, a truſtee for the mortgagee, who may at any time countermand the implied authority, by giving notice to the tenant not to pay the rent to the mortgagor any longer. 1 Atk. 606. But if the mortgagor elects the other alternative, the leſſee may be turned out by an ejectment, he being in under a perſon who had no power to under-let, but ſubject to eviction by the mortgagee. Keech v. Hall, Dougl. 21. But if there is tenant from year to year, and the landlord mortgages pending the year, the tenant is entitled to ſix months notice from the mortgagee. Birch v. Wright, 1 Term Rep. 378.——Though the tenant be in poſſeſſion under a leaſe prior to the mortgage, yet the mortgagee, after giving notice, is entitled to the rent in arrear at the time of the notice, as well as to what ſhall accrue afterwards, and he may diſtrain for it after ſuch notice. Moſs v. Gallimore, Dougl. 279.]——(*b*) It is ſaid, that a tenant in tail of an equity of redemption, may deviſe it for payment of debts. Vern. 41. Turner v. Gwinn.——[*A.* being ſeiſed of the lands in queſtion in fee, mortgaged the ſame for two ſeveral terms of 1000 years each, and afterwards made his will, by which he deviſed thoſe lands to *L. L.*, his heir at law, and to the heirs male of his body, remainder

der to *B.* for life, with contingent remainders to his firſt and other ſons in tail, remainder to *C. D.* for life, with remainder to his firſt and other ſons in tail, remainder to his own right heirs, and died: Afterwards *L. L.* being ſeiſed of the lands in queſtion under the will, and alſo of other lands in fee of a very conſiderable yearly value, made his will, by which he bequeathed to his mother the ſum of 2000*l.*, and then directed and appointed, that his executor ſhould pay off and diſcharge all mortgages and incumbrances laid and charged upon his eſtate in Suſſex, being the lands in queſtion, and particularly mentioned the two aforeſaid mortgages for years, and then directed and appointed that the ſaid ſeveral mortgage leaſes ſhould be kept on foot; and upon payment of the ſeveral ſums of money due upon the ſame, ſhould be aſſigned by the mortgagees to his mother dame *M. S.*, for her ſole uſe and benefit, during the remainder of the ſeveral terms, in the ſaid ſeveral mortgages contained; and farther deviſed a yearly rentcharge of 100*l.* to his mother for life, to be iſſuing out of all his manors, &c. in the ſeveral counties of Hertford and Bedford. Then the will went on—"and as for and concerning all and every my manors, "meſſuages, lands, tenements, and hereditaments, which I the ſaid *L. L.* am now ſeiſed of in law or "equity, or which I have a power to give or charge, I do give and diſpoſe the ſame in manner following"—and then he appointed, that if his wife proved with child, and ſuch child ſhould be a ſon, that his ſon ſhould have all his aforeſaid manors, &c., in tail, remainder to his couſin *W. L.*, the defendant in the original cauſe, and to his heirs: And if the ſaid after-born child ſhould prove a daughter, he appointed that 5000*l.* ſhould be raiſed out of the profits of his ſaid eſtate for ſuch daughter; and if his wife were not with child at the time of his death, then he deviſed all his ſaid manors, &c. to his ſaid couſin *W. L.*, and his heirs for ever. The teſtator died, his wife not having been with child. *S. B.* and *G. D.* both died without iſſue. Then the plaintiff, as repreſentative to dame *M. S*, brought a bill, praying an aſſignment of thoſe terms; and the defendant brought a croſs bill, praying to be let in to redeem as deviſee of the reverſion by the will of *L. L.* And the queſtion was, Whether the equity of redemption, which the teſtator had, incident to the reverſion in fee, as heir at law of the mortgagor, was ſevered from the reverſion by the deviſe, and given to dame *M. S.*; and ſo thoſe terms veſted in her irredeemable by the deviſee of the reverſion? or, whether thoſe terms were deviſed to her only as ſecurities for the original mortgage-money, and ſo ſubject to be redeemed by him, that ſhould have the inheritance? And it was decreed by the Lord Chancellour, King, aſſiſted by Lord Chief Juſtice Raymond, and Mr. Juſtice Denton, that the deviſee of the reverſion under the will of *L. S.*, ſhould be let into redeem; for that the teſtator did not otherwiſe intend theſe mortgages for his mother, than as ſecurities for ſo much money. Amhurſt v. Litton, Fitzg. 99.]

Sid. 460. Vent. 82. Lev. 274. Carth. 101. 414.

Therefore, if a man mortgages his land, and, as is uſual, ſtill continues in poſſeſſion, and levies a fine, and five years paſs, yet the mortgagee is not barred; for though the mortgagee be, in reality, out of poſſeſſion, yet when that is done by the conſent of both parties, and the nature of the contract requires it ſhould be ſo while the intereſt is paid, it is againſt the original deſign of the contract, that any act of the mortgagor, except the payment of the money, ſhould deprive the mortgagee of his ſecurity, and is no leſs than a fraud, which the law will not countenance.

Palm. 135. Cro. Jac. 593.

And as the mortgagor, being conſidered only as tenant at will to the mortgagee, cannot, by his act, defeat the intereſt of the mortgagee, otherwiſe than by payment of the mortgage-money; ſo neither can the mortgagee defeat the mortgagor of his equity of redemption: therefore, if a mortgagee in fee ſuffers a recovery, this, even at law, ſhall not bind the mortgagor's right of entry, upon performance of the condition. But if the mortgagor had been a party to the recovery, then his right had been bound, not only on account of the recompence in value, but becauſe he is eſtopped by the recovery to claim the land againſt the recoverer, or his heirs, when he was called in before the judgment given to defeat his title, and could not do it.

Plow. 373. a.

So, if a mortgagee be diſſeiſed, and the diſſeiſor levy a fine, and five years paſs after the proclamations, though the mortgagee is hereby barred, yet, if the mortgagor pay, or tender his money, he has five years to proſecute his right, by the ſecond ſaving in the ſtatute of 4 *H.* 7. *c.* 24. becauſe his title did not accrue till payment of the money.

And

And as the mortgagor, till the equity of the redemption be foreclosed, is considered as owner of the land, it was ruled, where a bill for a redemption was brought against a mortgagee in possession, and a decree accordingly, that the mortgagee, before the account taken, having presented to a church that became void, should revoke his presentation (*a*), and present such a person as the mortgagor, or his vendee (he having contracted to sell) should appoint.

Preced. Chan. 71. [That the mortgagor shall present, see Gally v. Selby, 1 Str. 403. Kensey v. Langham, Ca. temp. Talb. 144. Robinson v. Jago, Bunb. 130. (*a*) *Qu.* How is the presentation to be revoked?]

[In the case of *Gardiner* v. *Griffith*, the mortgage was of a long term in a naked advowson, and therefore a distinction was attempted; because the mortgagee could have no other satisfaction than by providing for a child, relation, or friend, on the advowson becoming void; and the rather, for that it was expresly so agreed in the mortgage deed; but the court gave no opinion thereupon. And, in the case of *Mackenzie* v. *Robinson*, which was the case of a mortgage of a naked advowson, Lord *Hardwicke* doubted the legality of such a covenant, *that the mortgagee should present*, it being a stipulation for something more than principal and interest; and the mortgagee, not being able to find any precedent in his favour, gave up the point of presenting; in consequence whereof, an order was made, that the mortgagor should have liberty to present, and the mortgagee was obliged to accept of his nominee.

Gardiner v. Griffith, 2 P. Wms. 404. Mackenzie v. Robinson, 3 Atk. 560.

But, if the mortgagee present to an advowson, a bill by the mortgagor, to compel the incumbent to resign and to deprive him of his living, will be dismissed, unless brought within six months after the death of the last incumbent. In such case the mortgagee, instead of bringing a foreclosure, should pray a sale of the advowson.

Gardiner v. Griffith, 2 Will. 405. 3 Atk. 458.

A mortgagee takes the estate mortgaged in the same plight that it is in, in the hands of the mortgagor. If the mortgagor therefore has done any act that amounts to a forfeiture, the mortgagee will lose his security. Thus, tenant for life, with remainder to his wife for life, remainder to his sons in strict settlement, remainder over, having occasion for money, together with his wife, mortgaged the estate settled by way of lease and release and fine, *come ceo*, &c. which mortgage was afterwards assigned to the plaintiff, and another lease and release and fine levied and executed by the husband and wife for making good the assignment. The husband died, and a bill was brought against the widow and eldest son to compel them to redeem or to foreclose them, and to be relieved against the forfeiture. The defendant, the son, pleaded the marriage-settlement of his father and mother, who were but tenants for life, and insisted on the forfeiture; and the court allowed the plea; the Lord Chancellour saying, that this was a contrivance to destroy the settlement and disinherit the son; and his Lordship said, he had so decided in many cases, particularly in the case of Sir *Harry Peachy* and the Duke of *Somerset*.

Lady Whetstone v. Sainsbury, Pre. Ch. 591. See Willis v. Fineux, *Id.* 108.

A mortgagee, before foreclosure, cannot exercise any act of ownership over the property which may incumber the mortgagor. He can make no lease of the lands for years to an undertenant.

Hungerford v. Clay, 9 Mod. 1. 2 Eq. Ca. 610.

Thus, in the case of *Hungerford* v. *Clay*, the bill was for redemption on payment of principal and interest. The substance of the answer was, that the defendant, the mortgagee, had made a lease of the house for five years at a rent reserved with a covenant, that the lessee should have the option of a farther lease for four years after the expiration of the said term; that the term for five years was now expired, and the lessee desired to take the premises for four years longer; that, if the plaintiff would grant such lease, the defendant would reconvey on payment of principal and interest. On hearing this case at the Rolls, the defendant had a decree; but, on appeal to the Chancellour, his Lordship was of opinion, that the mortgagee, before foreclosure of the equity of redemption, could not lease the premises for years to bind the mortgagor, unless, to avoid an apparent loss, and merely in necessity: and the decree at the Rolls was reversed.

And as a mortgagee cannot, before foreclosure, exercise any act of ownership that will attach on the estate, but ought to reconvey the premises free from all incumbrances; so neither can he justify, in equity, the commission of any act which may injure the estate; therefore, though at law, a mortgagee in fee may commit waste, yet he will be restrained in equity. Thus, on a bill to redeem a mortgage, wherein an account was decreed, and 250*l.* reported as due, and exceptions taken to the report; it being, on motion and reading affidavits, shewn, that the defendant had burnt some wainscot and committed waste, the defendant was ordered to deliver up possession to the plaintiff, who was a pauper, he giving security to abide by the event of the account.

Hanson v. Derby, 2 Vern. 392.

So, where the mortgagee of an estate in fee had cut down trees, on application to the court it was decreed, that an account should be taken of what was cut down, and the produce applied in the first place to the payment of the interest, and then to the sinking of the mortgage; and an injunction was granted to stay felling any more.

But a distinction is made where the security is defective; for, in that case, the court will not restrain a just creditor from his legal privileges; but then the timber, when cut down, must be applied to ease the estate, and not to the mortgagee's benefit.

Withrington v. Banks, Sel. Ca. Ch. 31. 3 Atk. 518.

However, although the mortgagee cannot, to better his security, do any act to incumber the estate mortgaged, which will be valid against the mortgagor after redemption, nor will be justified in committing waste; yet he will be entitled to such expences as he shall incur in necessary repairs, or other acts for the preservation of the estate mortgaged, and may, certainly, add this to the principal of his debt, and it will carry interest.

Thus, if a leasehold estate be mortgaged, and there is no covenant on the part of the mortgagor, that he should procure the lives to be filled up, the mortgagee cannot compel him to do it; but must pay the expence of renewing, and reimburse himself by

3 Atk. 4. Lucam v. Martins, 1 Wils. 34.

adding

adding it to the principal of the mortgage, and it ſhall carry intereſt. So it was determined in the caſe of *Manlove* v. *Ball* and *Bruton*, which was a mortgage of a church leaſe for three lives, two of which died during the time the eſtate was in mortgage, and were renewed on fines paid by the mortgagee.

Manlove v. Ball et al. 2 Vern. 84. *Supra.*

A term aſſigned in truſt to attend the inheritance will, in equity, follow all the eſtates created thereout, and all the incumbrances ſubſiſting upon ſuch inheritance, and is ſo connected with it, that equity will not ſuffer it to be ſevered to the detriment of a *bonâ fide* purchaſer. Therefore, a mortgagee ſhall have the benefit of all the intereſts which the mortgagor had at the time the mortgage was made, unleſs againſt an intermediate purchaſer without notice, and, conſequently, if there be a term in a mortgaged eſtate held in truſt for the mortgagor, when the mortgage of the inheritance is made, the concealment of it will be a fraud upon the mortgagee, and the truſtees of ſuch a term aſſigned to attend the inheritance, will, in equity, become truſtees for the mortgagee of the inheritance.

*Vide* 3 Atk. 476, 477. Charlton et al. v. Low et al. 3 P. Wms. 328.

If a mortgage be made of an eſtate to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor, or his repreſentatives, with a good title; the mortgagee will be entitled, in equity, to the benefit of it; for it will be conſidered there as a graft upon the old ſtock, and as ariſing in conſideration of the former title.

As, where houſes and lands were demiſed for a long term, and an aſſignee of the leaſe, believing he had a good title, mortgaged it for 100 *l.* afterwards the title turned out to be bad, the eſtate belonging to another perſon. Then the real owner of the eſtate, out of compaſſion to the aſſignee, who had built upon it, leaſed the premiſes for a long term to truſtees for his wife, he being run away. And on a bill filed, the truſtees were decreed to make a new mortgage to the mortgagees; the Maſter of the Rolls ſaying, that this was a graft on the old ſtock, all the benefit of it, except the rent reſerved, ariſing in conſideration of the former title.

Seabourne v. Seabourne, 2 Vern. 11.

If a mortgagee procures a grant of a new term after the old one be actually expired, yet this will be a truſt for the mortgagor, and redeemed with the principal; for it is ſuppoſed to have proceeded from having had the original term: and, although there be nothing in fact in having a tenant-right, yet, as ſuch regard is had to it, in the eſtimation of the world, it will be looked on as the occaſion of the leaſe.]

Rakeſtraw v. Brewer, Sel. Ca. in Ch. 35. Lee v. Lord Vernon, 7 Brown's Par. Ca. 432.

By the 7 *W.* & *M.* *c.* 25. it is enacted, "That no perſon or "perſons ſhall be allowed to have any vote in election of mem"bers to ſerve in parliament, for or by reaſon of any truſt eſtate "or mortgage; unleſs ſuch truſtee or mortgagee be in actual "poſſeſſion, or receipt of the rents and profits of the ſame eſtate, "but that the mortgagor, or *ceſtui que truſt* in poſſeſſion, ſhall "and may vote for the ſame, notwithſtanding ſuch mortgage or "truſt."

And by the 9 *Ann.* *c.* 5. which requires, that knights of the ſhire ſhould have 600 *l.* *per annum*; and every other member 300 *l.*

*per annum*, it is enacted, "That no perſon ſhall be qualified to "ſit in the Houſe of Commons, within the meaning of the act, "by virtue of any mortgage, whereof the equity of redemption "is in any other perſon, unleſs the mortgagee ſhall have been in "poſſeſſion of the mortgaged premiſes for ſeven years before the "time of his election."

Eaton v. Jaques, Dougl. 455. Walker v. Reeves, *Id.* 461. note.

[On the aſſignment of a term by way of mortgage, the mortgagee, before actual poſſeſſion, is not liable to the reverſion and arrears of rent, and other covenants in the original demiſe.

Traherne et al. v. Sadleir et al. 1 Brown's Par. Ca. 105.

But, if the mortgagee enters into poſſeſſion, he becomes liable to all covenants that run with the land, for he takes it *cum onere*, and, enjoying the profits, he muſt ſubmit to the loſſes.

Webb v. Ruſſel, 3 Term Rep. 393.

And if a mortgagor, by a mortgage of a term veſted in him, deveſts himſelf of all intereſt therein, in the conſideration of a court of law, he retains only the equity of redemption, which he muſt purſue in a court of equity; and therefore, if he join with his mortgagee in a leaſe, in which the leſſee is made to covenant with the mortgagor, for rent, repairs, &c. ſuch covenants will be merely collateral to the mortgagee's intereſt in the land, and the aſſignee of the mortgagee, cannot maintain an action for the breach of them on the ſtatute of 32 *H.* 8. *c.* 34.

Theſe covenants, therefore, muſt be conſidered as *covenants in groſs*, upon which, of courſe, the mortgagor may maintain an action. And ſo it was determined on the ſame inſtruments, and between ſome of the ſame parties, in the caſe of *Stokes* againſt *Ruſſell*, in the court of King's Bench.

Stokes v. Ruſſel, 3 Term Rep. 678.

Farrant v. Lovel, 3 Atk. 723.

If a mortgagor commit waſte, whether it be a mortgage in fee or for a term of years, the court, on a bill by the mortgagee to ſtay waſte, will grant an injunction; for they will not ſuffer a mortgagor to prejudice the incumbrance.

Cowp. 601.

A mortgagor is never permitted to diſpute the title of his mortgagee; becauſe no man is permitted to diſpute his own ſolemn deed.

Doug. Rep. 610.

A mortgagor *in poſſeſſion* gains a ſettlement, becauſe the mortgagee, notwithſtanding the form, has but a chattel, the mortgage being only a pledge to him for ſecurity of his money, and the original ownerſhip of the land ſtill reſiding in the mortgagor, ſubject only to the legal title of the mortgagee, ſo far as ſuch title is requiſite to the end of his ſecurity.

Rex v. Catherington, 2 Term Rep. 771.

But, if the mortgagee evict the mortgagor and take poſſeſſion, the mortgagor, though afterwards occupying permiſſively for a particular purpoſe, will not thereby gain a ſettlement.]

## (D) Of the legal Performance of the Condition.

7 E. 4. 3. 9 H. 6. 12. 22 H. 6. 37. 47 E. 3. 26.

THE condition muſt at law be ſtrictly performed, otherwiſe the mortgagor loſes all benefit of redemption; but, if upon a mortgage a tender be made of the money, at the place, at any time

time of the day ſpecified in the condition, and the mortgagee refuſe, the condition is ſaved for ever. Plow. 173. 5 Co. 114. Co. Lit. 209.

And upon ſuch refuſal the land is diſcharged, becauſe upon the tender the demiſe is void; and if it be upon a feoffment, the condition is performed, and the feoffor may re-enter. But the money lent doth yet remain a debt or duty, becauſe it was a debt by the original lending of the money, whether it had been ſo ſecured or not; and though the ſecurity fails, according to the words of the agreement, yet there is the ſame natural juſtice that the money ſhould continue: but, if a feoffment were made, on condition of payment of a ſum gratuitouſly, to re-enter, if it were refuſed, there is no remedy. Co. Lit. 209.

The legal tender, or payment, muſt be made to the parties mentioned in the condition; becauſe, to make ſuch a tender as will be a legal performance, it muſt be made according to what the parties have expreſsly agreed on in the condition.

Therefore, if a man bargains and ſells lands, with proviſo, that if the vendor, before ſuch a day, pay ſo much money to the vendee, his heirs or aſſigns, that the ſale ſhall be void; the vendee before the day makes his executors, and dies, and the vendor tenders the money to the executors, this is not good, becauſe the word *aſſigns* muſt be underſtood to be aſſigns of the land, in its primary and original ſignification; and where there is an expreſs proviſion to whom the tender and payment is to be made, the executor is excluded; for *expreſſum facit ceſſare tacitum.* Dyer, 180, 181. Co. Lit. 110.

But, if a man make a feoffment in fee, upon condition, that the feoffee ſhall pay 20 *l.* to the feoffor, his heirs, or aſſigns; here, the primary ſignification of the word *aſſigns* fails, becauſe there can be no aſſignment of the land of which he hath enfeoffed another; and ſince the original ſenſe of the word fails, leſt it ſhould be wholly inſignificant, the ſecondary ſenſe of the word is to be taken, *viz.* the aſſignees in law, which the executors are *quoad* the perſonal eſtate; and therefore the payment is good either to the executor or to the heir. Co. Lit. 210. 5 Co. 96.

If the condition be to pay the money to the feoffee, in mortgage, his heirs or aſſigns, and he make a feoffment over; it is in the election of the feoffor to pay the money to the firſt or ſecond feoffee, becauſe by the words he may pay it either to him or the aſſignee. So, if the firſt feoffee die, in this caſe, he may pay it to his heir or the aſſignee, for the ſame reaſon; nor is he obliged to take notice of the validity of the ſecond feoffment, to which he is a ſtranger. Co. Lit. 210.

But if the condition was, that the feoffor ſhould pay it to the feoffee at ſuch a day, and the feoffee die before the day, it ſhall be paid to the executor, and not to the heir, though the land deſcend to the heir; for during the ſuſpenſion of the condition, which is till the whole time is elapſed, the land is wholly taken to be a pledge for the money, and the money to be a perſonal duty to the feoffee, and, conſequently, is to be paid to ſuch perſon as repreſents him; but then this payment muſt be to the executor of the Lit. § 339. Co. Lit. 209. 5 Co. 96.

whole ſum; for a partial and fraudulent payment, though accepted by the executor, is really no performance of the condition, and therefore the intereſt remains in the heir at law.

Lit. § 337. If the condition were, that the feoffor ſhould pay ſo much money to the feoffee, without limitation of time, the feoffor hath time during life to pay the money to the feoffee during his life; but if either die before the time, which is ſet by the parties for the performance of the condition, is elapſed, the feoffment is abſolute; but if the payment were to be made to the feoffee, his heirs or executors, then the feoffor hath time during life.

5 Co. 96. If a man make a feoffment in fee, upon condition, that the feoffor, within a year after the death of the feoffee, pay to his heirs, executors, or adminiſtrators, 100*l.* that then the feoffor ſhould re-enter; the feoffee make a feoffment over, and die; the feoffor pay the 100*l.* within the year, and the heir pay back 30*l.* this is a partial and fraudulent payment, and no good performance of the condition, to defeat the eſtate of the feoffee: but if the whole money had been paid, it had been good, becauſe the payment is to be made to the perſons mentioned in the condition, and not to the aſſignee of the land, who is not named therein.

## (E) Of the Equity of Redemption and Foreclosure: And herein,

### 1. Who may redeem, and by whom the Mortgage Money ſhall be paid.

Hard. 465. ALTHOUGH, after breach of the condition, an abſolute fee-ſimple is veſted at common law in the mortgagee; yet a right of redemption being ſtill inherent in the land, till the equity of redemption be foreclоſed, the ſame right ſhall deſcend to and is veſted in ſuch perſons as have a right to the land, in caſe there had been no mortgage or incumbrance whatſoever: and as an equitable performance as effectually defeats the intereſt of the mortgagee, as the legal performance doth at common law, the condition ſtill hanging over the eſtate, till the equity is totally foreclоſed; on this foundation it hath been held, that a (*a*) perſon, who comes in under a voluntary conveyance, may redeem a mortgage; and though ſuch right of redemption be inherent in the land (*b*), yet the party claiming the benefit of it, muſt not only ſet forth ſuch right, but alſo ſhew that he is the perſon entitled to it.

(*a*) Vern. 193.

(*b*) Vern. 182. Chan. Ca 74.

2 Chan. Ca. 5. *Vide* tit. Heir and Anceſtor, and tit. Executor. As the heir at law is regularly entitled to the benefit of redemption, he is alſo entitled to the aſſiſtance of the perſonal eſtate of the mortgagor for that purpoſe; according to the doctrine eſtabliſhed in the courts of equity, that the perſonal eſtate, in the hands of the executor, ſhall be employed in eaſe of the heir, by whatever means the heir becomes indebted as heir; for the perſonal eſtate having received the benefit by contracting the debt, and

and the real being conſidered only as a pledge for it, it is but reaſonable that ſatisfaction ſhould be made out of it; according to the common rule, *Qui ſentit commodum ſentire debet & onus.*

And on this foundation it hath been frequently held, that if a man mortgage lands, and covenant to pay the money, and die, the perſonal eſtate of the mortgagor ſhall, in favour of the heir, be applied in exoneration of the mortgage. 2 Salk. 449. pl. 3. [So, Pockley v. Pockley, 1 Vern. 36. King v. King, 3 P. Wms. 360. Galton v. Hancock, 2 Atk. 436. Robinſon v. Gee, 1 Vez. 251. Earl of Belvedere v. Rochfort, 6 Br. P. C. 520. Philips v. Philips, 2 Br. Ch. Rep. 273.]

Alſo it is held by ſome opinions, that this benefit ſhall not only extend to the heir at law, or *hæres natus*, but alſo to an (*a*) *hæres factus*, from a preſumption, that it is the intention of the teſtator, that he ſhould have all the privileges of the *hæres natus:* And (*b*) ſome even hold, that an ordinary deviſee ſhall have this benefit: but as to this laſt point it hath been (*c*) held otherwiſe; and that if a man mortgages his land, and then deviſes it to *J. S.* or to *A.* for life, the remainder in fee to *B.*, that there the charge doth paſs with the eſtate, there appearing no intention of the teſtator that he ſhould have it diſcharged (*d*).

(*a*) 2 Chan. Ca. 84. (*b*) Vern. 36. (*c*) Chan. Ca. 271. [(*d*) In a later caſe a contrary determination was given. There, the defendant's teſtator having made a mortgage of his lands for a conſiderable ſum of money, by his will appointed them to be ſold for payment of his mortgage-money, and afterwards deviſed the lands ſo in mortgage, *as to one moiety* thereof to the plaintiff, &c. and made the defendant executor, and deviſed the perſonal eſtate to his executor *for the payment of his debts:* The ſingle queſtion was, Whether the perſonal eſtate ſhould be applied to diſcharge the mortgage for the benefit of the deviſee? And it was decided at the Rolls, that the perſonal eſtate ſhould be ſo applied for the advantage of the deviſee, and that decree was confirmed by the Lords Commiſſioners. Johnſon v. Milkrop, 2 Vern. 112. —— In the caſe of Pockley and Pockley, 1 Vern. 36. it was determined, that ſuch debt on mortgage would leſſen the widow's cuſtomary moiety in the province of York; for the cuſtom cannot take place until after the debts paid.—So, a mortgage ſhall be paid out of the perſonal eſtate, in preference to the cuſtomary or orphanage part of the cuſtom of London. Bail v. Bail, cited 1 P. Wms. 335. —— And where lands are ſubject to, or deviſed for, payment of debts, ſuch lands ſhall be liable to diſcharge mortgaged lands either deſcended or deviſed. Bartholomew v. May, 1 Atk. 487. Marchioneſs of Tweedale v. Coventry, 1 Br. Ch. Rep. 240. Even though the mortgaged lands be deviſed, expreſsly *ſubject to the incumbrance.* Serle v. St. Eloy, 2 P. Wms. 366. So, lands deſcended ſhall exonerate mortgaged lands deviſed. Galton v Hancock, 2 Atk. 424. So, *unincumbered* lands and *mortgaged* lands, both being ſpecifically deviſed, (but expreſsly "*after payment of all debts,*") ſhall contribute in diſcharge of ſuch mortgage. Carter v. Barnardiſton, 2 P. Wms. 505. 2 Br. P. C. 1. In all theſe caſes, the debt being conſidered as the *perſonal* debt of the *teſtator* himſelf, the charge on the real eſtate is merely collateral.]

So, if the mortgagor conveys away the equity of redemption, the purchaſer ſhall not have the benefit of the perſonal eſtate, but muſt take it *cum onere.* 2 Salk. 450. Vern. 37.

It has likewiſe been held by ſome opinions, that the heir of the mortgagor ſhall have the benefit of the perſonal eſtate to pay off the mortgage, though there be no covenant in the mortgage-deed for the payment thereof; becauſe the mortgage-money is a debt, whether there be any expreſs covenant for the payment of it or not. 2 Salk. 449. Vern. 436. Preced. Chan. 61. [(*e*) This guarded aſſertion is no longer neceſſary: the law is now clearly ſettled as here laid down. For, by Lord Talbot, in King v. King, 3 P. Wms. 358. every mortgage implies a loan, and every loan implies a debt; and though there be no covenant or bond, yet the perſonal eſtate of the borrower of courſe remains liable to pay off the mortgage. Hence, a decree of Lord Harcourt in the caſe of the mortgage of a ſhip, where the ſhip was taken at ſea, and there was no covenant for payment of the money; and though the ſhip could not properly be ſaid to be in nature of a pawn or *depoſitum*, ſince the mortgagor had failed with the ſame to ſea; nevertheleſs the executors of the mortgagor were decreed to pay the money for which the ſhip was

was mortgaged. So, it is in the caſe of Welſh mortgages (Howel v. Price, *infra*), where no day is appointed for the payment, but the matter is left at large. And ſee Baſh v. Hyham, 2 P. Wms. 455. S. P.]

[Howell v. Price, Pr. Ch. 425. Gilb. Eq. Rep. 106. S. C. *totidem verbis*. 2 Vern. 701. S. C. It appears from the report in Pr. in Ch. & Gilb. that there was no decree upon the argument of this caſe in 1715, to which period of time theſe hiſtories refer, but that precedents were ordered to be ſearched. The ſame caſe is reported by Peere Williams, but in a later ſtage of the cauſe, viz. in 1717,

But where a mortgage in fee was made, redeemable at *Mich.* 1702, or any other *Mich.* day following, on ſix months notice; and there was no covenant for payment of the mortgage-money; it was held by my Lord Chancellour *Cowper*, that the mortgagor having deviſed his perſonal eſtate to his wife and daughter, and having during his life paid the intereſt of the mortgage, the perſonal eſtate ſhould not be applied in eaſe and exoneration of the real eſtate, for the benefit of the heir at law; for, as he ſaid, there being no covenant for payment of the money, there was no contract at all between them, neither expreſs nor implied; nor would any action lie againſt the mortgagor to ſubject his perſon, or compel him to pay this money; but this was in the nature of a conditional purchaſe, ſubject to be defeated on payment by the mortgagor, or his heirs, of the ſum ſtipulated between them, at any *Mich.* day, at the election of the mortgagor, or his heirs; ſo that here was an everlaſting ſubſiſting right of redemption, deſcendible to the heirs of the mortgagor, which could not be forfeited at law like other mortgages; and therefore there could be no equity of redemption, or any occaſion for the aſſiſtance of the court; but the plaintiffs might even at law defeat the conveyance, by performing the terms and conditions of it; which were not limited to any particular time, but might be performed on any *Mich.* day, to the end of the world; and ſince here was no covenant or contract, either expreſs or implied, to charge the perſonal eſtate of the mortgagor, he thought there was no reaſon to lay the load of this debt upon that which was given to other perſons.

upon the equity reſerved after the trial of an iſſue that had been directed by the court. Upon that occaſion Lord Chancellour ſeemed to be ſtrongly of opinion, that the perſonal eſtate ſhould be applied in eaſe of the real, the teſtator having ſaid in his will, that his executors ſhould, by his perſonal eſtate, pay and levy his debts; and this mortgage-money being a debt, his Lordſhip decreed accordingly. 1 P. Wms. 291. 1 Eq. Ca. Abr. tit. Heir and Anceſtor (E), pl. 7.]

2 Salk. 450.

Alſo, if the grandfather mortgages, and covenants to pay the mortgage-money, and the lands deſcend to his ſon, and his ſon dies, having a perſonal eſtate and a ſon; the ſon's perſonal eſtate ſhall not go in aid of this mortgage.

Abr. Eq. 270. Wood v. Fenwick.

So, if an heir has lands deſcended to him, incumbered with a mortgage, and he, before any application made by him to have aid of the perſonal eſtate, diſpoſes of them, he cannot afterwards come upon the perſonal eſtate; for the equity, which an heir has, is, that the lands may deſcend clear to the family.

[Where the real eſtate is originally, or afterwards becomes *primarily* liable, the real eſtate ſhall be firſt applied, though a *covenant* is added, or a *bond* given; for ſuch covenant or bond is only intended as a collateral ſecurity to the land, and cannot alter the fund. In *Bagot* v. *Oughton*, 1 *P. Wms.* 347. land deſcended to the wife

wife ſubject to a mortgage made by her father; on an aſſignment of the mortgage, the huſband covenanted for the payment of the money to the aſſignee: it was decreed, that the huſband's perſonal eſtate was not liable to exonerate the mortgaged premiſes, for the debt was *originally* the father's, and *continuing* to be ſo, the covenant was an *additional* ſecurity for the ſatisfaction only of the lender, and not intended to alter the *nature* of the debt.

Evelyn v. Evelyn, 2 P. Wms. 591. Fitzg. 131. S. C. Sel. Ca. Ch. 80.

*George Evelyn*, the defendant's father, and grandfather to the plaintiffs, had three ſons, *John*, *George*, and the defendant *Edward Evelyn*; *George*, the father (being tenant for life, remainder to his eldeſt ſon *John*, in tail male of part of the premiſes) together with his eldeſt ſon *John*, on the 20th *October* 1698, by deed and recovery, ſettled certain eſtates in ſtrict ſettlement, with a power to *George*, the father, by deed or will, to charge by leaſe, mortgage, or otherwiſe, the premiſes limited to himſelf for life, with raiſing or paying any ſum not exceeding 6000 *l.* *George*, the father, in purſuance of the power, mortgaged part of the ſaid land for 1000 *l.* for the term of 1000 years. This mortgage afterwards, by meſne aſſignments, became veſted in Sir *Thomas Pope Blunt*, with a covenant, from *George Evelyn*, the ſon, for payment of the mortgage-money, and, on the ſame aſſignment, Sir *Thomas*, the mortgagee, covenanted to re-aſſign to *George Evelyn*, the ſon. Afterwards *George Evelyn*, the father, died; then *John Evelyn*, the eldeſt ſon, died without iſſue, upon which *George*, the ſecond ſon, entered upon the premiſes compriſed in the ſettlement, and died inteſtate, leaving the defendant, *Mary*, his widow, and three daughters. Then *Edward Evelyn* and his ſon (the next remainder-man in tail) inſtituted a ſuit againſt Mrs. *Evelyn*, the mother (afterwards married to Governor *Bohun*) being the adminiſtratrix of her former huſband, *George Evelyn*, praying, that the perſonal eſtate of her late huſband ſhould be applied towards paying off the mortgage of 1500 *l.* and in exoneration of the real eſtate. But it was held by the Lord Chancellour, aſſiſted by the Lord Chief Juſtice *Raymond*, and the Maſter of the Rolls, that the perſonal eſtate of the ſon ſhould not be applied to pay off this mortgage, made by the father; becauſe the charge was made by the father in purſuance of the power contained in the ſettlement; and as he had ſuch power, the defendant *Edward* muſt be contented to take ſuch land *cum onere*; and notwithſtanding that the ſon did afterwards, on the aſſignment to Sir *Thomas Blunt*, covenant to pay the mortgage-money, yet, ſince the land was the original debtor, this covenant from the ſon would be conſidered *only* as a ſecurity for the land.

Earl and Counteſs of Coventry, 2 Will. 222. Strange, 596. S. C.

*Gilbert*, the late Earl of *Coventry*, on his marriage with the daughter of Sir *Strenſham Maſters*, (the Earl being but tenant for life, with a power of making a jointure of lands, not exceeding 500 *l. per annum*, on any wife he ſhould marry) covenanted, in conſideration of the intended marriage, that he, or his heirs, would, after the marriage, according to the power given him by his father's will or otherwiſe, ſettle 500 *l. per annum* on his wife for her jointure; and it being in proof, that the late Earl directed his ſteward to look over the rent-rolls, for a fit part of the eſtate

eſtate to make good the jointure, and that afterwards the jointure-deed was engroſſed, but not executed; though this depended only on a covenant, yet the jointure of *land* being the *chief thing* in view, the decree was, that the *land* ſhould be ſettled, and the covenant not made good out of the *perſonal eſtate*.

Freeman v. Edwards, 2 Will. 435.

And ſo in the caſe of *Edwards* and *Freeman*, though the wife's jointure, and the daughter's portion were ſecured by articles, which were never completed by a ſettlement, yet thoſe articles being to ſettle lands, and the covenantor leaving lands ſufficient to anſwer them, it was decreed, that the daughter's portion ſhould be raiſed out of the lands, and that the perſonal eſtate of Mr. *Freeman*, the covenantor, ſhould not be applied in exoneration thereof. But it is to be obſerved, that in the latter caſe, particular lands were agreed to be ſettled, and conſequently, that the covenant was a lien upon thoſe lands.

Leman v. Newnham, 1 Vez. 51. So, Lacam v. Mertins, *Id.* 312. Robinſon v. Gee, *Id.* 251.

The ſon, tenant in fee, on an aſſignment of the anceſtor's mortgage, covenanted with the aſſignee for payment: yet it was determined, that the perſonal ſecurity was only *auxiliary*, and both principal and intereſt were charged *primarily* on the land; for although the intereſt had accrued during the poſſeſſion of the ſon, the intereſt muſt follow the principal, and be charged on the ſame fund.

Parſons v. Freeman, before Lord Hardwicke, 25th Oct. 1751. *Vide* 2 P. Wms. 664. note 1.

*A.* purchaſed an eſtate for 90*l.* which was at that time mortgaged for 86*l.*, and he covenanted to pay 86*l.* to the mortgagee, and 4*l.* to the vendor; the court admitted the rule of law above mentioned, but, in this particular caſe, thought that, although the covenant was with the vendor only, and the vendee's perſonal eſtate not liable in that reſpect to the mortgagee, yet the words were ſufficiently ſtrong to ſhew an intention in the vendee to make it his perſonal debt.

Lewis v. Nangle, before Lord Hardwicke, 7th Nov. 1752. *Vide* 2 P. Wms. 664. note 1.

*N.* was, before her marriage, indebted to ſundry perſons, and entitled to the inheritance of lands, charged with the payment of ſundry ſums; and before her marriage entered into articles, whereby the eſtates were to be ſettled to the huſband for life, *ſans* waſte, remainder in like manner to wife, remainder to the iſſue of the marriage, remainder to the wife in fee; the marriage took effect, and the huſband being preſſed for payment of the wife's debts, and having alſo occaſion for a farther ſum of money, they borrowed 1300*l.* of the wife's ſiſter (the original plaintiff in the cauſe), and ſecured it by mortgage of the wife's eſtate, and the huſband covenanted for payment of the whole money, and alſo executed a bond conditioned for payment of the money, according to the proviſos in the mortgage. Subject to this mortgage, the lands were ſettled on the huſband for life, remainder to the iſſue of the marriage, remainder to the wife's ſiſter (the mortgagee) in fee. *N.* died without iſſue; and the plaintiff was the deviſee of the ſiſter, who brought his bill againſt *N.*'s huſband for the payment of the mortgage-money. But the Lord Chancellour held, that although part of the money was raiſed for the huſband's uſe, yet the mortgage being a ſingle tranſaction, he muſt ſuppoſe the intention of the parties to be uniform, and that ſuch intention was

to

to charge the wife's eſtate with the whole debt; and his Lordſhip diſmiſſed the bill, ſo far as it ſought to compel the huſband to exonerate the land, but directed him to keep down the intereſt during his life.

*L.* had purchaſed ſeveral eſtates, ſubject to mortgages, with regard to one of which, he entered into a covenant to pay the mortgage-money, for the purpoſe of indemnifying a truſtee; and as to another, which was only part of an eſtate ſubject to a mortgage, upon ſplitting the incumbrance, both parties covenanted to pay their reſpective ſhares, and indemnify each other; Lord *Hardwicke* thought, that theſe covenants would not have the effect of making the mortgages perſonal debts of the vendee, they having been entered into for particular purpoſes, and declared his opinion accordingly in the decree. Forreſter v. Leigh, 23d, 25th June 1773. *Vide* 2 P. Wms. 664. note 1.

Sir *W. O.*, by his will of the 5th *February* 1739, taking notice, that his daughter *C.* was deaf and dumb, and that *B.* had taken care of her, deviſed certain real and perſonal eſtate to *J. B.*, her heirs, executors, and adminiſtrators, in truſt, by ſale, or felling timber to pay all his debts, and directed that *J. B.* ſhould receive the rents and produce of his real and perſonal eſtate without account, during his daughter's life, ſhe maintaining his daughter; and after the death of his daughter, he gave all his real and perſonal eſtate whatſoever to *J. B.* in fee, and appointed her ſole executrix; Sir *W. O.* died, *March* 1740, and *J. B.* proved the will; Sir *W. O.*, in his lifetime, mortgaged part of his eſtate, for ſecuring 1500 *l.* and intereſt, which remained a charge at his death. *J. B.* paid off 500 *l.*, part of this 1500 *l.*, and afterwards borrowed a farther ſum of 2500 *l.* on mortgage of the eſtates, which money was, in the mortgage-deed, expreſsly recited to have been borrowed, to enable her to diſcharge Sir *W. O.*'s debts. *J. B.* afterwards died, and on the diſpoſition made by her, and thoſe claiming under her, of the property of Sir *W. O.*, this cauſe was inſtituted. The cauſe was firſt heard before Lord *Bathurſt*, on the 19th *February* 1777, when the court declared, that the ſum of 1500 *l.*, part of the 3500 *l.* was not to be conſidered as a debt of the ſaid *J. B.*, but was to remain a charge on the real eſtate, and directed an account of her perſonal eſtate. By an order made on rehearing, on the 13th of *Auguſt* 1781, that part of the decree was reverſed, and, inſtead thereof, it was declared, that the ſaid ſum of 1500 *l.* appearing to have been a charge made on the eſtate of the ſaid Sir *W. O.* in his lifetime, and remaining ſuch at his death, was to be conſidered as a continued lien thereon; and that the ſubſequent charge made on the eſtate by the ſaid *J. B.*, being expreſſed in the mortgage-deed to have been made for the purpoſe aforeſaid, the ſame together, with the 1500 *l.*, amounting in the whole to the ſum of 3500 *l.*, was to be conſidered as remaining a charge on the ſaid eſtates. Perkins v. Baynton, 2 P. Wms. 664, note 1.

*G. D.* mortgaged lands to *W. C.*, to ſecure payment of 5000 *l.* with intereſt, at 5 *per cent.* and by will, of 22d of *May* 1723, deviſed the lands to his nephew *G.*, in tail-male, remainder to the plaintiff in tail-male, remainder over, and died in the ſame month. Shafto v. Shafto, before Lord Thurlowe, Feb. 1786.

In

2 P. Wms. 664. note 1.

In 1725, *G. S.* ſuffered a recovery to himſelf in fee. The mortgagee calling for his money, *W. G.* agreed to advance 5000*l.* at 4 *per cent.* on aſſignment of the mortgage, which accordingly, by indenture of 4th of *June* 1725, was aſſigned to him, with proviſo for redemption on payment of the principal and intereſt at 4 *per cent.*; and *G. S.*, for himſelf, his heirs, executors, and adminiſtrators, covenanted with *W. G.*, that he, his heirs, *&c.*, or ſome or one of them, would pay to *W. G.* the ſaid principal and intereſt, in manner therein mentioned. In 1779, *G. S.* agreed to raiſe the intereſt to 5 *per cent.*, and by deed covenanted with the mortgagees, that the eſtate ſhould remain a ſecurity for the 5000*l.*, with intereſt at 5 *per cent.*, and that he, his executors, *&c.* would pay ſuch intereſt for the ſame. In *January* 1782, *G. S.* died, the intereſt on the mortgage being in arrear for about 10 months; and the bill was brought (amongſt other things) to have the 5000*l.* and intereſt paid out of the perſonal eſtate of *G.*, or at leaſt the arrear of intereſt due at his death, and the additional 1 *per cent.* charged by the deed of 1779; but the Lord Chancellour was clearly of opinion, that the perſonal eſtate ought not to diſcharge the mortgage, the land being the primary fund. His Lordſhip alſo thought that the intereſt muſt follow the principal, and that the contract for the additional intereſt, turning upon the ſame ſubject, muſt be in the nature of a real charge.

So, Earl of Tankerville v. Fawcet, 2 Br. Ch. Rep. 57.

Wilſon v. Earl of Darlington, at the Rolls, Feb. 1785.

A real eſtate charged with a ſum of 200*l.* as a bounty, was holden to be *primarily* liable, though the perſonal eſtate was alſo ſubjected by the covenant of the donor.

2 Cox's P. Wms. 664, note.

Duke of Ancaſter v. Mayor, 1 Br. Ch. Rep. 454.

A leaſehold eſtate had been mortgaged by the teſtator's father to *N.*, for 6500*l.*, and had, ſubject to that mortgage, devolved upon him on the death of his father; afterwards the mortgage was aſſigned by the deſire of the teſtator to *H.*, who advanced him a farther ſum of 100*l.* upon it, and the teſtator conveyed other eſtates as an additional ſecurity to the mortgagee. The teſtator then made his will, and thereby deviſed as follows:—"I give and "deviſe to *A.* and *B.*, their executors, adminiſtrators, and aſſigns, "all thoſe my manors, lands, *&c.* in *L.*, to have and to hold to "them, from the time of my deceaſe, for the term of 99 years, "upon the truſts hereinafter mentioned." He then gave the real eſtate ſubject to the term, and, in default of iſſue of his own body, to the plaintiff for life, remainder to his firſt and other ſons, in ſtrict ſettlement, with remainders over, and afterwards declared as follows:—"I do hereby declare, that the term and eſtate, ſo as "aforeſaid limited to them the ſaid *A.* and *B.*, *&c.*, is upon the "ſpecial truſt and confidence, and to the intents and purpoſes "following; that is to ſay, upon truſt, that they the ſaid *A.* and "*B.*, *&c.* ſhall, out of the rents and profits, or by mortgage, "aſſignment, or demiſe, of all or any part of my before-men-"tioned manors, *&c.*, or any of them, for all or any part of the "ſaid term of 99 years, or otherwiſe as to their diſcretion ſhall "ſeem meet, levy and raiſe ſo much lawful money of *Great* "*Britain* as will be ſufficient *to pay and ſatisfy all the debts I ſhall*

"owe

" owe *at the time of my deceaſe*, my funeral charges, and all the " legacies and ſums of money given by me in and by this my " will, and pay and apply the ſame accordingly. And my will " and mind is, that after ſo much money ſhall be raiſed as ſhall " anſwer the purpoſes aforeſaid, together with all coſts, *&c.*, the " ſaid term ſhall ceaſe and determine." He then deviſed as follows:—" I give and deviſe to my brother *M. B.*, his executors and " adminiſtrators, all that the manor of *Eaſt* and *Weſt Deeping*, " holden by leaſe from the crown, ſubject to the yearly rent and " covenants reſerved in the ſaid leaſe, and alſo ſubject to the " mortgage thereon to *N.*, for 6500 *l.*; but in caſe my ſaid brother " ſhall not be living at the time of my deceaſe, then I give the " ſaid eſtate and premiſes, with the appurtenances, ſubject as " aforeſaid, to ſuch perſon as ſhall be entitled to the freehold of " my real eſtate at the time of my deceaſe, by virtue of the afore- " ſaid limitations of this my will." And towards the end of his will he deviſed as follows: " *Item*, I alſo give all my houſehold " goods, and all other my goods, chattels, effects, and perſonal " eſtate whatſoever, unto my ſaid brother *M. B.*, if he ſhall be " living at the time of my death; but in caſe he ſhall be then " dead, I give and deviſe the ſame to ſuch perſon as ſhall be en- " titled to the freehold of my real eſtate, under and by virtue of " the limitations in this my will." *&c.* *M. B.* died in the life-time of the teſtator, and the plaintiff became entitled under the limitations in the will to the real eſtate. And one queſtion was, Whether the term bequeathed by the teſtator for payment of debts was liable to the mortgage-debt on the leaſehold eſtate? *Et per curiam*, with reſpect to the leaſehold eſtate, *the charge under which it came to the teſtator was prior to his purchaſing it, and inherent in the eſtate*, and the eſtate itſelf was left liable to anſwer it, and neither the perſonal eſtate, nor real eſtate, ought to be charged with that debt; for when a man purchaſeth an equity of redemption, *ſubject* to incumbrances, that ſhould be a real incumbrance following the land, and *not a perſonal one*. And the difference between an eſtate deſcended and one purchaſed was nothing, unleſs the circumſtance of purchaſing created the difference, but *that* afforded *no* argument. The queſtion then was, Whether aſſigning the mortgage from *N.* to *H.*, and covenanting for payment of debts, altered the caſe, and made it the debt of the teſtator? and it was clear that it did not; for although where a man transferred a mortgage, and *covenanted* for the *payment* of the debt, according to the *rule of law*, he made it his *own* debt, and made *himſelf* liable to be ſued upon that covenant; yet the caſe of *Evelyn* v. *Evelyn* had decided, that though he might be at law liable, yet, while there were *real aſſets* ſufficient for the *payment* of the incumbrance, *they* ſhould be applied for *that purpoſe*; and it was to be underſtood, with reſpect to ſuch tranſaction, that the party did it by way of *accommodating the charge*, and not of making the debt *his own*. *Infra.*

Another queſtion in the preceding caſe was, Whether, when the teſtator mortgaged an eſtate *of his own* as an *ulterior* ſecurity, that

circumſtance would create a difference? and it was held that it would not; for nothing made it his debt ſo effectually as the covenant to pay, for it did not create the debt, but only operated as collateral to the debt. A man mortgaged his eſtate without covenant, yet, becauſe the money was borrowed, the mortgagee became a ſimple contract creditor, and in that caſe the mortgage was a collateral ſecurity; and if there were a *bond* or a *covenant*, *then* there was a *collateral* ſecurity of a *higher ſpecies*, but no higher by means of the mortgage merely; therefore having ſecurity amounted to nothing.

Lawſon v. Hudſon, 1 Br. Ch. Rep. 58.

Again, where *L.* being ſeiſed in fee by *deſcent* of an eſtate at *C.*, and other real eſtates both freehold and copyhold, by his will deviſed the eſtate at *C.*, which was ſubject to a mortgage for 1500*l.* contracted by his anceſtor, and alſo another eſtate, to be ſold; and charged the ſame, and alſo his perſonal eſtate (except 300*l.* due on bond, which was originally part of his wife's fortune, and ſpecifically bequeathed to her by the will) with his debts and legacies, and deviſed the reſidue of his real eſtate in truſt for his brother *B.* in ſtrict ſettlement, ſubject to a charge of 100*l.* a year to his wife upon the copyhold eſtate; and made his wife executrix: the queſtion was, Whether, under this will, the perſonal eſtate of the teſtator ſhould be applied in exoneration of the real, towards the diſcharge of the 1500*l.*? And it was held by Lord *Thurlowe* that it ſhould not; but that the ſame ſhould come out of the eſtate originally liable to it. And this decree was afterwards affirmed in the Houſe of Lords.

*Vide* 7 Bro. Par. Ca. 511.

Baſſet v. Percival, 21ſt July 1786.

Note (*a*) 2 P. Wms. 665.

*M. D.*, by will of 15th of *January* 1746, deviſed eſtates to truſtees for a term of 500 years, to raiſe money for payment of his debts and legacies, in aid of his perſonal eſtate; and ſubject to the term, he deviſed the eſtate in ſtrict ſettlement with the ultimate limitation to his own right heirs, and he gave the reſidue of his perſonal eſtate to his executrix *C. P.* The executrix applied the perſonal eſtate in payment of ſome of his debts, and all the legacies, except a legacy to herſelf of 1000*l.*, and then died; whilſt the limitations in ſtrict ſettlement ſubſiſted, and after the death of *C. P.*, her repreſentative filed a bill to have a debt due to *C. P.*, and her legacy, raiſed; and the only perſon then entitled under the limitation in ſtrict ſettlement dying, pending the ſuit, by which event the ultimate limitation to the teſtator's right heirs took place, a ſupplemental bill was filed againſt *M. D.* and *M. D. P.*, the coheirs of the teſtator. To ſtop this ſuit, the coheirs liquidated the demands of the repreſentative of *C. P.*, at 2070*l.*, and gave their joint and ſeveral bond for that ſum; this demand was afterwards aſſigned to *A. B.*, who alſo bought in debts to the amount of 3270*l.* remaining due from the teſtator *M. D.*, and the coheirs gave another joint and ſeveral bond to *A. B.*, for this ſum alſo; ſo that *A. B.* became the ſole creditor on the eſtate. *M. D.* being dead, and a bill being filed by *A. B.* for payment of theſe ſums of money, the queſtion was, Whether a moiety thereof ſhould be raiſed in the firſt place out of the perſonal eſtate of *M. D.*, or out of the real? and his Honour was of opinion, that

that the real eſtate was the original debtor, and ought to bear the burden.]

If one deviſe lands which are in mortgage to *A.* for life, remainder to *B.* in fee; *A.* ſhall contribute one-third towards the diſcharge of the mortgage, and *B.* the other two-thirds. [Corniſh v. Mew, 1 Ch. Ca. 271. Rowell v. Walley, 1 Ch. Rep. 221. Ballet v. Spranger, Pr. Ch. 62. Verney v. Verney, 1 Vez. 428.]

[And if the mortgage-money is payable on a contingency not arrived, he in remainder or reverſion may exhibit his bill *quia timet*, againſt the tenant for life, and the tenant for life ſhall be decreed to contribute. Hayes v. Hayes, 1 Ch. Ca. 223.

And if the tenant for life of the equity of redemption pays off the mortgage, and has the term aſſigned over in truſt for himſelf, and makes improvements, and dies; and afterwards the remainder-man or reverſioner comes to redeem; the repreſentatives of tenant for life ſhall have the allowance of two-thirds of the laſting improvements, but nothing for the other third, becauſe he received the benefit thereof during his life; and no intereſt ſhall be allowed during the life of tenant for life for the money he paid, for he is bound to keep down the intereſt during his eſtate. Newling v. Abbot, Eaſt. 1 Geo. 2 Eq. Ca. Abr. 596. 11. [refers to Vin. Abr., but the Editor finds no caſe of this name in that book.]

In the caſe of *James* and *Hailes*, it is laid down that, if an eſtate in mortgage be ſettled on *A.* for life, and then on *B.* in tail or in fee, the tenant for life ſhall bear two-fifths of the principal and intereſt, and the remainder-man three-fifths. James v. Hailes, Prec. Ch. 44.

But where he who is poſſeſſed of the equity of redemption hath ſuch an intereſt in the eſtate, as he can *ſecure* the money laid out by him to redeem upon, the remainder-man ſhall pay him, or his repreſentatives, *all* he hath advanced. As, where a *tenant in tail* of a mortgaged eſtate, under the will of his father, upon the death of his two brothers, paid off a debt originally on the eſtate by mortgage term for years, but neglected to have an aſſignment of the term to himſelf, and afterwards deviſed the ſame lands; and the plaintiffs, the remainder-men under the will, claimed the eſtate, as not barred, diſcharged of the incumbrance: the Lord Chancellour held, that there being a term for years in the mortgagee, which ſtood in point of law as it did before, no aſſignment in law being made thereof, none of the parties before the court had the legal eſtate, for a conveyance of which the plaintiffs came; and therefore *that* conveyance muſt be upon equitable grounds. That, ſo far as it appeared, tenant in tail paid it off with his own money; that he might have taken an aſſignment of the term, either in truſt, to attend the inheritance, which would have ended this queſtion, or in truſt for himſelf, his executors, or adminiſtrators, which would, notwithſtanding the remainder over, have kept this incumbrance on foot for the benefit of his perſonal eſtate and thoſe entitled thereto; or, that he might have called for an aſſignment of it in his life, if he had found out this limitation in remainder, that it might have been made for the benefit of his executors, *not* of the remainder; but his not doing any of theſe, clearly proved, that he took himſelf to have had the abſolute ownerſhip and diſpoſal of it. And the court could not decree, to Kirkham v. Smith, 1 Vez. 258.

perſons

perſons claiming this, in contradiction to his apprehenſion and intent, a conveyance of the inheritance, and likewiſe of this term, without making a ſatisfaction to the perſonal eſtate of the tenant in tail; as that would be contrary to the maxim, *that he who would have equity, muſt do equity;* and the plaintiffs were decreed to have the eſtate, ſubject to the money paid by the tenant in tail in diſcharge of the mortgage.]

Vern. 404. Clyat v. Battiſon.

But, if lands in mortgage are deviſed to *A.* for life, remainder to *B.* in fee, and *A.* takes an aſſignment of this mortgage in a truſtee's name; though *B.* might have compelled *A.* to contribute one-third towards payment of the mortgage, in reſpect of his eſtate for life; yet if *A.* be dead, and the bill be brought againſt his executor, he ſhall be obliged to contribute only in proportion to the time that *A* his teſtator enjoyed it.

Cro. Car. 87. Co. 99.

*A.* mortgaged his lands upon condition, that if he or his heirs repaid 100 *l.* at ſuch a day, he ſhould re-enter; before the day he dies, leaving iſſue a daughter, his wife *enſeint* with a ſon; the daughter pays the money at the day, and then the ſon is born; the daughter ſhall keep the lands, and the ſon ſhall not recover againſt her; for the daughter is in nature of a purchaſer, where ſhe hath regained the land by her own vigilance, which otherwiſe had lapſed at law to the mortgagee.

[If one purchaſe an eſtate ſubject to a mortgage, his perſonal eſtate will not be liable to exonerate the real eſtate from payment of the mortgage-debt, although he covenant with the vendor to pay the mortgage, and indemnify him from all coſts and charges in reſpect of it. Thus, *A.* agreed to purchaſe an eſtate of *B.*, which was then ſubject to a mortgage of 2000 *l.* to *D.*, and accordingly by indenture of leaſe and releaſe between *A.* of the one part, and *B.* of the other part, reciting the mortgage, and that *B.* had contracted with *A.* for the purchaſe of the inheritance of the ſaid eſtate, and had agreed to pay the ſum of 3500 *l.* for the ſame in manner therein mentioned, that was to ſay, to the mortgagee all ſuch ſums as ſhould be due to him upon the ſaid mortgage, on the firſt of *May* next enſuing, as alſo to pay ſuch ſum of money as ſhould remain after deducting the money due to the mortgage of *D.*; it was witneſſed that the ſaid *A.*, in conſideration thereof, did grant, *&c.* to the ſaid *B.*, his heirs and aſſigns for ever, all the ſaid premiſes, *&c.*; and in the covenant againſt incumbrances, the mortgages and ſecurities were excepted. And the ſaid *B.* did covenant, that he, *&c.* would well and truly pay, or cauſe to be paid, to the ſaid *D.*, the ſaid ſum due in manner aforeſaid, and would indemnify the ſaid *A.*, his heirs, *&c.*, and his goods and chattels, land and tenements, from all coſts and charges, *&c.* in reſpect of the ſaid mortgage. *A.*, after completing the purchaſe of *B.*, made his will, and died, and then a queſtion aroſe between his perſonal repreſentatives, and the deviſees of this eſtate under the will, Whether, from the nature of the contract, the perſonal eſtate of *A.* (reſpecting which he had made no diſpoſition in his will) was liable to be applied in diſcharge of the mortgage? *Et per curiam*, it is a clear rule that the perſonal eſtate is never charged

Tweddel v. Tweddel, 2 Br. Ch. Rep. 101.

charged *in equity* where it is not a law; and if not chargeable at law, there is no principle or caſe in this court to warrant its being chargeable in equity, contrary to the order of the law. Where it is a debt payable by executors *at law*, this court will relieve the heir, by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any more ſubſtantial claims. In reſpect of the rule of marſhalling aſſets, it is that it muſt be a debt affecting both the real and perſonal eſtate; ſo in caſe the perſonal fund proves deficient, to enable the court to marſhal the aſſets, you muſt prove that the executors are accountable at law, and not in equity. In this caſe, the perſonal eſtate never was liable, either by action againſt the party himſelf, or againſt his executors.

Sir *John Napper*'s eſtate was in mortgage, and he died, leaving Sir *Theophilus* his heir, who, upon his intermarriage with Lady *Effingham*, ſettled a jointure upon her, and covenanted to pay his father's debts, and then died, poſſeſſed of a conſiderable perſonal eſtate, which came to his wife, having diſpoſed of a real eſtate, which was ſettled by an act of parliament, in truſt to pay his father's debt: the heir at law brought his bill againſt the wife, to have the perſonal eſtate of the huſband, upon his covenant, applied to diſcharge the father's mortgages, and it was ſo decreed. But the reaſon was, becauſe the heir had diſpoſed of the eſtate ſo ſettled in truſt, and then it was but juſt and equitable, that his perſonal eſtate ſhould be applied to exonerate the mortgaged eſtate, deſcended to the heir at law, becauſe he was anſwerable for the truſt eſtate, ſettled for that purpoſe.] Napper v. Lady Effingham, Fitzg. 142. 144.

If a man enter into a bond, in which he binds himſelf and his heirs, and dies, leaving a real eſtate to deſcend to his heir, ſubject to a mortgage for years, and the heir ſells the equity of redemption, the obligee cannot redeem the mortgage, without firſt having a judgment at law againſt the heir. Abr. Eq. 315. Bateman v. Bateman.

A dowreſs may redeem a mortgage, paying her proportion of the mortgage-money; and as to the reſt, ſhe may hold over till ſhe is ſatisfied. Abr. Eq. 219. Palmer v. Danby.

So, if a jointure is made of lands which are mortgaged, the wife may redeem, and her executor ſhall hold over till repaid with intereſt; becauſe ſuch tenant for life ought to be reimburſed the money ſhe paid to ſet her eſtate free, and in the condition ſhe ought to have been in. Chan. Ca. 271. 2 Vent. 243. 2 Chan. Ca. 100. 161.

But, if a jointreſs after marriage join with her huſband in a fine, and mortgage the land, and the huſband die; there, her land is charged, and ſhe ſhall pay her part towards the diſburdening of the land; and her executors ſhall not hold the land till ſatisfied thereof, becauſe ſhe herſelf concurred in laying on the charge, and therefore muſt join in the diſburdening of it, according to the value of her intereſt. Chan. Ca. 271. 2 Chan. Ca. 99, 100.

If the wife joins in a mortgage, and levies a fine, with an intent to bar her dower; and in conſideration thereof the huſband agrees, that ſhe ſhall have the equity of redemption in lieu of her dower, and he afterwards mortgages the ſame eſtate twice Vern. 294. Dolin v. Coltman.

more; though this agreement be fraudulent againſt the ſubſequent mortgagees, ſo far as to entitle the wife to the whole equity of redemption, yet ſhe ſhall have her dower, if ſhe ſurvives her huſband, and ſhall not be put to her writ of dower, becauſe the eſtate may be ſo conveyed away by ſome of the mortgagees that poſſibly ſhe may not know againſt whom to bring her writ of dower.

Vern. 213. Brend v. Brend. [In this caſe, as reported by the name of Brond v. Brond, 2 Ch. Ca. 98. it is ſtated, that there was an agreement, that the wife ſhould not be prejudiced, but

If a man marries a jointreſs of houſes which are burnt down, and the huſband and wife borrow 1500*l.* to build on the ground, and levy a fine *ſur conceſſit* for ninety-nine years, if the wife lives ſo long, and a deed is made between the conuſee and the huſband, wherein the huſband covenants to repay the mortgage-money, with intereſt; and the equity of redemption is limited to the huſband and his heirs, and the huſband expends 3 or 4000*l.* in building on this ground, and dies; the wife ſhall redeem, and not the heir of the huſband; for the wife was no party to the deed of redemiſe, by which the redemption was limited to the huſband; and the wife being a jointreſs, and having granted a term for years only, out of her eſtate for life, there reſts a reverſion in her, which naturally attracts the redemption.

ſhould redeem, paying the intereſt of the money borrowed, and that the court reſolved, that the wife having ſuffered the repreſentatives of the huſband to remain in poſſeſſion, and pay off his debts, without exhibiting her claim for a long period of time, ſhould not be allowed any profits received by the huſband's repreſentatives, but from the time of filing the bill, which was the firſt notice to them of ſuch agreement.]

2 Vern. 480. Acton v. Pierce.

*A.* on his marriage agreed to leave his wife 1000*l.* if ſhe ſurvived him; the drawing of the agreement was left to the parſon of the pariſh, who made a bond from *A.* to his intended wife in 2000*l.* conditioned to leave her 1000*l.* if ſhe ſurvived him: The marriage was had, and *A.* died, leaving a freehold and copyhold eſtate in mortgage, and which were mortgaged together; and it was held, that the wife ſhould redeem as well the freehold as copyhold, and hold over till ſhe was ſatisfied.

2 Vern. 437. The Earl v. the Counteſs of Huntington.

*A.* joins with *B.* her huſband in making a mortgage for years of her inheritance for 4500*l.* to ſupply the huſband's occaſions, and to pay for the place of captain of the band of penſioners; and ſubject to the mortgage, which was for a term of years; the eſtate was ſettled on *A.* for life, remainder to her ſon in tail: *B.* in the mortgage-deed covenants to pay the money, and the proviſo was, that on the payment of the mortgage-money the term was to ceaſe: the mortgage was ſeveral times aſſigned, and particularly in 1683, and the wife joined in it, and there the proviſo was, that on payment of the money by them, or either of them, the mortgage-term was to be aſſigned as they, or either of them, ſhould direct or appoint: a few days after the mortgage was made, *B.* by letter thanked his wife for having ſealed it, and added, that the profits of the office ſhould be religiouſly applied to pay off the incumbrance: but afterwards when money came in, though he paid off the mortgage, yet he took an aſſignment thereof in truſt for himſelf; and by will deviſed his perſonal eſtate, and the benefit of this mortgage, to his ſecond wife. On a bill by the ſon of the firſt

firſt wife, to have this mortgage aſſigned him, it was declared by my Lord Keeper, that he could not decree for him, but upon the uſual terms of redemption, on payment of principal, intereſt, and coſts, diſcounting profits. But upon an appeal to the Lords, the ſon obtained a decree to have the mortgage aſſigned to him. 1 Br. P. C. 1.

So, where *A.* and his wife mortgaged the wife's eſtate, and *A.* covenanted to pay the money, but the equity of redemption was reſerved to them and their heirs; the huſband dying, it was decreed, that the mortgage ſhould be diſcharged out of the huſband's eſtate. 2 Vern. 604. Pocock v. Lee.

Again, a huſband, ſeiſed in right of his wife, borrowed 500 *l.* to ſupply *his* occaſions; for ſecuring which, he and his wife levied a fine of her inheritance, and raiſed a term of 500 years, which was limited to the perſon lending the money, with remainder to the wife in fee, to be void nevertheleſs upon payment of the money borrowed, with intereſt; and in the deed, the huſband covenanted to pay it off. Afterwards, the huſband made his will, by which he gave ſeveral charities out of his perſonal eſtate, and then died, without having diſcharged the mortgage, indebted by ſimple contract. The aſſets not being ſufficient to pay the mortgage-money, and alſo the charities given by the will, the widow exhibited her bill to have the former diſcharged out of her huſband's perſonal eſtate. And ſo it was decreed; for his perſonal eſtate would be liable to pay debts, before legacies, though left to a charity, they being ſtill but legacies. Tate v. Auſtin, 1 P. Wms. 264. 2 Vern. 689. S. C.

Where a man made a voluntary deed, and afterwards mortgaged the ſame lands, and the *firſt deed*, on trial at law, was found fraudulent againſt the mortgagee; yet, on a bill exhibited by the perſon to whom the deed was made to redeem the mortgage, it was held, that, though the firſt deed was fraudulent, becauſe voluntary, as to the mortgage, yet it was good as to the equity of redemption, and would paſs that; for a voluntary deed would bind the party that made it, and his heirs. Ran v. Cartwright, 1 Ch. Ca. 59. 1 Vern. 193. Nelſon, 101. E. Ca. Abr. 315. 1. Barthrop v. Weſt, 2 Rep. Ch. 62.

Aſſignees of a bankrupt may redeem, or aſſign an equity of redemption. 1 Ch. Ca. 71.

So, likewiſe, a tenant may put himſelf in the place of the mortgagor, and either redeem himſelf, or get a friend to do it. Dougl. Rep. 22. Keech v. Hall.

The aſſignee, in equity, may redeem a mortgage. Howard v. Harris, 1 Vern. 33.

And an aſſignee of the equity of redemption, which has been deſerted for a time, but not for that period which is a bar to a redemption, will, if there are circumſtances which would induce the court to decree a redemption in favour of the mortgagor or his repreſentative, be entitled to the benefit of it. Therefore, Lord *Hardwicke*, in a caſe, where a prowling aſſignee had bought an equity of redemption, which had been abandoned for fifteen years, for a very inconſiderable ſum, imagining, that from ſome knowledge of the law, he might be able to unravel a great number of circumſtances, and by that means entitle himſelf to a redemption, was of opinion, that he was entitled to a decree to Anonymous, 3 Atk. 314.

redeem. But his Lordſhip held him entitled only upon theſe terms, *viz.* that the aſſignee, in taking the account before the Maſter, ſhould be confined to ſurcharge, and falſify only, and the intereſt upon the mortgage be computed at five *per cent.* though at that period money bore a higher rate of intereſt.

Jones v. Mereddth et al. Bunb 346 Com. Rep. 661. — A mortgage by a popiſh heir may be redeemed by the next proteſtant heir.

2 Vez. 304. — An equity of redemption will follow the cuſtom as to the legal eſtate. In borough-engliſh lands, if mortgaged, the equity of redemption will deſcend to the youngeſt ſon to whom the lands deſcend.

*Ibid.* — So, in mortgages of gavelkind, lands which deſcend to all the children equally, the equity of redemption deſcends to all likewiſe.

Philips v. Hele, 1 Ch. Rep. 190. *et vide* 2 Burr. 978. — And it may be deviſed. Thus, where one, ſeiſed in fee-ſimple, mortgaged his lands, with a proviſo for repayment by him, his heirs, or aſſigns, and then deviſed the ſame premiſes, the court decreed, on a bill by the deviſee to redeem, that the equity of redemption belonged to him and not to the heir.

2 Chan. Ca. 8. — But, if a mortgagor, before the condition broken, deviſe, it will be void; for a condition is not deviſable.

2 Vez. 431. — Every deviſee of a mortgaged eſtate, that brings a bill to redeem, need not make the heir at law party; if the deviſee claims to have the will eſtabliſhed, it is neceſſary: if only a title under the will, it is not.

Shirley v. Watts, 3 Atk. Rep. 200. Angel v. Draper, 1 Vern. 399. King v. Marſſal, cited in the principal caſe. — A judgment creditor may redeem againſt a mortgagee of a leaſehold eſtate, who is likewiſe a bond creditor: but, before the bill is brought to redeem, *a writ of execution* muſt be ſued out; for until that be done, the judgment creditor hath no *lien* on the leaſehold eſtate, and, for want of its being taken out, the bill in the principal caſe was diſmiſſed.

Bunb. 347. 2 E. C. Abr. 594. notes. — Tenant by *elegit*, ſtatute merchant, or ſtaple, may redeem.

Stonehewer v. Thompſon, 2 Atk. 440. — And the law is the ſame as to a judgment creditor, though the judgment be with ſtay of execution. Thus, *H.* in 1693, confeſſed a judgment, with a defeaſance, by which it was not to take effect until after the death of a woman, who lived until 1726. The eſtate, ſubject to this judgment, deſcended in the mean time from *H.* to his heir, who mortgaged it to *T.* The mortgagee had no notice of the judgment at the time: the heir afterwards, in 1721, about five years before the woman died, became bankrupt; and the mortgagee was appointed aſſignee. After her death, the repreſentative of the judgment creditor brought his bill againſt the aſſignee to redeem the mortgage, upon payment of principal, intereſt, and coſts. The queſtion was, Whether, as there was no actual *elegit* taken out by the judgment creditor before the commiſſion of bankruptcy iſſued, the aſſignee under the commiſſion, *qua* ſuch, or the judgment creditor, ſhould redeem? And it was contended

contended on the ſide of the aſſignee, that the heir was chargeable *only* as *terre-tenant;* and therefore the perſon *who* claimed under the judgment was *not* a creditor of *the bankrupt*. *Sed per cur.*—The judgment creditor is entitled to redeem the whole (for it muſt be entire) and to have the eſtate of *H.* exonerated out of that of his heir, if the heir's is ſufficient. As to the point which had been laboured, in order to make this perſon come in as a creditor under the commiſſion of bankruptcy, there was nothing in it. If it had been merely a bond creditor from the anceſtor, there might have been ſome colour to inſiſt upon this under the ſtatute of fraudulent deviſes; becauſe that act made it a debt againſt the heir himſelf, as well as the anceſtor. But it was entirely different here, as this was *a judgment* which was a *lien* upon the land, *a fortiori* a *lien* upon the lands in the hands of the aſſignee under the commiſſion, who ſtood only in the place of the bankrupt.

The crown may redeem eſtates mortgaged, forfeited by the mortgagor by his being indicted and outlawed for high treaſon. Attorney General v. Crofts et al. 1 Brown's Par. Ca. 22.

If an eſtate deſcend to an infant ſubject to incumbrances, the guardian may, without the direction of a court of equity, apply the profits to diſcharge the incumbrances, *viz.* to pay the intereſt of any real incumbrance, and the *principal* of *a mortgage;* becauſe that is *a direct and immediate* charge upon the land; but *not* the principal of any other real incumbrance.] Palmer v. Danby, Pre. Ch. 137.

2. To whom the Mortgage-Money ſhall be paid.

Mortgages, being part of the perſonal eſtate, belonging to the executors or adminiſtrators; though it was formerly held, that if a feoffment in fee was made upon condition, that if the mortgagor paid the ſum to the mortgagee, his heirs, executors, or adminiſtrators, that then the mortgagor ſhould re-enter, and the day paſſed without payment, and the mortgagee died, whereby the lands deſcended to his heir; in ſuch caſe, the heir being named in the condition, and no bond or covenant given to make it appear a perſonal matter, and no deficiency of aſſets to pay creditors, that the heir parting with the benefit deſcended to him, ſhould have the money in the mortgage. Chan. Ca. 88. Smith v. Smoult.

But afterwards it was truly ſettled by the Lord Chancellour *Finch*, that the money ſhould go to the executors or adminiſtrators, and not to the heir; and the reaſon was, becauſe equity follows the law. And at common law, if conditions or defeaſances of mortgages are ſo penned, as no mention is made either of heirs or executors, in that caſe, the money ought to be paid to the executors, becauſe the money came out of the perſonal eſtate, and therefore ought to return thither again. But if the defeaſance appoints the money to be paid to the heir or executor diſjunctively, there, by the common law already mentioned, if the mortgagor pay the money preciſely at the day, he may elect (*a*) to pay it either to the heir or to the executor. But where the preciſe day Chan. Ca. 283. 2 Chan. Ca. 50, 51. 220. 2 Vent. 348. 351. Hard. 467. Vern. 170. 412. Preced. Chan. 11.

[(*a*) If the mortgage be in fee, con-

ditioned, that the mortgagor shall pay the money to the mortgagee, his heirs, executors, administrators, or assigns; and the mortgagee die before the mortgage forfeited, though the mortgagor has in this case his election to pay the money to either; yet it will belong to the executor. 2 Ventr. 351.]

is past, and the mortgage forfeited, all election is gone in law, for in law there is no redemption. And when the case is reduced to an equity of redemption, it were perfectly against equity to revive the election of the mortgagor; because that would only tend to the delay of the payment of the money as long as he pleased, and end in compositions to pay the money into that hand which would use him best. And to say that the election should be in the court, would be to place an arbitrary power in it, which would tend to the inconvenience of the subject; since no man could safely pay the money in such cases, without a suit in equity. And, therefore, since there ought to be a certain rule, a better cannot be chosen, than to come as near as can be to the rule and reason of the common law. Now the law always gives the money to the executor, where no person is named, and where the election to pay either to the heir or the executor is gone and forfeited in law, it is all one, as if neither heir nor executor were named in the condition. And then in natural justice and equity, the principal right of the mortgagee is to his money, and his right to the land is only as a deposit or pledge for his money; and therefore the money ought to be paid into the proper hand, that the mortgagee hath appointed receiver of his money, and that is his executor. And then the heir, who is only a trustee to keep the pledge, ought to deliver it back to the mortgagor; for though the heir has the use and benefit of the land till redeemed, yet he has it only as a pledge, and therefore is a trustee to restore it when the money is paid to the proper hand; and the heir himself, though he be proper to keep the pledge, being land, yet he is not proper to receive the money, it being purely personal. Nor is it hard, that the heir should part with the land, without having the money that comes in lieu of it; because we are to consider, that the money was originally parted with from the personal estate, and had immediately come into the hands of the executor, had it not been placed out on this real security. Whether, therefore, the executor has assets or not, the mortgage-money should be paid to him. But the mortgagee, by any conveyance in his lifetime, or by his last will and testament, may dispose of it otherwise to whom he pleases.

2 Vern. 66. If the heir of the mortgagee forecloses the mortgagor, the executor being no party, upon a bill by the executor against the heir of the mortgagee and the mortgagor, the land will be decreed the executor.

2 Vern. 67. But if the executor of the mortgagee, after a foreclosure by the heir, brings a bill to have the benefit of the mortgage, the heir, if he thinks fit, may take the benefit of the foreclosure to himself, paying the executor the mortgage-money and interest.

Ellis v. Guavas, 2 Ch. Ca. 59. And, if the mortgagor doth not redeem, the administrator shall have the land. Thus, where the mortgage was forfeited, the heir in possession by descent, no want of assets, and the mortgagor did not offer to redeem; the heir of the mortgagee was decreed to convey the lands to his administrator; for as the money, being

part

part of the perſonal eſtate, would have gone to him, ſo would the land, which was in lieu thereof.

If there be a mortgage in fee of a long ſtanding, and there be two deſcents caſt ſince the mortgage was made; though the mortgagor, by anſwer, ſays, he will not redeem, yet the mortgage ſhall go to the executor, and not to the heir, the equity of redemption not being foreclоſed or releaſed. 2 Vern. 367. Tabor v. Greaves.

[Although a mortgagor, the mortgage being forfeited, releaſes to the heir of the mortgagee in fee, yet the adminiſtrator ſhall have the benefit of that eſtate, even though there be no debts. And ſo it is in caſe a mortgagor be foreclоſed, or that the mortgage be of ſo ancient a date, as in the ordinary courſe of the court, it be not redeemable; *for, in caſe the mortgagee be not actually in poſſeſſion, it will be looked upon* to be perſonal eſtate. 2 Vern. 193.

And, where there was huſband and wife, and the wife, having a mortgage in fee of a copyhold, died leaving iſſue, which iſſue was admitted, and died, and then the huſband, as adminiſtrator to his wife, claimed title to the copyhold, being a mortgage, and ſo part of his wife's perſonal eſtate: it was decreed to him againſt the heir at law, although the latter had been admitted. Turner v. Crane, 1 Vern. 170.

So, a mortgage of an inheritance, to a citizen of *London*, hath been held to be part of his perſonal eſtate, and divided according to the cuſtom. 1 Ch. Ca. 285. 1 Vern. 4.

But where a mortgage was deviſed as real eſtate, after a decree of foreclоſure *niſi*, it was held to be perſonal eſtate for payment of debts, if aſſets fell ſhort, though conſidered as real eſtate between deviſor and deviſee. Garrett v. Evers, Moſel. 364.

But a mortgage will not paſs *as land* under a general deſcription, applicable to it in point of locality, if there be other circumſtances ſufficient to ſhew, that the owner conſidered it as perſonal property. Martin v. Moulin, 2 Burr. 969.

Where money ſecured by a mortgage (to which the executor was legally entitled) was articled to be laid out in land, and ſettled on the iſſue of the marriage, it was by *Hale*, Chief Juſtice, on a ſpecial verdict, adjudged to be bound by the articles. Laurence v. Beverley, cited 3 Will. 217.

If two perſons advance a ſum of money on mortgage, and take the mortgage to themſelves *jointly*, without inſerting in the deed the words, *to be equally divided between them*, and one of them dies; when the money comes to be paid, the ſurvivor ſhall not have the whole, but the repreſentative of him that is dead ſhall have a proportion, becauſe, from the nature of the tranſaction, the court preſumes this to be the intention of the parties. Thus, *N.* and *S.* lent 2000 *l.* to *G.* on mortgage, 1450 *l.* whereof was the money of *S.*, and 550 *l.* the reſidue, the money of *N.*, and it appeared, by a note under both their ſignatures, that the 1450 *l.* was delivered by *S.* to *N.*, and that, if the mortgage was paid off, then the 1450 *l.*, with intereſt thereon, was to be redelivered into the hands of *S.*, for the uſes of his will. Afterwards, and before the day of redemption, *S.* made his will, reciting the above memorandum, and diſpoſed of his ſhare thereby. The lands were redeemed on the day, and the whole money and intereſt paid to *N.*, 2 Vez. 258. Petty v. Styward, 1 Ch. Rep. 58.

*S.* being dead, and he claiming it by ſurvivorſhip. But, on a bill exhibited by his executor, the court was clearly of opinion, that by equity, there ought to be no ſurvivorſhip in a caſe of this nature; and that the note, under the hands of both the parties, and the will of *S.*, ſhewed plainly that there was a truſt between them, *that*, on repayment, each of them was to have his money, with intereſt.

2 Vez. 258. And if two perſons, being mortgagees, foreclose the mortgagor, the mortgaged eſtate ſhall be divided *between* them, becauſe their *intent* is *preſumed* to have been, that it ſhould be ſo divided.]

Vern. 271. Cotton v. Iles. But, if a mortgagee in fee enter for a forfeiture, and after ſeven years enjoyment abſolutely ſell the land to *J. S.* and his heirs, the eſtate ſhall not be looked upon to be a mortgage in the hands of *J. S.* ſo as to make it part of his perſonal eſtate, but it ſhall be for the benefit of his heir.

Preced. Chan. 265. Noys v. Mordant. *A.*, being in poſſeſſion of an eſtate that was a mortgage in fee, by will deviſes it to his daughters *B.* and *C.* and their heirs, and dies: *B.* marries, and dies: the queſtion was, Whether the ſhare of *B.* ſhould be decreed real or perſonal eſtate, and, conſequently, go to her heir, or to her huſband as her adminiſtrator? It was decreed againſt the huſband; and my Lord Keeper put this caſe: A man ſeiſed of lands in fee, which were only mortgaged to him, deviſes them to his ſon and heir, and his heirs; ſurely theſe lands ſhall deſcend as an inheritance; or, though the mortgage be paid off, ſhall not the money be conſidered as lands, and go to the heir and his heirs, as the lands would have done, and this purely by the intention of the teſtator; and did not the teſtator, who had a governing power, intend in the preſent caſe, that the mortgaged lands ſhould be conſidered as any other lands of inheritance, and be ſubject to, and be directed by, the ſame rules which other eſtates are?

3. Of the Precedency and Right of Redemption, where there are ſeveral Mortgagees or Incumbrancers; and herein of their Remedies againſt each other, as well as againſt the Mortgagor.

Abr. Eq. 320. Herein we muſt obſerve, as a ſure and eſtabliſhed rule, that he who hath the firſt mortgage, having the legal eſtate, ſhall prevail before all other ſubſequent mortgagees and incumbrancers. But if a man mortgages land by a defective conveyance, and afterwards mortgages by an aſſurance which is good and effectual, without notice, the ſecond ſhall prevail, becauſe that carries the legal title; and equity will not interpoſe, when both are equally upon valuable conſideration. But if a man mortgages by a defective conveyance, and there are ſubſequent debts that do not originally affect lands, there, the defect of ſuch a conveyance ſhall be ſupplied againſt a ſubſequent incumbrancer, who acquires a legal title afterwards; for ſince the ſubſequent incumbrancer did not originally take the lands for his ſecurity, nor had in his view an intention to affect them, when afterwards the lands are affected, and he comes under

under the very perſon that is obliged in conſcience to make the ſecurity good, he ſtands in his place, and ſhall be poſtponed to ſuch defective conveyance.

This rule and diſtinction being grounded on the following caſe, we ſhall here inſert it at large.

Eleanor Burgh & al. v. Henry Francis & al. 19 Decemb. 1670.

*Henry Francis*, father of the defendant *Henry*, in conſideration of 400*l.* money lent, by feoffment, 17 *July* 1665, mortgaged to the plaintiff's teſtator in fee, a piece of ground called *Purſefield*, in the pariſh of *Gibs*, but no livery thereon, and covenanted for him and his heirs, that he was lawfully ſeiſed in fee of the premiſes, and for quiet enjoyment, free from incumbrances againſt him and his heirs, and all perſons claiming under him, with covenant for farther aſſurance within ſeven years. *Henry Francis*, the father, *Mich.* 1669, borrowed of the teſtator 77*l.* on bond, and promiſed that the mortgaged premiſes ſhould be ſecurity for it. *Henry Francis*, the father, in 1670, made his will, and thereof made *Henry Francis*, his ſon, executor. The teſtator, *Robert Burgh*, died, and the plaintiff *Eleanor* proved his will. The defendant, *Henry Francis*, confeſſes ſeveral judgments, on bonds, entered into by his father (to wit) ſeven judgments, as heir, and one, as executor to his father. One of theſe ſeven judgments was obtained by *Heyman*, a defendant, on an action brought the firſt or ſecond day of *Hilary* term 1670, for 400*l.* and all the other judgments were entered about the ſame time. This cauſe came to be heard by Sir *Heneage Finch*, Lord Keeper, aſſiſted by Judge *Wyld*, who declared, that the court was fully ſatisfied, that the plaintiff ought to be relieved, and that the ſaid judgments ought not to incumber the premiſes, till the mortgage-money was fully paid; wherein the court did not ground its judgment upon the manner of obtaining the judgments all in a term, and moſt of them together, nor on the ſpecial way, whereby the heir charged the lands, by pleading *riens per deſcent*, nor on the priority of the *teſte* of the *ſubpœnas* before the *teſte* of the original, on which the judgments were grounded; but upon the true nature of the caſe the court declared, that the debt due by the mortgage, did originally charge the lands, which the bond did not, till they were reduced to judgments; and it ought not to be in the heir's power, by confeſſing judgments, to charge the lands in prejudice of that equity; and the rather, becauſe of the covenant for further aſſurance. And though the mortgage was defective in law, for want of livery, yet equity, which ſupplied that defect, charged the lands: and though the creditors had no notice, yet they ſhall be bound in this caſe, becauſe they are put in no worſe condition than they ought to be, *viz.* to be poſtponed to the mortgage. Therefore it was decreed, that the defendant *Henry*, the heir, ſhould convey to the plaintiff, or her aſſigns, in fee, in manner as a Maſter ſhould direct, but redeemable on the payment of the ſaid 400*l.* due on the former defective mortgage, and the premiſes to be held quietly againſt the plaintiffs, and all claiming under them, ſince the date of the mortgage; and he who has the equity of redemption, may, in convenient time, bring a bill to redeem; and in default thereof, the

the now plaintiffs may bring one to foreclose. And a perpetual injunction was alſo awarded, to quiet the plaintiffs and their aſſigns in poſſeſſion againſt all the defendants and the aforeſaid incumbrances, and to ſtay all proceedings at law, but the plaintiffs to have no coſts of this ſuit, unleſs ſome come to redeem; then, the now plaintiffs to have all the coſts of this, and ſuch ſuits, as is uſual in the redemption of mortgages.

From this caſe, which hath been a governing caſe in the courts of equity, they have ſtated the difference before mentioned; for theſe bond creditors did not originally pitch upon the land as a pledge and ſecurity for their money; and when they came afterwards, and reduced their ſecurities into judgments, to affect the lands; yet, ſince they affect it in the hands of the heir, who was ſubject to this equity, and obliged in conſcience to ſupply the defect in the execution of the deed, they can only ſtand in his place, and therefore muſt be ſubject to the defective ſecurity. But otherwiſe it had been, if there had been a ſubſequent mortgage duly executed, and without notice of the former; becauſe the lands being then originally pledged for the money, and the mortgagee having the legal title, the defective ſecurities that could not prevail at law, ſhould not overturn, in equity, a ſecurity that was equally upon valuable conſideration. But the bonds in the former caſe did not originally take hold of the land at all; and when they were reduced to a judgment, they only took hold of the land, together with other things; and therefore equity doth not look on them, as ſuch charges on the land as are to take hold ſo immediately on it, that a prior defective ſecurity is not to be relieved and ſet up againſt them; eſpecially, ſince ſuch incumbrancers did not take the land as an original ſecurity, but came in afterwards, under the perſon who was obliged in conſcience to ſupply that defect; for the difference between the two caſes turns upon this, that in the caſe of a ſecond valid mortgage, we muſt, in all manner of juſtice ſuppoſe, that the mortgagee would not have lent, if the land had not been offered to ſecure his money; and therefore when he hath the title at law, it is no equity to overturn it, or to poſtpone him to a defective ſecurity; but in the caſe of the bonds, the obligees lent their money upon the perſonal ſecurity, and not on the credit of lands; and therefore when they come to affect the lands, they muſt ſtand in the place of the perſon that had made himſelf liable, in a court of equity, to anſwer and make good the defective ſecurity.

2 Vern. 564. 2 Salk. 449. pl. 2. Taylor v. Wheeler.

Thus, it was alſo ruled by the Lord *Cowper*, where the caſe was, *A.* ſurrenders his copyhold by way of mortgage for money lent, and the ſurrender is not preſented at the next court, according to the cuſtom of the manor; *A.* becomes a bankrupt, and the aſſignees, *&c.* are admitted, and bring their ejectment, and the ſurrenderee of the copyhold brings his bill in equity to be relieved. And in this caſe, the court decreed a perpetual injunction in behalf of the ſurrenderee. For though it was ſaid, that the creditors of the bankrupt were equally valuable as the ſurrenderee, and having the title at law, they ought to be preferred; yet it was

over-

over-ruled, becauſe the other creditors of the bankrupt did not lend on the credit of the land, as the mortgagee did; and therefore, when ſuch creditors come under the bankrupt to charge the land, they ought to ſtand in his place, and come under the ſame obligation of conſcience to make good the defective ſecurity.

Oxwick & al. v. Plumer & al. Paſch. 3 May 1708.

The caſe of *Oxwick* and *Plumer* turns upon the reverſe of this judgment, and was thus: *Richard Wiſeman*, eſq. ſon and heir apparent of Sir *Richard Wiſeman*, intermarried with *Winefred Barrington*, entitled to a portion of 4000 *l.*, and brings his bill againſt the truſtees of his wife; whereupon a decree was had, to pay unto him the fortune of his wife, upon making a competent ſettlement; and upon failure thereof, the fortune to be inveſted in lands by the approbation of the Maſter. But upon the Maſter's report, that no competent ſettlement could be made by *Richard* the ſon, it was, by choice of parties, inveſted in lands of Sir *Richard* the father, of equal value, part of which lands happened to be eight acres of copyhold, which in the ſettlement were limited, and declared apart from the freehold, to be to the uſe of the iſſue of the marriage, in common form, and afterwards in fee to the ſon, with a covenant from Sir *Richard* to ſurrender the copyhold. The wife dies without iſſue, and the ſon mortgages both copyhold and freehold together, for a valuable conſideration, to *Oxwick* and others, plaintiffs; but without any ſurrender: the ſon dies, and the lands deſcend to *Eliz.* his ſiſter and heir at law: the mortgagees foreclose *Eliz.* by a decree of the court, and enter and take poſſeſſion; to whom being in poſſeſſion *Eliz.* releaſes, and confirms the eſtate in fee. Sir *Richard* the father being then out of poſſeſſion of the premiſes from the time of the ſettlement, which was made thirteen years paſt, ſurrenders the copyhold land to the defendant *Plumer*, for a valuable conſideration. *Plumer* is admitted, and brings his ejectment; and the mortgagees bring their bills to be relieved. The Maſter of the Rolls, on ſolemn argument, diſmiſſed their bill with coſts; and held, that this court would not ſupply the defect of a ſurrender againſt a perſon that came in by title, upon ſurrender of the ſame premiſes. The caſe coming on to be reheard before my Lord *Cowper*, he was of the ſame opinion; and he took this difference, that when there are two perſons that have equal equity, there, thoſe that have the legal title ſhall prevail, becauſe there is no equity to take from ſuch perſons the title that they have gained at law; as, where *A.*, *B.* and *C.* are three mortgagees, and *C.* purchaſes in the mortgage of *A.* to ſecure his own money *bonâ fide* lent; equity will never take from him the legal intereſt he hath gained. But if the contending parties in equity have not equal equity, then thoſe that have the greateſt equity ſhall prevail againſt the legal title; as, if a creditor takes hold of the land by a feoffment in mortgage, with livery, equity will ſupply the defective conveyance againſt a ſubſequent judgment creditor; becauſe the judgment creditor not relying on the land for his ſecurity, he hath not equal equity to have it applied for the payment of his debt, as he that took it in mortgage. But in this caſe, where *Plumer* had equally lent money, and

and taken hold of the eſtate by a mortgage made with a legal ſurrender; ſo that the legal intereſt was in him; the covenant to ſurrender, though prior, cannot be ſet up againſt him who had no notice of it; but *Oxwick* muſt purſue his remedy at law, for the breach of the covenant.

Churchill v. Grove, 1 Ch. Ca. 36.

A precedent mortgagee diſcounts his mortgage-money by purchaſe of parcel of the land, and the ſubſequent mortgagee, having alſo a judgment, comes to be relieved; the precedent mortgagee pleads this purchaſe; and without notice it is good; for having a legal title by the firſt mortgage, kept on foot precedent to the ſecond, this court will not deſtroy it; and the judgment on record is no notice, without expreſs notice from the party in intereſt.

Rand v. Cartwright, 1 Ch. Ca. 59.

If a man makes a voluntary deed, and mortgages the ſame lands; this deed, though fraudulent as to the mortgagee, is good to paſs the equity of redemption, becauſe the voluntary conveyance binds the party and his heirs.

Goddard v. Complin, 1 Ch. Ca. 119.

Tenant in tail demiſeth the lands for ninety-nine years, by way of mortgage, under a condition of redemption; and on his marriage ſuffers a recovery, and in conſideration of the portion ſettles a jointure; then the huſband borrows more money of the mortgagee, and appoints the term as a ſecurity. The recovery enures to make good the term; and if the mortgagee had no notice of the jointure, he ſhall be allowed his whole money, for the entail is deſtroyed by the recovery; becauſe every recovery places the fee in the recoverer; and neither the huſband nor wife, that comes in by title under him, can vacate this act precedent; ſo that the ſubſequent recovery of tenant in tail makes good all precedent incumbrances.

Roſcarrick v. Barton, 1 Ch. Ca. 217., &c.

A man makes a mortgage, and afterwards makes a marriage-ſettlement of the equity of redemption, wherein he limits it on the wife; and then on the iſſue of his body, with remainder in tail to his brother; the mortgagee exhibits his bill againſt the mortgagor, to have his money, or that he may ſtand foreclоſed, without making the brother a party; and has a decree accordingly; and afterwards the mortgagor dies without iſſue, and the lands remain to the brother by the marriage ſettlement, who prefers his bill to redeem. The bill was diſmiſſed; for having made thoſe parties to the bill of foreclоſure, that were parties to the mortgage, the mortgagee did as much as was poſſible; and ſince at law a fine, or other conveyance, extinguiſhes an equity of redemption, which is but a *choſe in action*, though the modern courſe hath allowed it to be transferred; yet it ought not to be ſo allowed, that the mortgagee ſhould not know from whom to ſeek a foreclоſure, in order to keep him an eternal bailiff to the mortgagor; therefore, after length of time, and in behalf of a mere volunteer, they would not open the account, after ſuch decree to foreclоſe had againſt the perſon that was party to the mortgage; for poſſibly the mortgagee, ſince the foreclоſure, had kept no account, ſince he was not bound to do it.

Reynoldſon v. Perkins, Amb. Rep. 564.

[*H.* being ſeiſed in fee, mortgaged for years, and afterwards, in 1734, made his will, and deviſed his eſtate to his ſon and his heirs,

heirs, ſubject to an annuity to his wife for life, and to the incumbrances upon the eſtate; and in caſe his ſon ſhould die without iſſue, to be divided amongſt his three daughters, or ſuch of them as ſhould be living at the death of his ſon; and if his ſon and daughter ſhould all die without iſſue, then to his wife for life, remainder to his own right heirs. A bill was brought by *P.*, as aſſignee of the original mortgagee, againſt the widow of the mortgagor, and her ſon, who was then an infant, to foreclоſe the equity of redemption; but the daughters were not made parties. In 1746, the cauſe was heard, and a decree made for an account and foreclоſure, unleſs redeemed by the mother or ſon. The account was taken before the Maſter, and the time for redemption being ſeveral times enlarged, and at laſt elapſed, the ſon, having attained 21, releaſed the equity of redemption; ſo that the foreclоſure was not made abſolute againſt him, but was made abſolute againſt the wife. The ſon afterwards died without iſſue, and *R.* having bought the daughters' intereſt for a trifle, in 1765, filed a bill to redeem. But the Lord Chancellour was clear of opinion, that *P.* was not entitled to redemption. That the firſt tenant in tail being a party to the foreclоſure was ſufficient. That he ſuſtained the intereſt of every body, and thoſe in remainder were conſidered as cyphers. That it would be very inconvenient if the remainder-men were neceſſarily to be parties. There might never be an abſolute foreclоſure. The account would be endleſs, and the foreclоſure would be open to every contingent remainderman. That nobody would lend money upon ſuch terms. That the releaſe in this caſe was equal to an abſolute foreclоſure by order. That the accounts were taken, and the time for redemption elapſed, and that this caſe was not ſo ſtrong as that of *Roſcarrick* and *Barton*.

If a man mortgages lands, and then confeſſes ſeveral judgments, and ſome of the perſons, who have judgments, give the mortgagee notice, and afterwards he obtains, againſt the mortgagor, a decree to foreclоſe; ſuch perſons, that give notice of their intereſt, ſhall, notwithſtanding, redeem; becauſe they are creditors for a valuable conſideration, and the mortgagee had notice of them, that he might have made them parties to his bill; but the perſons, who gave no previous notice of their judgments, are totally barred of all redemption, by the former decree. Greſwold v. Marſham, 2 Ch. Ca. 170.

A ſecond mortgagee may redeem the firſt, after a decree obtained by him to foreclоſe, although the firſt mortgagee had no notice of the ſecond mortgage, before the decree. 2 Vern. 601. *Et vide* Morret v. Weſterne, *ſupra*.

But the firſt mortgagee ſhall be allowed all his expences out of pocket. Thus, where *L.* a ſecond mortgagee, came to redeem *H.* who had been at great expences in law-ſuits to foreclоſe the mortgagor, and otherwiſe, in relation to the eſtate; the court ordered, that his coſts ſhould not be taxed, as in an adverſe ſuit, but that he ſhould be allowed all his coſts and expences, as was done in the caſe of a ſolicitor, who laid out and diſburſed money for his client; and farther, that the profits of the eſtate in queſtion ſhould Lomax v. Hide, 2 Vern. 185.

be

be applied, in the firſt place, to pay and ſatisfy what was due for ſuch coſts, charges, and diſburſements, before it was applied to ſink the principal; for that it was not reaſonable he ſhould wait for it, and be allowed it only on the foot of the account (as had been uſually done) whereby he might loſe the intereſt thereof, for ten or more years together.

Lloyd v. Manſeil, 2 P. Wms. 74.

And a decree to foreclose, though made abſolute, ſigned, and enrolled, is no plea to redeem, if ſurreptitiouſly procured.]

2 Ch. Ca. 123. Brent v. Engliſh.

*A.* mortgages to *B.*, and *C.* obtains a judgment in debt againſt *A.*, and then *A.* mortgages to *D.*, and then *B.*, *D.*, and *A.* account together for what was due to *B.*, and *D.* pays the money, and *B.* aſſigns the mortgage to *D.* *C.* ſues for his debt, and to have an account of what was really due to *B.* and *D.* on both ſecurities; *D.* pleads the account thus made up in bar to *C.*; but it was diſallowed; becauſe their account, being voluntary, ſhall never conclude a third perſon, ſo that he ſhall not come into the redemption; for it were unjuſt, that their accounts ſhould ſhut him out of his ſecurity, where he had no opportunity to litigate or examine the account.

1 Ch. Ca. 299. Needler v. Deeble.

But it hath been held, that if a firſt mortgagee brings a bill to foreclose the mortgagor, and an account is directed and taken between them, ſuch account ſhall bind the ſecond mortgagee, though he was no party to the bill, if there was no fraud or colluſion in the taking of it.

1 Chan. Rep. 57, 58. Petty v. Styward.

If a man mortgages his eſtate to two, who each of them lend ſeveral ſums upon the eſtate, as appears by notes under their hands, and one of them dies, there ſhall be no ſurvivorſhip; for it is conſidered as a ſum of money ſtill ſubſiſting apart, for which the lands are only a pledge and ſecurity; ſo that the money being diſtinct ſums, and the intereſt in it being diſtinct and ſeparate, there can be no ſurvivorſhip between them.

Pr. Ch. 30. Bentham and Haincourt.

If a mortgagee, after notice of a ſubſequent mortgage, joins with the mortgagor in a ſale of the lands to a ſtranger, the money received by either for the purchaſe ſhall ſink ſo much of the purchaſe-money: and in this caſe the mortgagor, being ſon-in-law to the mortgagee, and he having entered, and afterwards ſuffered the mortgagor to take the profits for ſeveral years, without requiring intereſt, it was held by the court, that the intereſt of the firſt mortgagee ſhould not affect the lands, ſo as to keep out the ſecond mortgagee longer than he would have been, had the intereſt been duly paid.

Ibbotſon v. Rhodes, 2 Vern. 554.

If *A.*, being about to lend money to *B.* on a mortgage, ſends *C.* to inquire of *D.*, who had a prior mortgage, whether he had any incumbrance on *B.*'s eſtate, and it is proved that *C.* went to him, and ſpoke to him accordingly, and *D.* denied having any; *D.*'s mortgage ſhall be poſtponed.

Berrysford v. Millward, Barnard. Rep. 101. 2 Atk. 49. S. C. *Vide*

[On a treaty of marriage between *A.* and *B.* his wife, *C.* the father of *A.*, and *D.* the father of *B.*, had a meeting together; at which meeting *M.*, who had a mortgage upon *C.*'s eſtate, was accidentally preſent; *C.* and *D.* diſcourſed together on the ſubject

an

and talked of making a settlement upon the estate on which the mortgage to *M.* was secured: *M.* never mentioned to the father of *B.* that he had such mortgage, but called out *C.* and reminded him thereof. *M.* then agreed with *C.* that he would take his personal security for the money, and they returned into the room together, when an agreement was entered into between *C.* and *D.*, in the presence of *M.*, to settle the estate in strict settlement. Afterwards, the marriage took effect, and *M.* brought an ejectment to recover the possession of this estate as mortgagee; whereupon *A.* and *B.* his wife brought a bill against *M.* and *C.*, in order to have a perpetual injunction: *M.* admitted all the facts, but pretended not to remember any thing of the agreement to accept *C.*'s personal security for the money lent. *C.* was examined as a witness in the cause for both parties, and swore to the fact of that agreement: and the Lord Chancellour was of opinion, that the plaintiffs were well entitled to a perpetual injunction, and ought to be relieved under the *head of fraud*; for that *M.* having voluntarily concealed his mortgage at the time of the treaty of marriage, was not entitled to have any benefit from it against the plaintiff.

Sheph. Prac. Counf. 482. pl. 9. a *quæ.* if such cases do not avoid prior claim at law as fraudulent.

*D.*, *N.*, and *H.*, having lent *B.* 8000 *l.* upon a mortgage in fee of the manor of *F.*, and on a statute in 1600 *l.* penalty as a farther security; and *H.* being a counsellour, and afterwards consulted by *J.* as to a loan of 200 *l.* to *B.* on a mortgage of the manor of *G.*, encouraged him to lend his money, drew the mortgage-deed, and inserted therein a covenant that the estate was free from incumbrances, making no mention of the statute which was taken, because *F.* was supposed to be deficient. The question was, Whether *H.* should be admitted to take advantage of the statute to lessen *J.*'s security upon the manor of *G.*? And it was held he should not; for if he, who only concealed his incumbrance, should be postponed, much more ought *H.*, who was intrusted as counsel by the mortgagee, promoted the loan, and drew the conveyance with covenants that the estate was free from incumbrances.

Draper et al. v. Borlace et al. 2 Vern. 370.

And if a first mortgagee be a witness to a second mortgage-deed, and, knowing the contents thereof, do not acquaint such second mortgagee with his former mortgage, this will give the latter a preference. It is likewise said, that it will make no difference, although it be not in proof that the witness knew the contents of the second mortgage; for, since it does not appear but that he might have known them, the law will presume that every witness, who can write or read, is acquainted with the substance of a deed or instrument which he, having attested, undertakes to support by his evidence.

Mocatta et al. v. Murgatroyd, 1 Will. Rep. 393. [But Mr. Cox, the editor of Peer Williams's Reports, in a note added to the above observation, doubts the truth of the proposition, and questions whether the bare attesting a subsequent incumbrance, without other circumstances of presumptive notice, will postpone a prior incumbrancer, since, at that rate, a prior mortgagee or incumbrancer may, without any fraud, or ill intention on his side, be liable to be cheated of his security.—And so (he observes) he found it said by Lord King, in the author's (Peer Williams) report of an anonymous case, in Mich. term, 1732. And Lord Hardwicke, before whom this point was agitated, in the case of Wilford and Beezly, 1 Ves. 6. said, "that he did not think that the bare attesting a deed as a witness would create such a presumption of his knowledge of the contents, as to affect him with any fraud therein; for a witness is only to authenticate it, and not to be privy to the contents."—And Lord Thurlowe, in the case of Becket and Cordley,

Cordley, 1 Br. Ch. Rep. 357. seems to have been of a similar opinion with Lord Hardwicke upon this subject; for speaking therein of the case of Mocatta and Murgatroyd, his Lordship says, "the "first mortgagee was a witness to the second mortgage, and was therefore postponed. I do not leave "this as a case, which I should determine in the same manner; for a witness in practice is not privy "to the contents of the deed. The book refers to a case where Lord King denies the law to be so."]

Hobbs v. Norton, 1 Vern. 136. *Vide* 2 Fq. Ca. Abr. 515. pl. 3. 9 Vin. Abr. 415. pl. 24. Watts v. Creswell.

*N.*'s younger brother, having an annuity of 100*l.* *per annum* charged on lands by his father's will, contracted with *H.* for sale thereof; *H.* went to *N.* and informed him of his intended purchase, desiring to know of him if his younger brother had a good title to it, and whether his father was seised in fee at the time of making the will, and if it had ever been revoked. *N.* told him he believed his brother had a good title, and that he had paid him the annuity for twenty years; but at the same time informed him, that he heard there was a settlement made of his father's lands before the will, which was in the hands of *T.*, but that he had never seen it, and therefore could not tell what were its contents; and encouraged the purchase, telling *H.* he had not only paid his brother the annuity to that time, but had also paid his sisters 3000*l.* under the same will. The purchase was completed, and afterwards *N.* got the settlement into his hands, and would have avoided the annuity, the lands being thereby entailed. *H.*'s bill was to have the annuity decreed or repayment of his purchase-money; and though, on the hearing, there was no proof that *N.* had any notice of the contents of this settlement at the time he promoted the purchase, yet the Lord Keeper decreed the payment of the annuity merely on the encouragement *N.* gave *H.* to proceed in completing the contract; for that it was a negligent thing in him not to have made himself acquainted with his own title, that he might have informed the purchaser of it, when he came to inquire of him.

Pearson v. Morgan, 1 Bro. Ch. Rep. 63. 2 Bro. Ch. Rep. 388.

And such constructive fraud not only binds the party himself personally, from whose negligence it arises, but also binds the lands, *&c.* charged. Thus, *B.*, the elder brother of *I. B.*, was under settlement entitled to a real estate, charged with 8000*l.* for one younger child of the marriage, but subject to a proviso, that, if the father should give to any of his daughters, or younger sons, any money or lands, for or in advancement in marriage or *otherwise*, the value thereof should be deducted from the portion, unless he should by writing declare to the contrary. The father devised to *I. B.* 4000*l.* after the death of his (the son's) mother, and the residue of his personal estate, and died. Then the elder son suffered a recovery by which he obtained the fee-simple in the lands. Afterwards *I. B.* applied to *P.* to lend him 3000*l.* on the security of the 8000*l.* portion, for which he assigned 5000*l.* part of the 8000*l.* as a security, and also entered into a bond in a penalty for the same. *P.*, previous to lending the 3000*l.*, applied by his solicitor to *B.*, informing him of *I. B.*'s application, and desired to be informed by him, whether the 8000*l.* was a subsisting charge upon the estate, when *B.* declared that it was, and that *P.* might safely advance his money upon the security. *B.* also afterwards applied for, and obtained a sum of money to pay off

off the 8000 *l.* portion; and gave *P.*'s ſolicitor notice that he would pay off the 3000 *l.* at the end of ſix months after the notice: *B.* dying ſoon after, the money was not paid, but from the death of his father, and down to his own death, he paid the intereſt of the 8000 *l.* Upon his death the eſtate deſcended to his two daughters. *B.* had poſſeſſion of the ſettlement, and knew of the advancements of the father to *I. B.*; but, ſuppoſing them not to affect the portion, did not reveal them to *P.* A bill was filed by the mortgagee againſt the daughters to have the 3000 *l.* raiſed and paid out of the ſettled eſtate. They ſet up as a defence, that the bequeſt of the 4000 *l.* and of the reſidue, was a ſatisfaction for the portion under the proviſo inſerted in the ſettlement. And it being held that the bequeſt was a ſatisfaction, it then became a queſtion, Whether *B.* had not bound himſelf and the land notwithſtanding, by his declaration "that the portion was a ſubſiſting "charge?" It was agreed on behalf of the daughters, that if *B.* knowingly miſrepreſented the caſe to *P.*'s attorney, it certainly muſt bind him. All the caſes were that the perſon miſrepreſenting was bound by his own miſrepreſentation; but this went ſomething farther, namely, to bind the lands. If a man was guilty of a fraud, by which the land was affected, the miſrepreſentation would bind the land; but if there was no fraud, the land could not be affected. It was the duty of *P.*'s ſolicitor to make every inquiry; he ought to have made the truſtees parties. It was great negligence on his part not to take a legal ſecurity. He ought to have inquired what *I. B.* took under the will. The principle the court went upon, was by acting upon the conſcience of the defendant in ſuch caſes; if the defendant was acting againſt conſcience, the court would apply a remedy, but there was in this caſe nothing againſt conſcience. *B.* was ignorant of the legal effect of the legacies. If then there was no fraud, there was nothing for the court to relieve againſt, and the land could not be bound. But by *Buller*, Juſt. (who ſat for the Chancellour), the only queſtion is, Whether *P.* has a right to have 3000 *l.* raiſed for payment of his debt, out of the eſtate of *James?* It is argued, that this is not to be done unleſs there is ſuch a fraud as to affect land, and that here was no fraud, but *B.* acted innocently. It brings to my mind a caſe tried before me at *Guildhall*, by one merchant againſt another, for giving a falſe character of a third perſon, by which the plaintiff was induced to give him a credit, and loſt his money; my direction to the jury was, that, if one man tells another a falſehood by which he is injured, the deceived perſon has his remedy by an action. Thoſe who wiſh to maintain the daughter's caſe, argue, that *B.* the father was a total ſtranger to the caſe, which argument admits the principle, that if he had been intereſted, the declaration would bind. Here, the perſon of whom the queſtion was aſked, certainly had no intereſt. Fraud is a queſtion of law, and of fact. It is always conſidered as a conſtructive fraud where the party knows the truth and conceals it, and ſuch conſtructive fraud always makes the party liable. I think that, here, *B.* knew of the proviſo and advancements, and that in this court he was obliged to take notice

of them. In fact he had expreſs notice. It is not like the caſe of a latter deed referring to a former one. The inquiry was a very proper one on the part of *P.*, and completely repelled any imputation of negligence in his agent, and the inquiry was properly made of the party immediately intereſted. *B.*, at the time of the inquiry, had the equitable intereſt in the eſtate, and, upon the application, aſſured *P.*, that he might ſafely lend his money. The inquiry was the moſt material *P.* could make. If *B.* admitted the term to be in exiſtence, he muſt be bound by his admiſſion. He had full notice, and induced *P.* to lend his money, which was a fraud that would affect the daughter's eſtate. The term muſt, therefore, be held to be in force to ſecure the 3000*l.*, and the truſtees muſt raiſe that ſum.]

Abr. Eq. 321, 322. Peter v. Ruſſel.

One *Goff*, being poſſeſſed of the *Thatched-Houſe* at *St. James's*, on a building leaſe for ſixty years, mortgages it to Dr. *Lancaſter* and one *Habberfield*, for ſecuring 600 *l.*, which the defendant afterwards paid off, and advanced to *Goff* 600 *l.* more, and took an aſſignment of this mortgage, but had not the original leaſe delivered to him till ſome days after the aſſignment. *Goff* afterwards, being in a declining way, propoſed to borrow of the plaintiff 350*l.* on a mortgage of a vault and two rooms, part of the mortgaged premiſes; and on a treaty for that purpoſe, one *Remington*, who acted for the plaintiff, deſired to ſee the original leaſe; *Goff* told him, that he had it not by him, but that his lawyer kept all his writings for him, as not thinking it ſafe to truſt them in his own houſe, where all ſorts of company reſorted; upon which *Goff* goes to the defendant, who was an attorney in the city, tells him he was about agreeing with a perſon for the rebuilding part of the premiſes, at ſo much a foot ſquare, which would better his ſecurity, and deſired him to let him have the original leaſe, that he might ſee the dimenſions of the houſe: the defendant would not truſt him with the leaſe in his own power, but goes along with him to the *Thatched-Houſe*; and after he had been there ſome time, *Goff* ſends for the plaintiff and *Remington*, told them he had now the original leaſe, which they might ſee; and upon their coming to his houſe, *Goff* goes into the room where the defendant was, and deſires him to let him have the leaſe, to ſhew the perſon he had mentioned, for that he was now in the houſe; and accordingly the defendant lets him have the leaſe, which he carries to the plaintiff and *Remington*; and they being ſatisfied therewith lend him the money, and take a mortgage of the vault and two rooms, inſiſting at the ſame time to have the original leaſe delivered to them; but *Goff* urging that it concerned much more than the plaintiff had in mortgage, and that he could not part with it, the plaintiff permitted him to keep it; and he thereupon, in about an hour's time, delivered it again to the defendant, without acquainting him with what he had done; and the defendant ſwore expreſsly in his anſwer, that he had no notice of this tranſaction or of the plaintiff's mortgage. Afterwards, the plaintiff lent *Goff* a further ſum of money, and he prevailed on the defendant to let him have the original leaſe a ſecond time; but there was no pro-

that the defendant knew the occaſion of it, and he, by his anſwer, expreſsly denied his having notice of it. *Goff* afterwards failed, and thereupon the defendant brought his ejectment, and recovered; and this bill was brought to have the defendant's mortgage poſtponed, upon pretence, that here was a manifeſt fraud on the plaintiff, and that the defendant was privy to it; and at the Rolls the plaintiff had a decree accordingly: but, on appeal, the decree was reverſed. Lord Chancellour ſaid, that if a man makes a mortgage, and afterwards mortgages the ſame eſtate to another, and the firſt mortgagee is in combination to induce the ſecond mortgagee to lend his money, this fraud will, without doubt, in equity poſtpone his own mortgage: ſo, if ſuch mortgagee ſtands by and ſees another lending money on the ſame eſtate, without giving him notice of his firſt mortgage, this is ſuch a miſpriſion as ſhall forfeit his priority. But here is no manner of proof that the defendant knew any thing of the plaintiff's lending his money; nay, if there had, yet the plaintiff appears guilty of ſo much a groſſer neglect, that he ought not to prevail; for the defendant intruſted *Goff* with his original leaſe but for a very little while; the plaintiff takes his word, that he could not part with it, and leaves it wholly in his power to go on in defrauding whom elſe he had a mind to. Beſides, it appears the defendant was impoſed on by *Goff*, for he parted with the leaſe only to better his own ſecurity, and had the moſt ſpecious pretence that could be for it; and therefore it cannot be, without manifeſt proof, objected to him, that he let *Goff* have the leaſe to ſhew the plaintiff, or with a deſign to draw in the plaintiff to lend his money. His Lordſhip diſmiſſed the bill with coſts, unleſs the plaintiff ſhould, within ſuch a time, redeem the defendant.

[*S.* made a mortgage of lands to *H.* who, placing a great confidence in him, lent the money, taking his word that he would deliver him the title-deeds, the mortgage being executed in *London*, and *S.* pretending the title-deeds were in the country. Afterwards, *S.* borrowed 2000*l.* of *E.* on a mortgage of the ſame lands, at the ſame time producing and delivering to him all his title-deeds, which were peruſed, and approved by his counſel. Then *H.* exhibited a bill to foreclоſe *E.* and to compel him to diſcover the title-deeds relating to the premiſes, and to have them delivered up to him, inſiſting upon them, as owner of the land. *E.* pleaded the mortgage made to him, and that he had no notice of the prior mortgage to *H.*, and inſiſted, that the court ought not to aid *H.* and take the title-deeds from him, without ordering him to be paid his mortgage-money; and ſo it was decreed by the Chancellour. Head v. Egerton, 3 P. Wms. 280.

*S.* being ſeiſed in fee of certain eſtates, ſubject to an outſtanding term of years in *R.* and *E.*, by indenture of leaſe and releaſe, dated the 4th and 5th days of *June* 1732, conveyed them to *D.* and her heirs, for ſecuring the payment of 1000*l.* and intereſt, and covenanted to produce the deeds reſpecting the terms for years. Afterwards, *R.* and *E.* aſſigned the term to other truſtees, in truſt for *S.*, his heirs and aſſigns; and then, *S.* by indenture, dated the Stanhope v. Verney, vide Co. Lit. laſt edit. 293. b. in note.

19th of *December* 1732, conveyed the ſame eſtates to *N.* by way of mortgage, for ſecuring to her 3000*l.* and intereſt, with a declaration that the truſtees of the term ſhould ſtand poſſeſſed of the term in truſt for her, and the deeds reſpecting it were delivered to her, and neither ſhe nor the truſtees had notice of the mortgage to *D.* Afterwards, *D.* brought an ejectment; *V.*, who claimed under *N.*, defended it, and ſet up the term with a declaration of the truſt of it in favour of *N.*; upon this, *D.* brought her bill in equity. The queſtion was, Which ſhould be preferred; *D.* who had the firſt declaration of the truſt of the term, or *V.* who had the *ſubſequent* declaration of the truſt, but had the cuſtody of the deed? Lord *Northington* held, that a declaration of truſt in favour of an incumbrancer was tantamount to an actual aſſignment, unleſs a *ſubſequent* incumbrancer, *bonâ fide*, and without notice, procured an aſſignment; and that the cuſtody of the deeds reſpecting the term, with a declaration of the truſt of it, in favour of a ſecond incumbrancer, was *equivalent* (*a*) to an actual aſſignment; and *therefore* gave him an advantage over the firſt incumbrancer, which equity would not take from him.

(*a*) That is in equity.

If the mortgage be of a reverſion, there is no reaſon to poſtpone the mortgagee upon the mere abſtract fact of his not having required or procured the title-deeds and writings; becauſe in ſuch caſes, the title-deeds and writings do not properly belong to the reverſioner, nor has he, generally ſpeaking, any means by which he can procure them, if refuſed by the tenant for life, or poſſeſſor of the particular eſtate.

Tourle v. Rand, 2 Ch. Rep. 650.

This queſtion was agitated in equity, before Lord *Thurlowe*, in the caſe of *Tourle* againſt *Rand*, which was as follows: *R.* being, as ſuppoſed, entitled under the will of his father to a remainder in fee (but in fact only to a remainder in tail) *expectant on the death of his mother*, in certain freehold eſtates, conveyed his reverſion and remainder, expectant on the death of his mother, to *A.* in fee, by way of mortgage. At the time of making the mortgage the deeds and writings were in the hands of a collateral relation; but *A.*'s attorney was informed by the mortgagor, that they were in the poſſeſſion of the mother, who would not conſent to part with them, ſhe being then in poſſeſſion of the eſtate as tenant for life, which ſhe continued until the time of her death. Immediately after her deceaſe, *A.*'s attorney applied to *R.* for the poſſeſſion of the title-deeds, to which *R.*'s general anſwer was, that he would ſend them in a day or two, or to that effect. Shortly afterwards, *R.*, being then tenant in tail in poſſeſſion, (but ſuppoſing himſelf tenant in fee of the above eſtate, and being alſo poſſeſſed of a leaſehold eſtate,) mortgaged both eſtates to *T.* At the time when the latter mortgage was made, all the title-deeds, relating to the eſtates, were delivered to *T.*'s attorney, and continued in *T.*'s poſſeſſion. Some time afterwards, *T.* filed his bill to foreclose the mortgaged premiſes, and among other things, charged that *A.* ought not to have permitted the title-deeds and writings to have remained in the hands of *R.*, that he left them in his hands for the purpoſe of enabling him to raiſe more money on the ſecurity

ſecurity of the premiſes, and that the ſame was a fraud on *T.*, and that therefore *A.* ought to be compelled to redeem *T.*'s mortgage, or ought to be debarred of any intereſt, which he might have in the premiſes, till *T.*'s mortgage ſhould be ſatisfied. It was contended on the part of *T.* that, where a prior mortgagee leaves the title-deeds in the poſſeſſion of the mortgagor, it is a fraud upon the ſecond mortgagee, as he is induced, by the title appearing on the deeds, to lend his money; that the ſecond mortgagee therefore having the deeds, ſhould be preferred. But Lord *Thurlowe*, Chan. ſaid, that he did not conceive that a firſt mortgagee, not taking the deeds, was *alone* ſufficient to poſtpone him; if it were ſo, there could be no ſuch thing as a mortgage of a reverſion. *In that caſe*, the deed being in the hands of tenant for life, is not ſufficient to turn him round. The firſt caſes where the prior mortgage was poſtponed, were caſes of fraud, then the ſame was done in caſes of groſs negligence (*a*). Here was no *laches*; the mortgagee could not compel the tenant for life to give up the deeds: though a dowreſs, upon a confirmation of her title, might be compelled, the tenant for life could not, although, after her deceaſe, he might have filed a bill. But that was not ſufficient to charge the mortgagee.

(*a*) "I find "no caſe," ſaith Eyre, C. B. "that "goes the "length of "ſaying, "that a "failure of "the ut- "moſt cir- "cumſpec- "tion ſhall "have the "ſame ef- "fect of "poſtpon- "ing a "mort- "gagee, as "if he were "guilty of "fraud or "wilful ne- "glect." 2 Anſtr. 440.

In the caſe of *Goodtitle* againſt *Morgan*, Mr. Juſtice *Buller* conſiders it "as an eſtabliſhed rule, in a court of equity (*b*), that a ſe- "cond mortgagee who has the title-deeds, without notice of any "prior incumbrance, ſhall be preferred; becauſe, if a mortgagee "lends money upon mortgage, without taking the title-deeds, "he enables the mortgagor to commit a fraud. If this has be- "come a rule of property in a court of equity, (ſays the learned "Judge,) it ought to be adopted in a courſe of law." *Quære.*]

(*b*) 1 Term Rep. 762.

Although a depoſit of title deeds for the ſecurity of a debt amount to an equitable mortgage, yet, if a creditor of the mortgagor, fearing his immediate inſolvency, take a conveyance of the ſame eſtate, without notice (*c*) of the incumbrance, equity will not prevent him from availing himſelf of his legal eſtate.

Plumb. v. Fluitt, 2 Anſtr. 432.

(*c*) *Secùs*, where there is notice either actual or conſtructive. Birch v. Ellames, 2 Anſtr. 427.

By the 4 & 5 *W.* 3. *c.* 16. reciting, that great frauds and deceits are often practiſed by neceſſitous and evil-diſpoſed perſons, in borrowing money, and giving judgments, ſtatutes, and recognizances privately, for ſecuring the re-payment of the ſaid money; and the ſame perſons do afterwards borrow money, upon ſecurity of their lands, of other perſons, and do not acquaint the later lender thereof with the ſame; whereby ſuch late lender is very often in danger to loſe his whole money, or forced to pay off the debts ſecured by the ſaid judgments, ſtatutes, and recognizances, before they can have any benefit of the ſaid mortgages; and that divers perſons do many times mortgage their lands more than once, without giving notice of their firſt mortgage; whereby lenders of money upon ſecond or after-mortgages do often loſe their money, and are put to great charges in ſuit and otherwiſe; for remedy whereof it is enacted, "That if any perſon ſhall bor- "row any money, or, for any other valuable conſideration, for "the payment thereof, voluntarily give, acknowledge, permit, or

" ſuffer to be entered againſt him, or them, one or more judg-
" ment or judgments, ſtatute or ſtatutes, recognizance or recog-
" nizances, to any perſon or perſons, creditor or creditors; and
" if the ſaid borrower or borrowers, debtor or debtors, ſhall af-
" terwards take up or borrow any other ſum or ſums of money
" of any other perſon or perſons, or, for other valuable conſider-
" ation, become indebted to ſuch perſon or perſons, and for ſe-
" curing the re-payment and diſcharge thereof, ſhall mortgage
" his, her, or their lands or tenements, or any part thereof, to
" the ſaid ſecond or other lender or lenders of the ſaid money,
" creditor or creditors, or to any other perſon or perſons, in truſt
" for or to the uſe of ſuch ſecond or other lender or lenders,
" creditor or creditors, and ſhall not give notice to the ſaid mort-
" gagee or mortgagees of the ſaid judgment or judgments, ſta-
" tute or ſtatutes, recognizance or recogninances, in writing,
" under his, her, or their hand or hands, before the execution of
" the ſaid mortgage or mortgages; unleſs ſuch mortgagor or
" mortgagors, his, her, or their heirs, upon notice to him, her,
" or them given by the mortgagee or mortgagees of the ſaid lands
" and tenements, his, her, or their heirs, executors, adminiſtra-
" tors, or aſſigns, in writing, under his, her, or their hands and
" ſeals, atteſted by two or more ſufficient witneſſes, of any ſuch
" former judgment or judgments, ſtatute or ſtatutes, recogni-
" zance or recognizances, ſhall, within ſix months, pay off and
" diſcharge the ſaid judgment or judgments, ſtatute or ſtatutes,
" recognizance or recognizances, and all intereſt and charges due
" thereupon, and cauſe or procure the ſame to be vacated, or diſ-
" charged, by record; that then the mortgagor or mortgagors of the
" ſaid lands and tenements, his, her, or their heirs, executors, ad-
" miniſtrators, or aſſigns, ſhall have no benefit or remedy againſt
" the ſaid mortgagee or mortgagees, his, her, or their heirs, exe-
" cutors, adminiſtrators, or aſſigns, or any of them, in equity or
" elſewhere, for redemption of the ſaid lands and tenements, or
" any part thereof; but the ſaid mortgagee and mortgagees, his,
" her, or their heirs, executors, adminiſtrators, and aſſigns, ſhall
" and may hold and enjoy the ſaid lands and tenements, for ſuch
" eſtate and term therein, as were or was granted and ſettled
" to the ſaid mortgagee or mortgagees, againſt the ſaid mort-
" gagor or mortgagors, and all perſon and perſons lawfully claim-
" ing from, by, or under him, her, or them; freed from equity of
" redemption, and as fully, to all intents and purpoſes whatſoever,
" as if the ſame had been purchaſed abſolutely, and without any
" power or liberty of redemption."

§ 3. " And it is further enacted, That if any perſon ſhall mortgage
" any lands or tenements to any perſon or perſons, for ſecurity of
" money lent, or otherwiſe accrued or become due, or for other
" valuable conſiderations; and if the ſaid mortgagor or mort-
" gagors ſhall again mortgage the ſame lands or tenements, or
" any part thereof, to any other perſon or perſons for valuable
" conſideration, (the ſaid former mortgage being in force, and
" not diſcharged,) and ſhall not diſcover to the ſaid ſecond or
" other mortgagee or mortgagees, or ſome or one of them, the
" former

" former mortgage or mortgages, in writing, under his, her, or " their hands, that then, and in theſe caſes alſo, the ſaid mortgagor " or mortgagors, his, her, or their heirs, executors, adminiſtra- " tors, or aſſigns, ſhall have no relief, or equity of redemption, " againſt the ſaid ſecond or after-mortgagee or mortgagees, his, " her, or their heirs, executors, adminiſtrators, or aſſigns, upon " the ſaid after-mortgage or mortgages; but that ſuch mortgagee " or mortgagees, his, her, or their heirs, executors, adminiſtrators, " and aſſigns, ſhall and may hold and enjoy ſuch more than once " mortgaged lands and tenements, for ſuch eſtate and term there- " in, as were or was granted and conveyed by the ſaid mortgagor " or mortgagors, againſt him, her, or them, his, her, or their " heirs, executors, or adminiſtrators reſpectively, freed from all " equity of redemption, and as fully, to all intents and purpoſes, " as if the ſame had been an abſolute purchaſe, and without " any power or liberty of redemption.

" Provided always, and be it further enacted by the authority § 4. " aforeſaid, That nevertheleſs if it ſo happen that there be more " than one mortgage at the ſame time made, by any perſon or " perſons, to any perſon or perſons of the ſame lands and tene- " ments, the ſeveral late or under mortgagees, his, her, or their " heirs, executors, adminiſtrators, or aſſigns, ſhall have power to " redeem any former mortgage or mortgages, upon payment of " the principal debt, intereſt, and coſts of ſuit to the prior mort- " gagee or mortgagees, his, her, or their heirs, executors, admini- " ſtrators, or aſſigns.

" Provided always, That nothing in this act contained ſhall be § 5. " conſtrued, deemed or extended to bar any widow of any mort- " gagor of lands or tenements from her dower and right in or to " the ſaid lands, who did not legally join with her huſband in " ſuch mortgage, or otherwiſe lawfully bar or exclude herſelf from " ſuch dower or right."

It hath been held, that if a man mortgages certain lands to one 2 Vern. 589. man, and mortgages thoſe lands with ſome others to another; though this ſeems to be a caſe omitted out of the above ſtatute againſt clandeſtine mortgages, yet if it appears to be a contrivance to evade it, as, if an acre or two of land were only added, this will not exempt it: alſo, a perſon, who will take advantage of the ſtatute, muſt be an honeſt mortgagee; and therefore if a man has uſed any fraud or practice in obtaining a ſecond mortgage, he ſhall not have the beneſit of the ſtatute.

4. How far the Purchaſing in a precedent Mortgage or Incumbrance will protect ſuch Purchaſer, and entitle him to a Precedency of Redemption.

It hath been eſtabliſhed as a rule in the courts of equity, that if 2 Vent. 337. a man mortgages lands to *A.*, and afterwards makes a ſubſequent Chan. Ca. mortgage to *B.*, without notice at the time of his making the 36. 149. mortgage, and *B.* purchaſes in a precedent mortgage, which ſtands 162. 166. out at law, though nothing on it be due in equity, or a ſtatute Hard. 173. whereon money is due, which he extends, he ſhall hold the land 2 Chan. Ca. 208. Vern. 187. till 2 Vern. 157.

till he is ſatisfied what is due upon both ſecurities, though he had notice of *A.*'s mortgage before his ſecond purchaſe of the prior ſecurity; becauſe, having at firſt innocently lent the money, he may do what he can to ſecure that money from being loſt; and when he hath purchaſed in the prior incumbrance, it is but juſt that equity ſhould leave it in the ſame manner that it ſtood at law; for there is no room for equity to interpoſe, to take away the ſecurity the law had given, where the perſon that has the ſecurity comes into the title without any corruption at all; and it were partiality, and not equity, to interpoſe, where the ſecurity gives the fair lender a good and legal title. And it is all one, whether ſuch third lender or purchaſer takes in a mortgage, that is an intereſt veſted, or a ſtatute, that is only a charge; for both are real liens, and ſufficient to overthrow the title of the meſne incumbrancer, whether money be due on the firſt ſecurity or not, ſince that does not alter the legal title.

Chan. Ca. 201. 3 Chan. Rep. 67. S. C. Sir Ralph Bovey v. Skipwith.

A man mortgages the manor and rectory of *D.* to *A.*, and afterwards mortgages the rectory to *B.*, without notice of the mortgage to *A.*, and then *B.* purchaſes in a precedent incumbrance on both the manor and rectory; and the queſtion was, When *B.* had received all the money due on the firſt ſecurity, whether he ſhould receive any more profits of the manor, or only keep the incumbrance on foot to protect the rectory? This was argued before Sir *Heaneage Finch*, Lord Keeper, in the preſence of *Wild* and *Twiſden*; and the two Judges held, that *B.* ſhould not receive the profits of the manor after the firſt incumbrance was ſatisfied, becauſe he had taken the rectory only for his ſecurity of that ſum; and it would be unreaſonable to give him a ſecurity beyond what he had in his original intention. But the Lord Keeper over-ruled it; for that when he had purchaſed the precedent incumbrances, which comprehended both the manor and the rectory, and were forfeited at law, it was but reaſonable that the eſtate ſhould not be taken away by the meſne incumbrancer here in a court of equity, which by no methods could be evicted at law, unleſs ſuch perſon that ſeeks relief would do equity, and pay the whole money due on both ſecurities.

Wyndham et al. v. Lord Richardſon et al. 2 Cha. Ca. 212.

[Again, *R.* being ſeiſed in fee, acknowledged a ſtatute of 1000*l.* to *I. S.* in 1663, and, on the 20th of *June* 1665, mortgaged the manor of *A.* to the plaintiffs *W.* and *K.* for 2000*l.*, and two days afterwards mortgaged part of the ſame to the defendant *B.*, and then died, leaving the defendant *H.* his heir; *B.*, the ſecond mortgagee, agreed with *M.*, another defendant, executor of *I. S.*, to put the ſtatute in execution at his coſts, and to pay *M.* the debt due on the ſtatute, after ſuch time as the ſtatute ſhould be extended, and an aſſignment made thereof by *M.* to *B.* The ſtatute was extended in *Auguſt* 1672. The plaintiffs' bill was, that on paying the debt on the ſtatute, it might be ſet aſide and aſſigned to them, and for a decree againſt *H.* to pay or be foreclosed of redemption. One queſtion was, Whether the plaintiffs ſhould be admitted to ſet aſide the extent on payment of what was due on the ſtatute without paying off the 2000*l.* due on the ſecond mortgage to *B.*, until the ſtatute was ſatisfied, not according to the

juſtice

juſtice of the debt in equity, but according to the extended value? It was objected, that the defendant *B.* had not, in his mortgage made after the plaintiffs' mortgage, all the lands mortgaged before to the plaintiffs, but only part thereof, and that the ſtatute covered the whole; and that, although the defendant *B.* might, by the purchaſe of the ſtatute, defend himſelf againſt the plaintiff, as to what was in his mortgage, yet he could not, as to ſuch lands as were not therein. But the Chancellour was ſtrongly againſt the plaintiffs on this point, and a queſtion of fact ariſing, the caſe went off upon propoſitions.

And if a puiſne incumbrancer or purchaſer get in a ſatisfied judgment, or a prior ſtatute, or judgment, or recognizance, although it be paid off, yet, if he can make *uſe of it at law*, equity will not interfere to hinder him. 208. Hard. 318. *Sed vide* Hard. 172. *cont.* Edmunds v. Povey, 1 Vern. 187. 2 Ch. Ca.

So, where the plaintiff was a jointreſs, and the defendant a mortgagee ſubſequent, who had gotten an aſſignment of a ſtatute that was precedent to the jointure, but was ſatisfied, and extended it on the lands mortgaged; the bill was to ſet aſide the extent: but the Maſter of the Rolls decreed, that it ſhould not be ſet aſide, but upon payment of principal, intereſt, and coſts.] Sadler v. Buſh, 2 Vern. 30.

But, if *B.*, the ſecond mortgagee, had notice of the mortgage of *A.* at the time of his firſt lending the money, then he could not purchaſe in a prior incumbrance, ſo as to crowd out *A.*, becauſe he lent it on the proſpect that *A.* was firſt to be paid, and under that immediate expectation; and though the eſtate would bear more money at the time of the loan, yet, if by prior debts appearing, or any accident, it is likely to fall ſhort, it ſeems, he cannot crowd out *A.*, of whoſe intereſt he had notice, ſince he took the eſtate, with his eyes open, under notice of *A.*'s intereſt; and therefore, on his original taking the ſecurity, ran all the hazards of that nature; for it is corruption in *B.* to purchaſe after ſuch notice, with an ill intention of deſtroying *A.*'s prior ſecurity. Chan. Ca. 166.

A man mortgages lands (ſubject to an annuity) to *A.* and then mortgages the ſame lands to *B.*: The mortgagor and annuitant borrow more money of *A.* for which the annuity is aſſigned, and the lands farther charged; *A.* ſhall be allowed the money if he had no notice of *B.*'s mortgage; if he had, then only what was paid to the annuitant. 2 Chan. Ca. 20.

[Where a judgment creditor, or creditor by ſtatute or recognizance, buys in a firſt mortgage, he cannot tack or unite this to his judgment, ſo as to gain a preference thereby; becauſe ſuch creditor cannot be called a purchaſer, nor hath he any right to the land; he hath neither *jus in re*, nor *jus ad rem*; and therefore though he releaſe all his right to the land, he may extend it afterwards. All that he hath by the judgment, is a lien upon the land; but it is not certain whether he ever will make uſe thereof; for he may recover the debt out of the goods of the conuſor by *fieri facias*, or may take the body, and then, during the defendant's life, he can have no other execution. Beſides, the judgment creditor doth not lend his money upon the immediate view or contemplation of the conuſor's real eſtate; for lands afterwards purchaſed, may be extended upon the judgment; nor is he deceived Brace v. Ducheſs of Marlborough, 2 P. Wms. 491. Anon. 2 Vez. 662. *Sed vide* Wright v. Pelling, Gilb. Eq. Rep. 151. & Pr. Ch. 494.

or

or defrauded, although the conuſor of the judgment hath before mortgaged his real eſtate, as in the caſe of a mortgagee, if the mortgagor hath before mortgaged his land to another.]

Breerton v. Jones, June 8, 1709. *Per* Maſter of the Rolls. 3 Eq. Ca. Abr. 325. S. C.

*A.* mortgaged his eſtate to *B.*, and then aſſigned the equity of redemption to *C.*; afterwards *D.* obtained a judgment againſt *A.*; then *B.* the mortgagee aſſigns to *D.* his mortgage; and then *C.* tenders the money due on the mortgage to *D.*, who had notice of the aſſignment of the equity of redemption, upon his purchaſing in of the mortgage. It was here objected, that *D.* having the legal eſtate in him by the aſſignment of the forfeited mortgage, and *C.* having only an equitable intereſt, not ſupported by the legal eſtate, that if *C.* would have equity, he ought to do equity, by payihg off both monies to *C.* But it was anſwered and reſolved by the court, that *C.* ſhould redeem, paying only the money due on the mortgage, and not what was due on the judgment; becauſe the equity of redemption was never bound by the judgment; for the judgment was not confeſſed, ſo as to become a real lien upon the eſtate, at the time when the equity of redemption was conveyed away; but it only ſubſiſted upon bond, which was a ſecurity *in perſonam*, not *in rem*, at the time when this equity was aſſigned; and therefore the judgment could never charge nor affect it; and, conſequently, *C.* purchaſed an eſtate not bound by the judgment; and, by conſequence, the judgment creditor, by purchaſing in the prior mortgage, could never defeat the intereſt of *C.* It was alſo declared, that if a perſon who has a firſt mortgage, purchaſe in a ſubſequent judgment, without the conſent of the mortgagor, that a meſne mortgagee, or aſſignee of the equity of redemption, ſhall not be obliged to pay the money due on both ſecurities, in order to redeem, becauſe ſuch tranſaction of the mortgagee is only to load the eſtate without the conſent of the owner, and he has nô proſpect of bettering his own ſecurity, as in the caſe where a mortgagee at a third hand purchaſes in the firſt incumbrance.

Stephenſon v. Hayward, Feb. 9, 1710. *per* Lord Keeper Harcourt. Pre. Ch. 310.

*Beeching* made a mortgage of his eſtate, and became indebted to *Hayward* in 60 *l.*, and then conveyed to *Streater*, another defendant, in truſt to pay a debt to *Streater*, and then all his other debts in average; then *Streater* tendered the money to the mortgagee, which he refuſed, and afterwards aſſigned the mortgage to *Hayward*; and then *Hayward* obtained judgment againſt *Beeching*, on his bond of 60 *l.*, and then *Streater* ſold to the plaintiffs, who not having paid their purchaſe money, preferred their bill againſt the mortgagees and *Hayward* to redeem. The Lord Keeper ordered that the plaintiffs ſhould redeem *Hayward*'s mortgage, and deduct their coſts out of the mortgage money, and that the judgment ſhould be paid but in proportion; for though *Hayward* had a title at law, and it was inſiſted, that his judgment would affect the reſulting equity in *Beeching*, if there was more than ſufficient to pay his debts; and none of the creditors of *Beeching* were made parties to the ſuit; yet the Lord Keeper thought, that the conveyance made for the payment of all *Beeching*'s debts was a good conſideration, and that being prior to the judgment, the ſubſequent judgment could not affect the eſtate; and though no creditors

*Beeching*

*Beeching*'s were made parties, yet they might be brought in before the Maſter.

But where *A.*, the plaintiff, had lent money on ſeveral notes of different dates, each of them in words to this effect; "Received "of *A.*—*l.*, to be ſecured on mortgage of my *Stokehall* eſtate;" and the drawer had, previouſly to his drawing theſe notes, made a mortgage of his eſtate to the defendant; and *A.*, to cover the ſums lent on the notes, bought in a mortgage which was made prior to the defendant's: Lord *Hardwicke* was of opinion, that *A.* ſhould thereby protect himſelf againſt the defendant's mortgage; and ſhould be paid the money lent upon the notes, as well as what was due to him upon the aſſignment of the firſt mortgage. Matthew v. Cartwright, 2 Atk. 347.

A prior mortgage purchaſed in will be no protection to a *puiſne* mortgagee, unleſs it be forfeited; for, until then, the eſtate remains, as it was at common law, redeemable upon performance of the condition ſtipulated. Hitchcock et al. v. Sedgwick et al. 2 Vern. 155.

And a *puiſne* mortgagee, who purchaſeth in a prior ſecurity to protect his own, ſhall not only hold it until he be paid his debt, and reimburſed the money advanced by him to purchaſe it; but until he has received all the money, and arrears of intereſt, due on the ſecurity bought in, as well as upon his own. Darcy v. Hale, 1 Vern. 49.

And, as a *puiſne* mortgagee may tack a prior incumbrance, that brings with it the legal eſtate, to his own, and thereby protect himſelf againſt intervening charges thereon; ſo, a mortgagee *eigne*, having the legal eſtate, may tack a ſubſequent ſum advanced by him upon the former ſecurity, to his prior mortgage, and thereby protect himſelf againſt *meſne* incumbrances. Goddard v. Camplin, 1 Ch. Ca. 119.

Thus, where *A.* had an annuity charged on the manor of *S.*, and *B.* an eſtate therein liable to the annuity, and *C.* an intereſt ſubſequent to both by mortgage; *B.* having no notice of *C.*'s intereſt, treated with him in the reverſion in fee, who deſired to borrow money of him, and thereupon purchaſed *A.*'s intereſt, and for that, and by way of money lent to the reverſioner, paid 900*l.*, but there was no more than 500*l.* due to *A.*; *C.* exhibited his bill againſt *A.* and *B.*, to redeem them on payment of their debts; the queſtion was, Whether *C.* ſhould pay *B.* any more than the mortgage-money he had originally lent, and the 500*l.* paid by him, which was due to *A.*? And it was decreed, that he ſhould pay the whole 900*l.* advanced. Blackſtone v. Moreland, 2 Ch. Ca. 20.

So, if there be firſt and ſecond mortgagee, and the firſt lend money after the laſt mortgage made, taking a *judgment* as ſecurity, he may tack this to his mortgage to protect himſelf againſt the ſecond mortgagee, for he hath the legal eſtate and the judgment which, though it paſſeth no intereſt, preſently, in the land, operates as a *lien*. Shepperd v. Titley, 2 Atk. 352; 4th reſolution in Brace v. Ducheſs of Marlborough, 2 P. Wms. 494. 2 Vez. 662.

But the farther ſum advanced muſt be to one who has a right to charge the eſtate in queſtion. Thus, *I. C.*, the grandfather of *C*, made a mortgage of lands in fee to *H.*, and then having two ſons *A.* and *B.*, deviſed the equity of redemption to his youngeſt ſon *B.*, and his heirs, and died; *B.* entered into the mortgaged lands, Cooper v. Cooper, Nelſon's Rep. 153.

lands, and enjoyed the ſame two years, and then died, leaving a ſon an infant. After *B.*'s death, his elder brother *A.* entered on theſe lands, and having occaſion for money, joined with the mortgagee in an aſſignment of the mortgage to another perſon, of whom he borrowed a farther ſum, which the aſſignee advanced, having no notice of the will of *John Cooper*. Then the heir of *B.* came of age, and exhibited a bill to be let into the equity of redemption upon the foot of the firſt mortgage. And on his part it was inſiſted, that the aſſignee could be in no better condition than the mortgagee, and that, if there had been twenty aſſignments for more money, if the mortgagor or he who legally repreſented him had not joined, he ſhould not be barred, but ought to be relieved. On the other ſide it was contended, that the aſſignee was a purchaſer for a valuable conſideration without notice of this incumbrance by the will, and that he had a good title, having taken an aſſignment from the mortgagee, wherein the viſible heir of the mortgagor was a party, and therefore, that if the heir would redeem, he ought to pay the whole principal ſum and intereſt. But the court was of opinion, and decreed that the heir ſhould be let into the equity of redemption upon the foot of the firſt mortgage.

Smithſon v. Thompſon, 1 Atk. 520.

And where *A.* had a prior judgment, and a mortgage likewiſe on the eſtate of *B.*; and a ſubſequent judgment creditor, but prior in time to the mortgage, brought a bill in Chancery, praying a ſale of the mortgagor's eſtate, who was likewiſe willing and deſirous to ſell; *per curiam*, here, *A.* is not a ſubſequent incumbrancer buying in a prior, but is the firſt of the incumbrancers, who has advanced more money on a ſecond incumbrance. Where the *firſt incumbrancer* by judgment has likewiſe a mortgage upon the eſtate, notwithſtanding there is another judgment, prior in time to the mortgage, yet, if the mortgagee had no notice of ſuch judgment, the creditor upon the ſecond judgment ſhall not come into a court of equity, and pray a ſale of the eſtate ſo mortgaged, without paying off the principal and intereſt, both of the firſt judgment and the mortgage; for it would be very hard, if the defendant ſhould be in a worſe condition, with a prior incumbrance in his favour, than a mortgagee without notice of a prior judgment would be.]

Holt v. Mill, 2 Vern. 279.

If a man lends 600*l.* on a mortgage, and afterwards, diſcovering that the eſtate is pre-mortgaged to *J. S.*, he gets in an old ſatisfied incumbrance, and brings his bill againſt *J. S.* to redeem or be foreclоſed, he need not prove the actual payment of any money for ſuch precedent incumbrance, the having the deed or acquittance being ſufficient.

2 Vern. 159. Siddon v. Charnell, Bunb. 298. Sherley v. Fag, caſe cited, 1 Vern. 52, 53. 2 Vern. 58. reported 1 Ch. Ca. 68.

[The law is the ſame, although the incumbrance, ſet up as a protection, be obtained by fraudulent means; as, where one, being a purchaſer, came into a man's ſtudy, and there laid hand on a ſtatute that would have fallen on his eſtate and put it in his pocket; in that caſe, he having obtained an advantage at law, the court would not take it from him, though procured ſo unfairly, and by ſo ill a practice: *ſed quære.*

*ſed contra* Gilb. *lex prætoria*, 248.

But,

But, where the prior incumbrance taken in is deficient in those requiſites which are neceſſary to give it legal efficacy, no protection can be derived from it. As, if a recognizance, bought in, hath not been enrolled in proper time. And though the court may, on application, interpoſe, and, by their ſpecial order, ſupply the defect as to perſons who come *ſubſequent* to ſuch interpoſition, yet it will not over-reach an intermediate incumbrancer.

Fothergill v. Kendrick, 2 Vern. 334. Bothomley v. Lord Fairfax, 1 P. Wms. 340.

So, if a judgment be not docketed within the time limited by the ſtatute 4 & 5 *W. & M. c.* 20., it will not protect a *puiſne* incumbrancer, although the *eigne* incumbrancer hath actually notice of it at the time of making the mortgage. Thus, where judgment was ſigned in *June* 1725, and a mortgage made to the plaintiff, who had notice of the judgment in 1728, but the judgment was not docketed, as appeared by an entry on the margin of the docket, until *January* 1730; the Maſter of the Rolls held, that the docket was not good, being made after the time limited by the ſtatute, and that the mortgage had got the preference of the judgment by defect of the docket; and, as to the notice, it was not material, the ſtatute being expreſs, that judgments, not docketed, ſhall loſe their preference as to *purchaſers* and *mortgagees*.

Forſhall v. Coles, 7 Vin. Abr. 54. P. C. 6. S. C. 2 E. Ca. Abr. 592. 8.

[But this exception, as to judgments not docketed, is confined to caſes where they are ſet up againſt purchaſers or mortgagees, or heirs, or executors, or adminiſtrators in the adminiſtration of the effects of thoſe of whom they are repreſentatives.]

Robinſon v. Harrington, 1 Pow. Mortg. 415.

If a prior mortgage or ſtatute be bought in, pending a bill brought by *A.* againſt the mortgagor, and *B.*, who buys in ſuch precedent ſtatute or mortgage to foreclоſe; though this purchaſe be *pendente lite*, yet it will protect *B.*, he being at liberty to do what he can for his own ſecurity.

Hawkins v. Taylor and Leigh, 2 Vern. 29. Farmer v. Richmond, *Id.* 81. S.P.

[The plaintiff (after a decree had been made in a cauſe in which he had been a party with other creditors, and the Maſter had been directed to inquire into the priority of their demands,) bought in a judgment given in 1694, and made claim before the Maſter, to have it tacked to his mortgage and thereby to be paid before the defendants; as to which the Maſter refuſed to make any report: whereupon the plaintiff filed his bill, and one queſtion was, Whether he could tack the incumbrance bought in after the decree to his mortgage? Lord Chancellour *Hardwicke*, as to this part of the caſe, ſaid, that there was no caſe wherein it had been determined that a *puiſne* incumbrancer, a party in a cauſe, and *a decree made* in that cauſe, for ſatisfaction of incumbrancers *according to their reſpective priorities*, having taken in a prior to tack to his *puiſne* incumbrance, ſhould be allowed to make uſe of it in any other ſhape, than that in which the original incumbrancer might uſe it, had no ſuch purchaſe been made. He thought it would be moſt miſchievous and pernicious, if the court ſhould allow the doctrine of tacking to be carried to that extent. Firſt, taking it upon the terms of the decree; all thoſe decrees, where there were ſeveral incumbrances before the court, a ſale directed, and every thing neceſſary to clear the eſtate, in order to that ſale, proceeded

Wortley v. Birkhead, 2 Vez. 571. 3 Atk. 809. S. C.

on the foundation, *that the rights of the parties* were to be taken as they ſtood at the time of the decree; and therefore they directed an inquiry into the priorities. What, then, were thoſe priorities? Why, ſuch as they ſtood at the time of the decree: not that afterwards, the priority ſhould be varied. The ſenſe, reaſon, and juſtice of the caſe required it ſhould be ſo; for otherwiſe, if where an incumbrancer on an eſtate which was affected with ſeveral charges, brought a bill for ſatisfaction thereof, and there were all proper parties and a decree for it, as between himſelf and the owner of the equity of redemption, (ſome of the incumbrances being prior, others poſterior to his,) one of thoſe defendants, who happened to be prior to him, was allowed to convey to another defendant, who was *puiſne* to him, it would ſhut out the plaintiff after the decree made, at which time the rights were conſidered. What would be the conſequence? Nothing could lay a foundation for greater colluſion and contrivance, between the parties, to exclude each other, than ſuch a liberty would, and that to the great deceit of the plaintiff; for then a man would loſe his coſts by ſuch a proceeding, although he had a right to his debt, principal, intereſt, and coſts, according to the reſpective priorities; that was the direction of this decree: and there was a ſufficient fund according to the then right of the plaintiff, to pay all that was due; but if this were permitted, after a decree was made, two of theſe defendants might, by a colluſion, give a third incumbrancer more than his debt, and it would be worth while to do ſo, in order to exclude another, who happened to be a ſecond incumbrancer. It would be carrying ſecurities to market in that manner, whereby the purchaſer of them ſhould not only ſtand in the place of the party ſelling, but would acquire a new equity, which it would be miſchievous to allow; and therefore, his Lordſhip ſaid, he never was clearer in opinion than upon this part of the caſe, as to the general right.

Briſtol et al. v. Hungerford et al. 2 Vern. 524-5.

So, where *S.* a *puiſne* incumbrancer, after the bill brought, and after the firſt decree made, and, in truth, after the report, got an aſſignment of an old judgment and mortgage, expecting thereby to gain a preference to his debt; the court held, that the aſſignment obtained by him being after the decree made, he ſhould not profit by it or change the order of payment, but ſhould come in according to the time of his own incumbrance, without regard to the old judgment and mortgage.

2 Vez. 575.

And the law is the ſame as to purchaſers, incumbrancers who are not parties in the ſuit, *but who could come in under the decree*; for they muſt come in upon, and ſubmit to, the terms of that decree, though no parties.

But a third mortgagee may purchaſe in a firſt mortgage, and defend himſelf thereby, notwithſtanding a ſuit be depending between the reſpective mortgagees.

Robinſon v. Daviſon et al. 1 Br. Ch. Rep. 63.

Thus, where the ſecond mortgagee filed his bill againſt the mortgagor, firſt and third mortgagees to be let in to pay off the firſt mortgage, and that then the eſtate ſhould be ſold, his own mortgage paid, and the third be ſatisfied out of the remainder;

and pending the ſuit the third mortgagee bought in the firſt mortgage: it was determined by this he had gained a priority, and ſhould be paid his whole money before the ſecond mortgage.

However, in many caſes a ſuit pending in equity againſt land, is a bar to alienation; for *pendente lite nihil innovetur:* therefore the vendor of lands, pending a ſuit in equity againſt them, can give no title but what will be ſubject to its iſſue; but it is the pendency of the ſuit that creates the notice, for as it is a tranſaction in a ſovereign court of juſtice, it is ſuppoſed all people are attentive to what paſſes there; and to prevent a greater miſchief that would ariſe by people's purchaſing a right under litigation and then in conteſt. *J. F.* having only one daughter, and deſiring to keep part of his eſtate in his name, by will, made in 1684, deviſed a meſſuage to *F.* his near kinſman, in tail male, with remainder over, and gave his lands in *Suſſex* to his daughter, who married *E.*; they, with *C.* were ſuppoſed to have deſtroyed the will after the death of the teſtator. *F.* brought his bill againſt *D.* and his wife; and, in 1687, obtained a decree to hold and enjoy the lands according to the will againſt them, and all claiming under them. The eſtate deviſed to *F.* having been mortgaged by the teſtator, prior to his will to *B.* for 100*l.*, *N.* pending the ſuit, bought in *B.*'s mortgage, and purchaſed the equity of redemption from *D.* and his wife. *N.* was ſerved with the former decree, and appeared, and was examined, and ſet out his title under this mortgage, whereupon *F.* was put to bring his bill to redeem. *N.*, by anſwer, alleged, that although he had been informed before his purchaſe that it was pretended there had been ſuch will made, yet, upon inquiry, he had been aſſured and ſatisfied that it was deſtroyed by the teſtator in his lifetime, and therefore he proceeded in his purchaſe, and inſiſted, that the former decree, to which he was no party, was unjuſt in decreeing the lands to be enjoyed according to the will; but, in regard he purchaſed *pendente lite*, and with notice that there was a will, the court would not admit him to examine the juſtice of the former decree, or to try at law whether ſuch will was cancelled or deſtroyed by the teſtator, but declared he ſhould be bound by the former proceedings, and decreed the redemption of the mortgage to the plaintiff.

*Vide* Worſley v. Earl of Scarborough, 3 Atk. 392.

Finch v. Newnham, 2 Vern. 217. & *vide* Fleming v. Page, Finch, 320. & *vide* Herbert's caſe, 3 P. Wms. 116. this doctrine of notice extended to a criminal caſe.

*A.* and *B.* were partners; *A.* died having made his will, and deviſed to his executors and their heirs, "all his real and perſonal "eſtate, not by his will otherwiſe diſpoſed of, in truſt that they "ſhould, by charging, leaſing, or ſelling his eſtates, or any of "them, raiſe money for the payment of all his debts; and what "ſhould remain, he directed to be divided into equal portions, "ſhare and ſhare alike, between his five children, and left it to his "executors to make proper allowances for their maintenance, "until there ſhould be a diſtribution made of his eſtates." *A.* amongſt other things had a mortgage of 3500*l.* In a cauſe between the executor of *B.* and *A.*'s executors, the mortgage deed was directed to be left in the hands of a Maſter in Chancery, till the partnerſhip account ſhould be finally adjuſted. Afterwards *A.*'s executors conveyed the mortgage to Maſter *Bennet*, as ſecurity for one

Mead v. LordOrrery, 3 Atk. 236. *Id.* 392. S. P.

one of the executors, on his appointment to be receiver of another perſon's eſtate. And one argument uſed by the children of *A.* in a ſuit againſt the holders of the mortgage, by way of ſecurity for the due diſcharge of the receiverſhip, was, that there was a ſuit at the time of the aſſignment about the mortgage, who was entitled to it, and that therefore it was void, as being made *lite pendente*. But Lord *Hardwicke* ſaid, that he did not ſee how this *lis pendens* could affect this aſſignment, unleſs it had been determined that this was the mortgage of *B.* the partner of *A.* and belonged to his creditors, who were the plaintiffs in that cauſe. But that as it was therein determined to be *A.*'s eſtate, there was an end of that objection.

Sorrel v. Carpenter, 2 P. Wms. 482.

But, in caſe of a real purchaſer for a valuable conſideration, *pendente lite*, the plaintiff will be held to ſtrict proof of his own title. Thus, a bill was brought by *S.* againſt *C.* to have the benefit of a decree, obtained againſt *L.*, for the recovery of a leaſehold eſtate held of the dean and chapter of *Saint Paul*'s; *C.* being a purchaſer of this eſtate from *L. pendente lite*, but, as was proved, for the full value, and without any notice of *S.*'s claim, or any actual notice of the ſuit. For the plaintiff it was inſiſted, that this purchaſe, made *pendente lite*, was to be conſidered as made under an implied and conſtructive notice. But the court ſaid, that although, where there was a conveyance made *pendente lite*, without any valuable conſideration, and to avoid and elude a decree, it ought to be highly diſcountenanced; and, though the alienation were for ever ſo good a conſideration, the purchaſe, if made *pendente lite*, was nevertheleſs to be ſet aſide, yet, where there was a real and fair purchaſer, without notice, it was a very hard caſe, eſpecially in a court of equity; and, there being ſome defect in part of the proof in deraigning the title of *S.*, leave to amend, or make any new proof after publication was refuſed, and the bill diſmiſſed (*a*).

(*a*) There appears to have been an order to amend the bill in Trin. term 1728. (the term of which the reporter makes the deciſion to have been); Reg. Lib. B. 1727. fol. 453.; and an order of diſmiſſal in the Mich. term following. Reg. Lib. B. 1728. fo. 18.

In this caſe, the Chancellour obſerved, that it was a difficult matter to ſearch for bills in equity, or to get notice of them; many ſuch being, after filing, kept in the ſix clerks' deſk; and that though the court would oblige all perſons to take notice of its decrees as much as of judgments at law, yet there did not ſeem to be the ſame reaſon for obliging people to take notice of the filing of a bill. *Vide* 3 Atk. 392.

Garth v. Crawford, Barnard. Ch. Rep. 450.
2 Atk. 175.

And if a purchaſe or mortgage be made, pending a bill, to perpetuate the teſtimony of witneſſes to a will of land, the proceedings may be read againſt a purchaſer or mortgagee, during the ſuit, although he hath not notice either expreſs or implied.

S. C. by the name of Garth v. Ward.

Barnard. Rep. 454.
2 E. Ca. Abr. 687. 13.

But, in general, a bill that cannot be brought to a hearing, cannot properly create a *lis pendens*, ſo as to affect a purchaſer, claiming under one of the parties, after filing the bill.

Scarle v. Lund, 2 Vern. 88.
2 Eq. Abr. 332. 4.
2 Ch. Ca. 48. *& vide* 3 P. Wms. 401.

And it ſeems, that a decree in a court of equity, for money, does not bind a purchaſer for a valuable conſideration, without notice thereof, any more than a judgment at law; for a decree is not of ſuperior force to a judgment; nay, its effect is inferior; and where it is ſaid a decree is equal to a judgment, or to be paid equally therewith, this muſt be intended only out of the perſonal eſtate; for a decree for a debt does not bind the real eſtate, it act-

ing

ing only in *perſonam*, not in *rem*; and the remedy upon a decree to affect the land, is only for a contempt, whereupon the party proceeds to a ſequeſtration, and that is but a perſonal proceſs, as appears by its falling and abating by the death of the party.] et Ca. temp. Talb. 217. 2 P. Wms. 622. 1 Vez. 496.

But, where *A.* made a mortgage to *B.*, and afterwards a commiſſion of bankruptcy was taken out againſt him, and the commiſſioners made an aſſignment of his eſtate, and then *C.* lent the bankrupt 2000*l.* on a ſecond mortgage, having no notice of the bankruptcy, though he afterwards got in the firſt mortgage; yet it was held by two lords commiſſioners againſt one, that this prior mortgage ſhould not protect the mortgage ſubſequent to the bankruptcy; for every one is bound to take notice of a commiſſion of bankruptcy. Hitchcock v. Sedgwick, 2 Vern. 157. 160.

And though a purchaſer or mortgagee may buy an incumbrance, or lay hold on any plank to protect himſelf, yet he ſhall not protect himſelf by taking a conveyance from a truſtee, after he had notice of the truſt; for by taking ſuch conveyance, he becomes the truſtee himſelf. Saunders v. Dehew, 2 Vern. 271.

[Even a fine levied by a purchaſer, for full conderation, *with notice of a truſt*, to ſtrengthen his eſtate, will not bind the *ceſtui que truſt*, although there be five years non-claim; for he, having purchaſed with notice, is but a truſtee, notwithſtanding any conſideration paid by him; and the eſtate not being diſplaced, the fine cannot bar; but a fine and non-claim will be a bar in equity, if a purchaſer hath not notice. Cited, Bovey v. Smith, 1 Vern. 149. 2 Ch. Ca. 125. 2 Vern. 194. 1 Atk. 475.

And where the plaintiff's bill was to be relieved upon a truſt, and charged the defendant with notice thereof, and that he had procured a conveyance of the lands upon which the truſt was had, *and that at or before his taking the ſaid conveyance*, he had notice of the ſaid truſt for the plaintiff; the defendant, by way of anſwer, denied that he had any notice of the truſt *at the time of his purchaſe or contract*, and pleaded that he was a purchaſer for a valuable conſideration; it was inſiſted that the point of notice was not well anſwered, in that the defendant denied notice *at the time of the purchaſe only*; for, the word *purchaſe* might be underſtood to mean the time when the contract for the purchaſe was made, and it might be, he had no notice then, and might have notice after, before, or at the ſealing of the conveyance; and if there was any notice before the conveyance to him was executed, that would charge the defendant; upon which objection the plea was overruled. More v. Mayhow, 1 Ch. Ca. 34. Attorney General v. Gower *et al.* 2 E. Ca. Abr. 685. 11. *et* Wigg v. Wigg, 1 Atk. 384.

But if *ceſtui que truſt*, tenant in tail, be the mortgagor, and join with the truſtees in making the conveyance, it will be good and valid; they being conſidered as truſtees purely for the tenant in tail to preſerve his eſtate *only*, and not to ſtand in oppoſition to him, for the ſake of thoſe who are to come after him. Elie v. Oſborne, 2 Vern. 754. 1 Eq. Ca. Abr. 385. 3.

Previous to the caſe of *Willoughby* and *Willoughby*, a notion generally prevailed, that although a ſatisfied term reſulting by operation of law, might, if got in, be made uſe of to protect a purchaſer, a term once aſſigned to attend the inheritance, could not be ſo applied; Willoughby v. Willoughby, in Chan. June 19, 1756.

applied; for it could not enure to any other purpoſe than that preſcribed, unleſs ſevered again by the owner of that inheritance; but in that caſe Lord *Hardwicke* explained this diſtinction, obſerving that its applicability to ſuch purpoſe was an unavoidable conſequence of the rule, that "*a purchaſer for a valuable conſideration, and without notice, ſhall not be hurt in equity.*" The facts of the caſe were as follow: *George Willoughby*, being ſeiſed in fee of an eſtate in *W.* (ſubject to a mortgage-term for 500 years) by articles dated 12th *November* 1717, made upon his marriage, agrees to ſettle this eſtate to the uſe of himſelf for life, and afterwards to the intent that his wife ſhould, out of the rents, *&c.* of part, take an annuity of 250*l.* by way of jointure, with remainder, as to the whole eſtate, to the uſe of the firſt and other ſons of the marriage in tail male, with remainder to *George Willoughby* in fee, with a power for the ſaid *George* to charge the eſtate by will or deed, with the payment of 3000*l.* for the portions of his younger children. At this time the eſtate was ſubject to a mortgage for a term of years, as mentioned above, which being ſatisfied, the ſaid term was by indenture, dated 17th *Auguſt* 1718, aſſigned to *Shelling* and *Popham* and their executors, *upon truſt* for *G. W.*, his heirs and aſſigns, *to attend* the *inheritance*. A ſettlement was made of the eſtate 14th *March* 1718, purſuant to the articles: 14th *March* 1750, *George Willoughby* made his will, and thereby executed the power reſerved to him, by charging the eſtate with 3000*l.* for the portions of his younger children, and afterwards died, leaving *Jane* his widow, *Henry* his eldeſt ſon, three daughters, and a younger ſon *George*. *Henry*, having attained his age of 21 years, and being tenant in tail, ſuffered a recovery, and limited the eſtate to truſtees in fee, to the uſe of ſuch perſon and perſons, and for ſuch eſtate as he ſhould by deed appoint. *Henry*, in purſuance of his power, by indenture dated in *June* 1751, for ſecuring 870*l.* which he had borrowed of *Jane* his mother, declared the truſtees ſhould ſtand ſeiſed, and the eſtate be charged with the payment of this ſum and intereſt. The term of 500 years was ſtill ſtanding out in *Shelling* and *Popham*. Afterwards *Henry* borrowed 800*l.* of the defendant *Cripps*, and for ſecuring this with intereſt, by indentures of leaſe and releaſe, dated 14th and 15th *June* 1752, he conveyed the eſtate in mortgage to *Cripps* and his heirs. The ſame day *Shelling*, the ſurviving truſtee, aſſigns the term of 500 years to *Boot*, upon truſt, in the firſt place, to protect the eſtate limited to *Cripps* and his heirs from meſne incumbrances, and, *ſubject thereto*, to *attend* the inheritance. It appeared upon the evidence, that *Cripps* had full notice of the articles and ſettlement, and that, notwithſtanding, in the releaſe above, he took a covenant from *Henry* that the eſtate was free from all incumbrances except the 500 years term and the ſeveral meſne aſſignments thereof; but it did not appear that he had notice of the mortgage to the mother. The bill was brought by *Jane* the mother, and the younger children, for payment (by ſale of the eſtate) of the arrears of her jointure, the 3000*l.* to younger children, and the 870*l.* to the mother, and that then the reſt of the incumbrances might

Willoughby v. Willoughby, in Chan. June 19, 1756.

might be paid according to their order and priority. The defendant *Cripps* inſiſted that, as the legal eſtate was in *Boot*, his truſtee, and as he was a purchaſer for a valuable conſideration and without notice of the firſt mortgage, he was entitled to be preferred in payment of his mortgage upon this principle, that he had both *law* and *equity* on his ſide, and the mother *only* equity.

Lord *Hardwicke* was of opinion, that ſuppoſing *Cripps* to have no notice of the jointure, portions, or other incumbrances, he would *in equity be entitled* to the *benefit* of this term.

*Jones*, ſeiſed in fee of ſeveral eſtates, demiſed the ſame in 1761, to *Aubrey*, for nine hundred and ninety-nine years, by way of mortgage. Afterwards, in 1768, this term was aſſigned to *Lockwood* in truſt for *Jones*, as to part of the lands, and in the mean time to attend the inheritance; in 1767, *Jones* mortgaged to *Morgan*, and in *July* 1769, to *David*. Both theſe mortgages were in fee. In *December* 1769, *Jones* and *Lockwood* aſſigned the laſt-mentioned lands to *Moreland*, his executors, &c., for the remainder of the term of nine hundred and ninety-nine years, in truſt for *Sprigg*, for ſecuring 10,000*l.* lent by *Sprigg* to *Jones*. Afterwards, *Jones*, by indentures of leaſe and releaſe, mortgaged the ſame eſtates in fee to *Sprigg*, for ſecuring the 10,000*l.* On the mortgage to *Sprigg*, all proper ſearches were made on his part for incumbrances, and he had all the title-deeds that could be found delivered to him at the time he advanced his money, except the demiſe of the term for nine hundred and ninety-nine years, and the aſſignments of it, which were kept in the hands of *Lockwood*, on account only of containing other premiſes in mortgage to *Lockwood*, and which were not included in the mortgage to *Sprigg*, nor aſſigned to *Moreland*, his truſtee, but counterparts of them were then delivered to *Sprigg*. On theſe facts the queſtion on an ejectment was, Whether *Morgan* and *David*, or *Sprigg*, ſhould be preferred?

Goodtitle on dem. of ſeveral v. Morgan *et al.* 1 Term Rep. 755.

On the part of *Morgan* and *David* it was contended, that this term muſt be conſidered as attendant on the inheritance, and, conſequently, at the times of the reſpective mortgages to them, the truſtee of the term became their truſtee, and the term could not be ſeparated from the inheritance but by their conſent. That if, previous to the conveyance to *Sprigg*, in 1769, *Morgan* and *David* had brought ejectments upon their mortgages, neither *Jones* nor *Lockwood*, his truſtee, could have ſet up his term as a bar to their ejectments; then if *Jones* himſelf could not ſet up the term it was abſurd to ſay, that thoſe who claimed under him might, for they could not claim a greater eſtate than he had. Then *Jones*, having parted with the inheritance, had no power afterwards to make any appointment of it differently. His power was gone, though it were collateral, by the conveyance of the land. *Sed per Aſhburſt*, Juſtice, no man ought to be ſo abſurd as to make a purchaſe without looking at the title-deeds; if he is, he muſt take the conſequence of his own negligence. If the firſt mortgagee had an ordinary precaution, he muſt have known that this term was then outſtanding. And if he did know of it, and neglected to take an

assignment of it, it was enabling the mortgagor to commit a fraud, by mortgaging the same estate again. By this, therefore, he became *particeps criminis*, and he must suffer the consequences of the fraud; and *Sprigg*, who has got the legal estate, must be preferred.

Brothers v. Bence, Fitzgib. Rep. 118. 2 Eq. Ca. Abr. 615. 11.

Where *A.*, a copyholder in fee, mortgaged to *J. S.* who was admitted by *B.*, the steward of the manor; and afterwards *A.* made a second mortgage to *C.*, who was also admitted by *B.*, and then *a mortgage to B.*, who bought in *J. S.*'s security; it was decreed, that *B.* should not postpone *C.*; because it is presumed, from the mere act of admission, that a man of ordinary diligence and understanding, being steward of the manor, when *C.* was admitted, must know, or have notice of the *mesne* mortgage to *C.*

2 Ch. Ca. 246. Gilb. Rep. Eq. 8. 1 Ch. Ca. 291. Dunch v. Kent, 1 Vern. 319.

Where a purchaser *cannot make out a title*, but by a *deed*, which leads him to a fact material to it; he will not be deemed a purchaser without notice of that fact, but will be presumed cognizant thereof; for it is deemed gross neglect, that he sought not after it.

Drapers' Company v. Yardly *et al.* 2 Vern. 602.

Thus, where *B.* devised to *J.* in tail male, and if he died without issue male, to *Y.* in tail male, but subject to two legacies of 500*l.* and 1000*l.* to the Drapers' Company; and *Y.* afterwards levied a fine to the use of him and his heirs (on which was five years non-claim), and then granted a rent charge of 100*l. per annum* to *S.*, and mortgaged the premises to *L.*; the court held the fine and non-claim was no bar to the legatees; for *Y.* having no title, but under the will, it was implied notice to all purchasers under him.

Dunch v. Kent, 1 Vern. 260. 319.

So, where an annuity was granted to *A.* by the crown, by patent issuable out of the excise upon special trust, that all such of the creditors of *B.*, as would come in *within a twelvemonth*, and accept a share of this annual sum proportionate to their debts, should have the same assigned to them; and *A.*, after the year, assigned part thereof by instruments which purported to be in consideration of debts due and owing from *B.*, but were in truth for *A.*'s own debts, and the assignees had afterwards assigned the same over to others, who claimed, as purchasers, without notice, for full and valuable consideration; it was held, that although all the creditors of *A.* did not come in within the year, yet this patent was in trust for them, and not convertible to other purposes; and that those who purchased of the assignees of *A.* came in under the letters patent, in which the trust was mentioned, and ought to have taken notice of it at their peril.

Moore v. Bennet, 2 Ch. Ca. 246.

And subsequent purchasers also are taken to have notice of the contents of a deed or will, if they must claim under it. As, if *A.* makes a conveyance to *B.*, with power of revocation by will, and, afterwards, limits other uses; if *B.* disposes thereof to a purchaser, a subsequent purchaser is intended to have notice of the will, as well as of the power to revoke; for no title can be made to a purchaser, but by the conveyance which contains the power of revocation.

But

But in the case of *Bovey* v. *Smith*, a will was not suffered to be set up, as presumptive notice to defeat a transaction, by a trust therein contained, that had lain dormant for many years, after a fine, and where there was *room to presume*, that other trusts were appointed. In that case *B.*, the mother of *A.*, being in *Holland*, and having a separate estate, about forty years previous to the time of filing the bill, made her will in *Dutch*, and thereby devised houses to *W.*, her husband's son by a former wife, and to other trustees, in trust *for her four daughters and their children, and such of their children as should be alive at the last*, and, afterwards, declared the trust of all her estate, thereby undisposed of, to be for her and her heirs. The trustees, apprehending that the devise carried the inheritance of the houses to the daughters, sold such inheritance in 1652, for a good consideration, and distributed the money, arising from the sale, equally amongst them. *A.* was privy to this conveyance, and made no claim, nor pretended any right to the houses; a fine was levied of them, and five years afterwards *W.* the trustee, for a full consideration, purchased them back to himself and his heirs. Then *A.* having taken advice on the will, and conceiving the daughters took only an estate for life, exhibited his bill against *S.*, who now stood in the place of *W.*, the trustee, to have an execution of the trust, and the lands decreed to him. Two decrees had been for the plaintiff.—One point argued was, that it was impossible any one should come at the land without having notice of the trust, for they must purchase under the will; and all their title was by the will by which the trust was created, and every man that had notice of the will must, at his peril, take notice of the operation and construction of the law upon it. But the Lord Keeper said, this was an application, after one-and-thirty years possession, to affect an estate with a trust, notwithstanding a release and fine, and *that*, upon a supposal that *B.* had made no other appointment (as she had power to do by the deed), *and* which, after so long a possession, it ought rather to be presumed she had done; and also upon a supposal, that this was a true copy of the will. This was only a translation; the original was lost; the difference in point of translation between the children and issue was nice, and the question was, Who should suffer? For the defendant was a purchaser, and had paid a full consideration, and was here to be affected with a notional notice only; the plaintiff stood by all the while and was silent, and, at best, passive in the breach of trust. That, therefore, though it was hard to dismiss the bill after two decrees for the plaintiff, yet his Lordship was not satisfied he could decree it for him, and the bill was dismissed.

Bovey v. Smith, 1 Vern. 84. 144. 2 Ch. Ca. 124. S. C.

So, likewise, this rule admits of an exception, in the case of an assignee of the estate of a testator, under an assignment made by the executor; for he will not, in favour of creditors or residuary legatees, be presumed to have notice of what is contained in the will of the devisor; because, whoever takes any thing from an executor, must always do it with notice of a will; and there-

1 Vez. 173.

fore, if this doctrine of the will being notice to the aſſignee was to prevail, no perſon would dare to purchaſe, or take an aſſignment from an executor. Beſides, it would be unreaſonable that a purchaſer ſhould take upon him to make out the account, as to the *quantum* of the debts or aſſets, when he is not entitled to have the vouchers for that purpoſe. Thus, *M.* having a mortgage of 3500*l.* made his will in 1712, and deviſed all his real and perſonal eſtate, not by his will otherwiſe diſpoſed of, to his executors in truſt, in the firſt place by charging, leaſing, or ſelling thereof, or of any part thereof, to raiſe money to pay his debts; and then to divide what ſhould remain, after payment thereof, in equal proportions between his five children, and appointed his wife, his eldeſt ſon *I. M.*, and another perſon, executors, and died, leaving his widow and five children; and after payment of all *M.*'s debts, a large ſurplus remained to be divided. *I. M.*, having been appointed, in 1726, receiver of all the rents and profits of the real and perſonal eſtates of *E.*, procured a deed to be made, to which the other executors were parties, reciting, that there was due on the mortgage 9000*l.* and that the ſame was the proper money of *I. M.*, and aſſigning the mortgage and all due thereon to *B.*, his heirs and aſſigns, with a proviſo to be void, if *I. M.* faithfully accounted with *B.* for what he ſhould receive from the eſtate of *E.* *I. M.* afterwards died inteſtate, without accounting with *B.* and greatly indebted to the eſtate of *E.* A bill was then filed by the plaintiffs, two of the children of *M.*, againſt the defendants, the repreſentatives of *E.*, to account for what they had received on the mortgage, and to deliver up the deeds and writings relative thereto; and one queſtion was, Whether the plaintiffs, as reſiduary legatees of *M.*, were entitled to be relieved againſt the aſſignment of the mortgage, and to have an account; or, whether the repreſentatives of *E.* were entitled to retain the aſſignment? And this turned upon the point, Whether the aſſignees of the mortgage were to be conſidered as having notice of the truſt for the benefit of younger children? And the court held, the bare point of notice of the will, in this caſe, was not ſufficient.

Mead v. L. Orrery, 3 Atk. 236. July 19, 1745. *Et vid.* Ewer v. Corbett, 2 P. Wms. 148. Burting v. Stonard, *Id.* 150.

So, where an executor aſſigned over a mortgage term of his teſtator to *A.* as a ſatisfaction of a debt due to *A.* from himſelf; it was objected, in favour of the daughters of the teſtator, who were creditors under a marriage ſettlement, that the aſſignees took this aſſignment with notice that it was the teſtamentary aſſets of the teſtator. But the court held the alienation to be good.

Nugent v. Gifford, 1 Atk. 463. 1738. S. C. 2 Vez. 269. Ewer v. Corbett, 2 P. Will. 149. Buſting v. Stonard. 2 P. Will. 150.

But where *H.*, being indebted to *C.* on bond, died poſſeſſed of a great perſonal eſtate, and made *W.* executor and deviſee, who waſted the eſtate; *D. having notice of C.*'s debt, bought a leaſehold eſtate of *W.* by diſcounting 200*l.* due from *H.*, 550*l.* due from *W.*, and by payment of 150*l.* in money; on a bill filed by *C.* to have ſatisfaction for his debt of the leaſehold eſtate, being part of *H.*'s

Crane v. Drake, 2 Vern 616. Note, Lord Hardwicke admitted the principle of this caſe,

*H.*'s aſſets, the queſtion was, Whether this was a good ſale to bind a creditor? And it was held it was not, for *D.* was a party conſenting to and contriving a *devaſtavit*. but doubted whether the facts warranted the application of it. *Vide* 2 Vez. 469.

So, where the deviſee of an eſtate, in truſt for payment of debts, mortgaged the eſtates to one of the creditors, with notice; and the queſtion was, Whether ſuch creditor ſhould retain it by way of ſecurity for his own debt, as well for the old debt, as for the money lately advanced? The Chancellour was of opinion, that, though the general rule was, that though a purchaſer or mortgagee need not ſee to the application of the money, where there was no ſchedule of the debts, yet this rule was never carried ſo far, as to put it in the power of the deviſee in truſt, or of the heir at law, who in equity was conſidered as a truſtee, to favour one creditor, which would be the conſequence if this was allowed. Such creditor as to his old debt, could not be put into a better condition by taking the mortgage, but muſt come in, *pari paſſu*, with the reſt of the creditors; for the eſtate was a ſecurity in the hands of the truſtee before, and ſuch mortgage only operated to change the courſe, which the court would not ſuffer the truſtee to do, conſidering the giving preference to one creditor, as a fraud, which the court would not allow. Ithell v. Beane, 1 Vez. 215.

If a deed, by which a prior charge is made upon an eſtate, be delivered, among other papers, relating to the title thereof, to an intended purchaſer, he will be taken to have notice of the prior incumbrance; it being neceſſarily preſumed, that ſo material a circumſtance could not eſcape his notice, or, if it did, it muſt be through groſs neglect.

Thus, the plaintiff's father and mother ſold an eſtate to *C.* and his heirs, which, purſuant to an agreement made on their marriage, had been ſettled on the plaintiff's father for life, part on the mother for her jointure, remainder of the whole on the firſt and other ſons in tail male; and the conveyance was made by deed and fine. *C.*, upon his purchaſe, took in a mortgage-term, which was prior to the ſettlement, entered and afterwards ſold the eſtate to *H.* and *I.* It appearing, by the proofs in the cauſe, that *C.*, the firſt purchaſer, *had notice of the ſettlement*, and that the ſame, amongſt other writings, were delivered to him, the court decreed, that *C.* ſhould account for the conſideration-money, for which he ſold the eſtate, with intereſt from the deceaſe of the plaintiff's father and mother, diſcounting what was due on the mortgage made prior to the ſettlement. Ferrers v. Cherry *et al.* 2 Vern. 384.

And if it do not appear, upon the face of ſuch ſettlement, whether it be voluntary, or on articles before marriage, and, in conſequence, whether to be conſidered as binding againſt creditors or not, that will not alter the caſe; for the purchaſer, having notice of the deed, muſt, at his peril, purchaſe, and be bound by the effect of it. But, in the laſt caſe, the bill was diſmiſſed as to *H.* and *I.* who were made defendants, they having pleaded that they were purchaſers without notice, and the plaintiff not being able to prove

any notice againſt them, there was no foundation to preſume knowledge of the ſettlement, *C.* being able to make a good title without it.

Morrett v. Paſke, 2 Atk. 54. *Vide* 1 Atk. 490, 491.

A creditor by judgment, in 1698, for 600 *l.* came to an account with the conuſor in the year 1707, and ſettled the remainder due upon the judgment at 420 *l.*, and took a mortgage in fee for that ſum, as a collateral ſecurity to the judgment; and one *S.* an attorney, in 1716, took an aſſignment of this mortgage, in which there was a recital, *that* 90 *l. of the conſideration of the aſſignment was then the full worth of the eſtate.* *S.* was likewiſe in poſſeſſion of another mortgage made in 1688, upon the ſame eſtate which was ſubject to the judgment in 1698, and the mortgage in 1707. It was reſolved *S.* ſhould not be allowed to tack the two mortgages together, ſo as to defeat intermediate incumbrances between the years 1688 and 1698; and yet the mortgage in 1707 ſhould have relation back to the judgment in 1698, and by conſolidating them together, ſhould entitle *S.* to receive the ſum due upon that judgment, prior to creditors after the year 1698; but, as to money reported due ſince the mortgage in 1707, it ſhould be paid only in priority to creditors ſubſequent to 1707. One ground of which deciſion was, that the words in the recital of the aſſignment of the mortgage in 1716, *viz.* "that 90 *l.* the conſideration-money, "was the full worth of the eſtate *at that time*," naturally implied, that there were intermediate incumbrances, and therefore, to give *S.* the advantage of tacking both mortgages, would be contrary to his own intention; for, at the time he took the aſſignment of this *puiſne* incumbrance, he muſt know the eſtate was worth no more from the very words of the recital.

Coppin v. Fernyhough, 1 Bro. Ch. Rep. 291.

Again, *I. C.* being ſeiſed of ſeveral freehold eſtates, had ſettled the ſame to certain uſes, and being poſſeſſed of a prebendal leaſe for twenty-one years, which was uſually renewed every ſeven years, and which he held at the time of making his will, after charging the ſame, together with other freehold eſtates, with an annuity, deviſed it to the ſame uſes, intents, and purpoſes, as were declared in the ſettlement of the freehold eſtates firſt mentioned. Then the teſtator died. The leaſehold eſtate was ſeveral times renewed by the ſeveral perſons in poſſeſſion, and in one of the renewals, the then leſſee was ſtyled deviſee of *I. C.* Afterwards there were ſeveral other renewals. Then the eſtate was mortgaged by one of the claimants, under the ſettlement and will as his own property. And the queſtion was, Whether the mortgagee, who had no other notice of any defect in his title, except that the leaſe, which was aſſigned to him, recited, among the conſiderations, the ſurrender of the former leaſe, which recited the ſurrender of the other, in which the leſſee for the time being was ſtyled deviſee of *I. C.*, had ſuch notice thereby, as would render the eſtates in his hands liable to the truſts of the ſettlement? And it was held, that the mortgagee was affected with notice of the ſettlement, and that he muſt convey the eſtate according to the uſes, *&c.* limited and declared therein.

Where

Where there were father, mother, and ſon, and the father ſettled an eſtate on himſelf for life, then to his wife for her jointure, and on her death, to the ſons of the marriage; under which ſettlement, the wife and ſon inſiſted on being purchaſers for a valuable conſideration, without notice, and notice of a prior charge was proved againſt the father, by recitals on his own conveyances, and in part by his own admiſſion; but, as to the wife and ſon, there was no proof, but from theſe deeds being in the hands of the family; this was held not ſufficient to affect them with notice; becauſe ſuch ſettlement might have been made by an apparent owner without the deeds having been looked into. Whitfield v. Fauſſet, 1 Vez. 387.

If a deed, or other paper which is deemed conſtructive notice of a prior incumbrance, be found in the cuſtody of any one, it will be no objection to the charge of notice, that it does not appear when it came there; for if a perſon admits, or it be proved that a deed is in his cuſtody, whether as repreſentative of another or otherwiſe, it will be incumbent upon *him* to ſhew when it came there, for it is impoſſible for the other ſide to ſhew it. 2 Vez. 486.

Where tenant for life, remainder to his firſt ſon, mortgaged for 1500*l.*, and the deed of ſettlement was produced and ſeen by the purchaſer, who lent the money notwithſtanding, being adviſed that the tenant for life, not having then any ſon born, could deſtroy the contingent remainders, though, in truth, there was a ſon born five days before the lending of the money; yet the mortgagee having had no notice thereof, and having got the deed of ſettlement, the court would not relieve againſt him by compelling him to produce it. Brampton v. Barker, 2 Vern. 159. 1 E. Ca. Abr. 333. 3.

Notice to a man's ſcrivener, attorney, agent, or counſel, is ſufficient notice to the party himſelf. Merry v. Abney, 1 Ch. Ca. 38.

1 Vez. 69. 2 Vez. 477. 3 Ch. Ca. 110. Aſhley v. Bailie, 2 Vez. 368. Hothwall v. Abney, Nelſon Rep. 59.

Thus, *M.* ſuffered a recovery of an eſtate in *A.*, and then ſettled all his lands in *A.* upon his family; afterwards a tenement in *A.*, of which he had the reverſion after an eſtate for life, deſcending to him in tail by the death of the tenant for life, he ſuffered a recovery of it, and deviſed it to his younger ſon in fee. Then *M.* mortgaged it, together with 200*l.* that he had a power to charge on the ſettled eſtate, for ſecuring 200*l.* which he borrowed, and then he died. The mortgagee applied to the elder ſon for the money, who at firſt diſputed the payment, but afterwards ſubmitted thereto, upon the mortgagee's aſſigning to him the tenement ſo charged, that he might ſtand in the mortgagee's place; to which the mortgagee agreed, upon his covenanting to indemnify him for making this aſſignment, he having heard of the younger ſon's title. The eldeſt ſon then mortgaged the tenement to *B.* who had advanced the money to pay off the former mortgage. It was ſworn, that *B.*'s agent was preſent at the execution of the aſſignment when the indemnity was inſiſted upon; and the agent depoſed, that the deeds were laid before counſel, who made objections about the plaintiff's title. The aſſignment itſelf was ſtrong evidence of notice, for it had not the face of an aſſignment Maddox v. Maddox, 1 Vez. 61.

to

to a perſon having the equity of redemption, but was made ſubject to the equity of redemption; and was plainly meant to keep the mortgage on foot, if any other perſon had the equity of redemption, as the covenant to indemnify alſo ſuppoſed. One queſtion was, Whether the laſt mortgagee had not notice of the youngeſt ſon's title? And the court held, here was ſuch evidence of general notice, either to the party himſelf, *or to his agent*, to take care, as made it neceſſary for him to inquire into the title, which not having done, he muſt take the conſequence.

2 Vez. 485.

Brotherton v. Hatt *et al.* 2 Vern. 574.

Again, *E.* mortgaged his manor of *B.* to *M.* and his heirs, for ſecuring 3000 *l.*; afterwards *G.*, the father of the plaintiff *B.*, lent *E.* 2800 *l.*, and, by deed, reciting *M.*'s mortgage, he declared, that after the 3000 *l.* and intereſt paid, the eſtate ſhould ſtand charged, and be a ſecurity for *G.*'s money. *M. was no party to this deed.* Afterwards *H.*, one of the defendants, lent *E.* 400 *l.* and obtained a deed *from* E. *and* M., that after *M.* was paid, the eſtate ſhould, in the next place, ſtand charged with the 400 *l.*, and in like manner for *C.*, and ſeveral other defendants. All the ſecurities were tranſacted at the ſhop of *W.* and *Y.* ſcriveners, who were witneſſes, engroſſed the writings, and were in the nature of agents to all the ſeveral lenders. The queſtion was, Whether *B.* ſhould be paid next after *M.*, or whether *H.* and the others ſhould be preferred, becauſe they had got a declaration both from *E.* and *M.*, who, by that means, became a truſtee for them, after his own money paid? And it was decreed, that *B.* ſhould be paid next to *M.*, and ſo on, as the mortgagees ſtood in order of time; for notice to the agent was good notice to the party, and conſequently, thoſe that lent laſt, muſt come laſt, having notice of what was before lent.

3 Atk. 37.

And although a country attorney acts by an agent in cauſes in *London*, yet he will be conſidered as the ſolicitor for his clients, though he reſides in the country, and what is known to him, will be conſtructive notice to them.

Sheldon v. Cox *et al.* Amb. Rep. 624, *et vide* Doe on dem. of Willis *et al.* v. Martin, Mich. term, 31 G. 3.

*A.* and *B.* were empowered by act of parliament, to purchaſe eſtates in a certain diſtrict to enable them to build a ſquare, *C.* (who was a barriſter at law, and who appeared to have taken the management of the affair upon himſelf) purchaſed a parcel of ground held on a church leaſe, and borrowed 3500 *l.* of *D.*, and gave him a declaration of truſt of the leaſehold eſtates as a ſecurity, and delivered him the renewed leaſes: *C.* afterwards built ſeveral houſes, ſome of which were erected upon the ground on which *D.* had his ſecurity, and then *C.* granted a leaſe of theſe houſes to *H.*, reſerving a ground rent; which was done for the purpoſe of eſtabliſhing a rent; and *H.* declared himſelf in writing to be only a truſtee for *C.* Afterwards *H.* aſſigned ſome of the houſes in *D.*'s ſecurity to *M.*, for ſecuring a ſum of money by him lent, and then he aſſigned all the houſes to *E.* likewiſe, for ſecuring a farther loan. Neither *M.* nor *E.* had actual perſonal notice of the mortgage to *D.*, nor of each other's mortgage; but both *M.* and *E.* employed *C.* as their counſel and agent in theſe tranſactions, and nobody elſe. On a bill filed by *D.* for a ſale of the

the eſtates, and to be paid his mortgage-money in the firſt place, one queſtion was, Whether *M.* and *E.* were to be affected by the notice to *C.*, their agent, of *D.*'s ſecurity? *Et per curiam*, It is a fixed and ſettled point, that notice to the agent is notice to the principal. *C.*'s acting in different capacities makes no difference. It is the ſame as if they had been in different perſons.

If one purchaſes in the name of another perſon, without any authority from him ſo to do, or his having notice of his intention; yet, if he afterwards *agrees to it*, he makes the former his agent *ab initio*.

Thus, *G.*, in 1699, lent *W.* 200 *l.* upon a ſurrender of copyhold lands, but neglected to get the ſurrender preſented at the next court day as he ought to have done, for want of which the ſurrender was void, according to the cuſtom of the manor. In 1703, *B.* agreed with *W.* to purchaſe the mortgaged premiſes for 400 *l.*, and took a ſurrender in the name of *M.*, who afterwards conſented to become the purchaſer, and paid the money. It was proved, that *B.*, whilſt he was treating with *W.*, had notice of the former incumbrance, and therefore declined to purchaſe in his own name, and took the ſurrender in the name of *M.*, and procured him to become a purchaſer, that *B.* might be paid a debt, which *W.* owed him, out of the conſideration-money. On a bill filed by the executor of *G.*, *M.* pleaded himſelf to be a purchaſer without notice of the plaintiff's demand; and that his ſurrender was preſented, and he admitted tenant, without notice of *G.*'s ſurrender, which was kept in his pocket, and not preſented till long after his purchaſe, ſurrender, admittance, and payment of his conſideration-money. But it was adjudged at the Rolls, that notice to *B.* was ſufficient to affect *M.*; for, though he did not employ *B.* to purchaſe for him, or knew any thing of it until after *B.* had agreed and taken the ſurrender in his name, yet he, by approving of it afterwards, had made *B.* his agent *ab initio*; and *M.* was decreed to pay the 400 *l.* and intereſt, or to ſurrender to the executor of *G.*

Jennings v. Moore *et al.* 2 Vern. 609. S. C. 1 Brown's Parl. Ca. 244. *Et vide* Merry v. Abney, 1 Ch. Ca. 38.

But, examining a title in *one* tranſaction, in the ordinary courſe of buſineſs, which cannot be ſuppoſed to make any impreſſion, as to any future event, will not operate as conſtructive notice to an agent in general, or counſel or attorney, to affect his client on a *ſubſequent* tranſaction, and in another buſineſs at a diſtant period; for, an agent or counſel cannot be ſuppoſed to remember every particular circumſtance, contained in deeds or papers that come under his peruſal.

Caſe of Lord Falconbridge, cited 2 Vez. 369. Fitzg. 211. S. C. Worſley v. Earl of Scarborough. 3 Atk. 392.

And Lord *Hardwicke*, in the caſe of *Warwick* and *Warwick*, expreſſed his approbation of the rule laid down in the caſe of *Fitzgerald* and *Falconbridge* above mentioned, *that notice ſhould be in the ſame tranſaction*, and his Lordſhip ſaid, that it ſhould be adhered to, otherwiſe it would make purchaſers' and mortgagees' titles depend altogether on the memory of their counſellors and agents, and oblige them to apply to perſons of leſs eminence as counſel, as not being ſo likely to have notice of former tranſactions. And in the principal caſe, it was held that notice, ariſing from

Warwick v. Warwick, 3 Atk. 294.

from a caſe (ſtated by one who was an agent for both parties in a ſubſequent mortgage) ſtated in order to do ſomething towards ſuffering a common recovery, a year and ſix months before the party was to be affected with this notice, was not ſufficient to affect a purchaſer. However, there were other circumſtances in the caſe favourable to the purchaſer.

Steed v. Whitaker, Barnard, 220.

So, where lands were ſettled by *F.* on his marriage in 1734, which he mortgaged among others, in 1736, to *W.*, who had no notice of the ſettlement, and *R.* was employed as agent in making both the ſettlement and the mortgage; one queſtion was, Whether *W.* ſhould be conſidered as having notice of the ſettlement, *R.* having acted as agent on both occaſions? And the court held, that affecting a perſon with notice of the title of another, by reaſon of his agent's having notice of it, had not been carried ſo far, as to affect the principal, unleſs where the agent had it, at the time of his tranſaction with him; and that, as the notice which the attorney had of the ſettlement, in this caſe, was two years before the mortgage, the mortgagee could not be affected by it.

Gilb. Eq. Rep. 7, 8.

It hath not been ſettled, whether, where one employs an attorney or counſel, and, for want of diſpatch, takes the matter afterwards out of his hands, and gives it to another agent to finiſh, and the firſt agent acknowledges notice, but no proof of notice of a prior incumbrance can be had againſt the ſubſequent agent, notice to the firſt agent ſhall bind the party himſelf.

*Vide* Whalley v. Whalley *et al.* 1 Vern. 484.

If one take a mortgage by aſſignment from a mortgagee, affected with notice of an outſtanding title, he will take ſubject to that title; for his aſſignor cannot transfer to him a better right than he has himſelf. And if ſuch original mortgagee, in a bill filed by the perſon ſetting up an *eigne* title againſt the mortgagee and his aſſignee, and praying to be let into poſſeſſion, charging notice, confeſs by his anſwer, that he had notice before the lending of the money; that confeſſion of notice will bind his aſſignee; for though the mortgagee's anſwer cannot be read againſt the aſſignee as evidence, yet he muſt ſtand in his aſſignor's place, and then his aſſignor's confeſſion of notice will bind him.

Collett v. Dorſels *et* Ward, Ca. temp. Talbot, 65.

*T.* having made mortgages of ſome parts of his eſtate, theſe mortgages afterwards by *meſne* aſſignment became veſted in *W.*, and carried with them the legal eſtate. *T.* then became a bankrupt, but, before the aſſignment of *T.*'s effects to the aſſignees, *W.* obtained a releaſe of the equity of redemption from *T.*, for a valuable conſideration; on a ſuit brought by the aſſignees againſt *W.* to ſet aſide theſe conveyances, it was held, that a purchaſer for a valuable conſideration, without notice of the bankruptcy, could not be relieved againſt within 21 *Jac.* 1.

Wilker v. Bodington, 2 Vern. 599.

*H. B.*, on *May* 1ſt, 1710, was arreſted at the ſuit of one *S.*, for a juſt debt of 790 *l.* ſecured by bond; he, for delay, pleaded it was for money won at play, and held out the plaintiff above ſix months, which, although he afterwards paid the debt and many thouſand pounds to others, and appeared publickly on the Exchange, was adjudged an act of bankruptcy by the ſtatute of *Jac.* 1. Afterwards, in 1717, *H. B.*, on the marriage of the defendant,

defendant, his ſon, made a ſettlement, by which, after reciting, that he had on his own marriage ſettled land, on truſtees, in truſt, to ſecure 2000 *l.* to his wife if ſhe ſurvived; *H. B., with the privity of the truſtees, who were parties to it,* aſſigned all his eſtate, right, title, and intereſt to the wife's relation for the benefit of *H. B.* for life, and of his wife for life, *&c.* The plaintiff *W.* was the aſſignee under a ſtatute of bankruptcy, taken out againſt *B.* ſubſequent to the ſettlement. The queſtion was, Whether a court of equity would decree the truſtees of the firſt ſettlement to aſſign the term to the plaintiff, or ſuffer it to reſt in them, to protect the ſettlement? For the defendants it was inſiſted, that they being purchaſers without notice of the bankruptcy, equity ought not to impeach their title, if they could defend themſelves at law; and that, although they had not the legal eſtate in them, yet the truſtees of the firſt ſettlement, in whom the legal eſtate was, being parties to the laſt ſettlement, were become their truſtees. And it was ſo held by the Chancellour, who ſaid, he took it to be the rule in equity, that where a man was a purchaſer without notice, he ſhould not be annoyed in equity, not only where he had a prior legal eſtate, but where he had a better title, or right, to call for the legal eſtate than another; and therefore diſmiſſed the bill.

*A.* lent money on lands, the mortgage being duly regiſtered, and afterwards *B.* lent money on mortgage on the ſame ſecurity, and his mortgage was alſo regiſtered, and then *A.* advanced a farther ſum on the ſame lands without notice of the ſecond mortgage: it was held, by Lord Chancellour *King*, that the regiſtering of the ſecond mortgage was not *conſtructive* notice to the firſt mortgagee before his advancement of the latter ſums; for though the ſtatute avoided deeds not regiſtered, as againſt purchaſers, yet it gave no greater efficacy to deeds that were regiſtered, than they had before. Bedford v. Backhouſe, 1 E. Ca. Abr. 615. 12.

So, in a later caſe, where *W.* advanced 800 *l.* on a mortgage in *Yorkſhire*, and regiſtered it; afterwards *K.* lent a ſum of money, and took a judgment for it, which was alſo regiſtered; then *W.* advanced a farther ſum, but without any expreſs notice of the judgment; and it was argued, on a bill brought by *W.* to foreclose, that *K.* ought to redeem, on paying the firſt mortgage; for that, where ſuch regiſters prevailed, every incumbrancer ſhould be ſatisfied according to the priority of his regiſter; and that the regiſtering *K.*'s judgment was conſtructive notice to *W.* ſufficient to deprive him of the common benefit of a court of equity, whereby a firſt mortgagee, without notice, was to hold till all ſubſequent incumbrances due to him were diſcharged: it was reſolved, that theſe ſtatutes avoided only prior charges not regiſtered, but did not give *ſubſequent* conveyances, regiſtered, any farther force againſt *prior* conveyances regiſtered, than they had before; and that to have affected *W.*, *K.* ought to have given him notice when he advanced his money; for, though *W.* might have ſearched the regiſter, yet he was not bound ſo to do. Wrightſon *et al.* v. Hudſon *et al.* 2 E. Ca. Abr. 609. 7.

But

Cowper's Rep. 712.

But a ſubſequent mortgagee, having notice of a prior mortgage not regiſtered, will not gain a priority by regiſtering, becauſe ſuch conduct is conſidered, in equity, as fraudulent, and the party hath that notice which the act of parliament intended he ſhould have.

Le Neve v. Le Neve, 1 Vez. 64. 3 Atk. 646. S.C. *Et vide* Cheval v. Nichols, Str. 664. *et* Sheldon v. Cox, Amb. Rep. 624.

Thus, *N.*, in 1718, married his firſt wife, and, on the marriage, a leaſehold eſtate, in the poſſeſſion of his father, was covenanted, in conſideration of the marriage, to be ſettled on truſtees, in truſt, for *N.* for life, then for his intended wife for life, remainder to the iſſue of the body of *N.* by his wife, in ſuch manner as he, by deed or will, ſhould appoint. The marriage was had, and a ſettlement made, in purſuance of the articles; the wife had iſſue, and died. In 1743, *N.* married a ſecond wife, but, previous thereto, entered into articles with her truſtees for ſettling the very ſame eſtate on himſelf for life, then on her for a jointure, remainder to the iſſue of that marriage; and a ſettlement was made purſuant thereto. The eſtate was ſubject to the ſtatute 7 Q. *Anne*, *c.* 20. which requires regiſtry. The firſt marriage articles and ſettlement were never regiſtered; the ſecond were. *N.* alſo mortgaged this eſtate, as abſolute owner thereof. The bill was brought by the children of the firſt marriage, to have the benefit of the ſettlement made on them, and, in order thereto, to have the ſubſequent articles and ſettlement poſtponed, though regiſtered. The ground of this application was, that the agent, who made the laſt ſettlement, had notice of the firſt. And, notice to the agent having been fully made out, the principal queſtion was, Whether it would affect the defendant's purchaſe, and oblige the court to poſtpone the ſecond articles, and ſettlement to the firſt, notwithſtanding the regiſtering act? And the court determined it would; for the intent of the act was to ſecure ſubſequent purchaſers and mortgagees againſt prior ſecret conveyances, by letting a ſubſequent purchaſer, having regiſtered, prevail againſt a prior ſecret conveyance, of which he had no notice; but if he had notice of a prior conveyance, which was veſted property, that was no ſecret conveyance. The ſtatute did not ſay, that the ſubſequent purchaſer ſhould not be affected by any equity whatſoever; therefore, though the manifeſt operation of it was to veſt the legal eſtate according to the prior regiſtering, yet it was left open to all equity; for there was no danger to the ſubſequent purchaſer, who might refuſe, if he had notice of the prior good conveyance.

Recited in laſt caſe. 1 Vez. 67. 2 Brown's Parl. Ca. 425.

And this doctrine was confirmed in the Houſe of Lords, upon an appeal, in the caſe of Lord *Forbs* v. *Deniſton*, which aroſe in *Ireland*.

But though apparent fraud, or *clear* and *undoubted* notice are held to be a proper ground of relief in caſes circumſtanced like the preceding ones, *ſuſpicion* of notice, though a *ſtrong ſuſpicion*, was held by Lord *Hardwicke not* to be ſufficient to juſtify the court of Chancery in breaking in upon this *act of parliament*.

Hine v. Dodd, 2 Atk. 275.

And therefore, where a mortgagee of lands in *Middleſex* ſwore in his

his anſwer, that, to *his belief*, he did not know of a judgment which had not been regiſtered, until after his mortgage executed; this was contradicted by *one* witneſs *only*, who ſwore, that, on a converſation at which ſhe was preſent, the mortgagee admitted that it was true "he knew of the judgment, but that he knew, "at the ſame time, that it was not regiſtered; and what were acts "of parliament for, unleſs they were effectually obſerved?" Lord *Hardwicke* ſaid, that, undoubtedly, this was *material* evidence, but then it was only *one* witneſs againſt the anſwer of the defendant, and the evidence amounted merely to a defendant's *confeſſion* in contradiction to his *anſwer*, and was contrary to a poſitive act of parliament made to prevent any temptation to perjury from contrariety of evidence. His Lordſhip, therefore, diſmiſſed the plaintiff's bill as to this part of the caſe.

It is an infallible rule, that a mortgagee may, in a court of equity, protect himſelf from diſcovery of his title-deeds if he denies notice. For, if a plaintiff brings his bill to redeem ever ſo ſtrongly, he is not entitled to ſee the mortgagee's title-deeds, becauſe a third perſon may find out a flaw in them. The rule appears to be the ſame on motion, where there is to be a ſale to raiſe the mortgage-money; this is a firſt principle, and not to be argued, and depends on the denial of notice.

Senhouſe v. Earle, 2 Vez. 450. Perrat v. Ballard, 2 Ch. Ca. 73. *Ibid.* 135, 136. 1 Vern. 27. Hall v. Atkinſon, 1 Eq. Ca. Abr. 333.

If *A.* purchaſes an eſtate, with notice of an incumbrance, or that it is redeemable, and then ſells to *B.*, who has no notice, who afterwards ſells to *C.*, who has no notice; by this the notice to *A.*, the firſt purchaſer, will not be revived; for, if it were ſo, an innocent purchaſer, without notice, might be forced to keep his eſtate; he could not ſell, and would be accountable for all the profits received *ab initio*. But the intereſt muſt be the ſame in *every* reſpect, or the principle does not apply.

Harriſon v. Forth, Prec. Ch. 51. *Et vide* alſo Lowther v. Carlton, Ca. temp. Talb. 187. *Et vide* Brandlyn v. Ord, 1 Atk. 571.

Upon this ground, where *A.*, who was entitled to the equity of redemption in certain lands, had brought his bill againſt the repreſentatives of *B.*, who was the *meſne* purchaſer, and likewiſe againſt *C.*, who was the *puiſne* purchaſer; *A.* had not replied to the anſwer of the repreſentatives of *B.*, and the queſtion was, Whether they ſhould not have been brought before the court as proper parties? *Per* Lord *Hardwicke*, Chancellour.—The repreſentatives of *B.* deny he (*B.*) had any notice of *A.*'s title at the time he purchaſed, and it is admitted on all hands that *C.*, who purchaſed of *B.*, had notice of the title; now, if I ſhould go on with this cauſe, I ſhould deprive *C.* of the benefit he would have from the defence which is ſet up by the repreſentatives of *B.* It is like the caſes at law by warranty, *&c.* where one defendant is allowed to pray in aid the evidence of another defendant, who has an intereſt in the thing conteſted, if it is of uſe or advantage to him in ſtrengthening his own caſe. And for this reaſon, his Lordſhip allowed the objection, for want of parties in not bringing the repreſentatives of *B.* before the court.

Lowther v. Carlton, 2 Atk. 139.

Again,

Sweet v. Southcote, 2 Bro. Rep. Chan. 66.

Again, where a bill was brought to diſcover whether the defendant, who was aſſignee of a mortgage, had not notice that the original mortgagor was only tenant for life, ſtating that the title-deed, by which this appeared, was in the defendant's hands; the defendant pleaded that he was aſſignee of the mortgage, for valuable conſideration, and through many aſſignments from perſons who had no notice: it was argued, that this plea was not good; for it ſhould have ſtated, whether the defendant perſonally had notice: but the Maſter of the Rolls allowed the plea, holding that the plaintiff could not call upon the defendant to ſhew whether he had or had not notice; for whether he had, or had not, was immaterial, if thoſe through whom he claimed had not, he having a right to avail himſelf of their being purchaſers without notice.

Andrew Newport's ca. Rep. T. Holt, 477. Skin. 423. S.C. *Et vide* Shirk v. Clark *et al.* Pre. Chan. 275.

A mortgage made by *K.* in 1659, by divers *meſne* aſſignments veſted in *N.*; it was objected, that it did not appear that any money was paid upon the original mortgage, and therefore it was fraudulent; and being fraudulent in the creation, though *N.* paid a valuable conſideration, yet this would not purge the fraud, and make it good againſt one, who was a purchaſer *bonâ fide*, and for a valuable conſideration. *Sed non allocatur:* for *Holt*, Chief Juſtice, ſaid, that the firſt mortgage was good between the *parties*, and being ſo, when the firſt mortgagor aſſigns for a valuable conſideration, this was all one as if the firſt mortgage had been upon a valuable conſideration, for then the ſecond mortgagee ſtood in the firſt mortgagee's place, and therefore was within the proviſo of the ſtatute 27 *Eliz. c.* 4. "that no mortgage, *bonâ fide*, and upon "good conſideration, ſhould be impeached by force of this act, "but it ſhould ſtand in ſuch force as before the act made;" and if this proviſo did not extend to the caſe, to what caſe ſhould it extend?]

5. Of the Equity which muſt be done by him, who would redeem, to the Perſon againſt whom a Redemption is prayed.

It is a rule in equity, that he, that will have equity to help where the law cannot, ſhall do equity to the party againſt whom he ſeeks to be relieved; and that therefore where there is an eſtate ſubſiſting in law, as there is in the mortgagee after forfeiture, equity will not deſtroy it, unleſs the party redeeming will ſatisfy all equitable demands out of the eſtate.

2 Chan. Ca. 164. 2 Chan. Rep. 247. Vern. 245. 2 Chan. Ca. 194.

And on this foundation it hath been frequently adjudged, that if a mortgagor borrows more money of the mortgagee upon bond, where the heir is bound, and dies, the heir of the mortgagor ſhall not redeem without paying the bond-debt, as well as that ſecured by the mortgage; becauſe when the condition is broken, ſo that the term or intereſt becomes abſolute in the mortgagee, if the heir of the mortgagor will have equity, he muſt do equity by the payment of the whole money due to the mortgagee; and this is called a rebutter. But if the bill was exhibited by the mortgagee to

to foreclose, there, if the heir of the mortgagor tender principal and costs, it sufficeth, without tender of the money due on the the bond, because such bond was not originally any lien on the land itself; and if that be tendered, for which the land was originally pledged, there is no reason to debar the heir of his right of redemption.

So, where a husband and wife levy a fine of the wife's land, to enable them to take up the sum of 400 *l.*, and they make a mortgage for it, and after the mortgage is forfeited, the husband pays in part of the mortgage-money, but afterwards borrows again the sum of the mortgagee; it was decreed, that the mortgagee having the estate in law in him by the forfeiture of the mortgage, he should hold the land against the heir of the wife until the whole money was paid; and if the heir would not pay in the whole principal, interest, and costs, he should be foreclosed. Vern. 41. Reason v. Sacheverel.

So, if a lessee for years mortgages his term, and afterwards borrows money of the mortgagee on bond, and dies, his executor shall not redeem without paying the bond as well as the mortgage. 2 Vern. 177. Preced. Chan. 18. S. C.

So, where a man borrowed 200 *l.* on the pawn of some jewels, which were worth about 600 *l.*, and took a note from the pawnee, acknowledging the jewels to be in his hands for securing the 200 *l.*, and afterwards the pawner borrowed at several times three several other sums of money of the pawnee, and gave his note for each sum, without taking any manner of notice of the jewels, and died; and his executors having brought their bill to redeem the jewels, on payment of the 200 *l.* first lent thereon, and interest; it was held, that to entitle them to such redemption, they must pay all the money due on the several notes, on this foundation, that he who will have equity must do equity; and that therefore, since the plaintiffs could not have back these jewels without the assistance of this court, it is reasonable and just they should pay the defendant all monies due to him, it being natural to suppose, the pawnee would not have lent those sums, but on the credit of the pledge he had in his hands before. Preced. Chan. 419. 2 Vern. 691. Demandry v. Metcalf.

If *A.* is bound in several bonds with *B.* as his surety for 4000 *l.*, and *B.* conveys the manor of *C.* to *A.* by way of mortgage, to counter-secure him against the bonds for 4000 *l.*, and *A* dies, and after *D.* the son and heir of *A.* becomes bound with *B.* for 2000 *l.* more; but there is no agreement that the mortgage should be a security to *D.* against the bond for 2000 *l.*, and after *B.* dies, his heir shall not be permitted to redeem upon payment of the 4000 *l.* only, but must save *D.* harmless, as well touching the 2000 *l.* as the 4000 *l.*, for he that would have equity to help where the law cannot, must do equity to the party against whom he seeks to be relieved. Chan. Ca. 97. St. John v. Halford.

[Where a woman, being a bond creditor, married a mortgagee and died, and the husband took out administration to his wife, he was allowed, on a bill brought by him to foreclose, to tack the bond to the mortgage, against the heir at law. Blackwell v. Symes, cited Ambl. Rep. 686.

Price *et al'.* v. Faſtnedge, Amb. Rep. 685.

So, where *F.*, ſeiſed in fee, mortgaged to *P.* for years, and *P.* died, having deviſed his real and perſonal eſtate to his daughter *S.*, and made her executrix; and *S.* afterwards lent *F.* 500 *l.* upon bond; the queſtion was, Whether *S.* could tack the bond debt to the mortgage? which depended upon the queſtion, Whether *S.* was to be conſidered as entitled to the bond and mortgage in different rights, the one in her own right, and the other as executrix? And it was held by Sir *Thomas Sewel*, Maſter of the Rolls, upon the authority of the laſt-mentioned caſe, that *S.* might tack theſe debts.

2 P. Will. 777.

But if one be indebted to *A.* by mortgage of a term for years, and alſo indebted to him by bond; if on the death of the mortgagor, the executor aſſigns over the equity of redemption of the mortgaged term, and the aſſignee of the executor brings a bill to redeem, *he* ſhall only pay the mortgage-money.

Cannon and Pack, 2 Eq. Ca. Abr. 226. 6. 6 Vin. Abr. 222. 6.

Upon the ſame principle, where, on a bill by the heir of the mortgagor to redeem a mortgage of copyhold lands, upon payment of principal and intereſt, the defendant inſiſted to have a judgment, which had been aſſigned to him, firſt ſatisfied before he ſhould redeem, Lord *Harcourt*, Chancellour, ſaid, *Copyhold lands are not liable to an execution upon a judgment; ergo*, the judgment ſhall not be tacked to the mortgage in this caſe, but the mortgagor ſhall redeem upon payment of the principal, *&c.* without ſatisfying the judgment.

Halliley v. Kirtland, 2 Ch. Rep. 361.

Where *A.* mortgaged lands to *B.* for 60 *l.*, and was alſo indebted to *C.* 50 *l.* on bond, and *B.* aſſigned his mortgage to *C.*, the court determined that, as the eſtate veſted was a *chattel leaſe* liable to debts, and *C.* had an aſſignment of it, and the bond debt was juſt, *A.*, the plaintiff, ought not to be let into redemption of the mortgage, but upon payment of both debts; and it was decreed accordingly.

Wyndham v. Jennings, 2 Rep. Ch. 247.

If the money due on the bond be lent firſt, and the mortgage made afterwards, yet there is the ſame equity for the mortgagee to have both ſums paid him. Thus, where *A.* borrowed of *B.* 300 *l.* on bond, and afterwards mortgaged lands to *B.* for 2000 *l.* lent, and then died, the plaintiff, the heir of *A.*, prayed a redemption; and the defendant inſiſted that the 300 *l.* was agreed to be ſecured alſo by the mortgage: the plaintiff was decreed to pay the defendant both debts.

Barrett v. Wells, Prec. Ch. 131.

But, if the mortgagee or aſſignee, to whom money is due on bond, countenance a fraud upon a third perſon, by concealment thereof, he ſhall be redeemed upon payment of the principal money only: therefore, where the plaintiff, deviſee of an eſtate, ſubject to a mortgage term for 1000 years, let the intereſt run in arrear, and gave ſeveral bonds for ſecuring it, and then died; his ſon and heir being about to marry, the intended wife's father applied to the mortgagee to inquire what was due on the mortgage, who, being deſired not to diſcover the bonds, ſaid, that there was only 500 *l.* due, and that all intereſt was paid; and that, upon payment of the 500 *l.*, he would deliver up the mortgage; the court held, on application to redeem, that the mortgagee, by concealing

cealing the bonds, had discharged the lands from being liable to more than what was then pretended to be upon them, and decreed a redemption, upon payment of the 500 *l.* with interest from that time, and without costs.

In respect of the heir, if there be several *incumbrances* upon an estate, and the prior incumbrancer claims a bond likewise, it will be postponed to all real incumbrances, whether by mortgage, judgment, or statute; for the bond is no charge on the estate, and he hath not the same equity against a puisne incumbrancer, as against an heir at law, who is liable to the bond in respect of assets. 87. Powis v. Corbett, 3 Atk. 556. 3 Salk. 84. 7.

Morret v. V. Haske, 2 Atk. 52. Gory's case, 3 Salk. 240. Troughton v. Troughton, 1 Vez.

Upon the same principle, if the person, claiming the equity of redemption, is a purchaser for a valuable consideration, the mortgage may be redeemed by him without discharging the bond; because the lands, in the hands of the alienee, can be charged with nothing but what is an immediate lien thereon, which the bond is not.

Bayley v. Robson, Prec. Ch. 89. Archer v. Snatt, 2 Str. 1107. Wood v. Mortimer, cited in the last case, 1 Eq. Ca. Abr. 325. 10. 1 Vez. 87. Coleman v. Wynce, Prec. Ch. 511. *Vide* Troughton v. Troughton, 1 Vez. 87.

Nor shall a bond be discharged on redemption of a prior mortgage, against creditors under a deed of trust of the equity of redemption; for it is only a charge upon the assets.

Anon 2 Vez. 662.

Therefore, where the question was, Whether a mortgagee, who had lent a farther sum afterwards upon a bond, should be allowed to tack it to his mortgage, in preference to the other creditors of the mortgagor, under a trust for payment of debts created by the will of the mortgagor, it was decided that the mortgagee should not tack the bond to the mortgage; for there being a devise for the payment of debts, the descent was consequently broke; therefore the mortgagee could have no priority with regard to his bond, but, as to that, must come in, *pro rata*, with the rest of the creditors under the trust.

Hearns v. Bance, 3 Atk. 630.

And a mortgagee cannot tack a bond to his mortgage, even against other specialty creditors. This point was so determined on reference to the principle upon which the rule, in respect of tacking a bond debt to a mortgage, is founded, and which furnishes an obvious solution of all the cases which we have stated as exceptions to the rule. For the only reason why the mortgagee can tack his bond to his mortgage, is to prevent a circuity of suits; it is solely matter of arrangement for that purpose; for the right has no foundation in natural justice. A creditor's having another specifick security, cannot give him in justice any priority. It is not done in any case but that of the heir, and merely to prevent circuity.

Lowthian v. Hasel, 3 Brow. Rep. Chan. 162.

*A.* purchased of *B.* the lands in question, and re-mortgaged them for securing part of the purchase-money, and for other part thereof gave a note payable on demand, on which 200 *l.* remained unsatisfied, and *A.* devised his lands to be sold for payment of his debts, and died, not leaving sufficient assets: the question was, Whether this 200 *l.* remaining due on the note, being for part of

Bond v. Kent, 2 Vern. 281.

the conſideration money, ſhould have a preference to other debts, and be looked on in equity as a charge upon the land? And it was inſiſted upon, that it ſhould, becauſe *B.*, as mortgagee, had the real eſtate in him. But it was held, that *B.* could have no preference, but muſt accept ſatisfaction in proportion only with the other creditors.]

Hard. 318. Sir John Hedworth and Primate.

If *A.* acknowledge a ſtatute to *B.* for payment of 800 *l.* with intereſt, which being forfeited, and the lands extended upon it, *A.* for a valuable conſideration ſettle the ſame lands in tail, and after borrow money of *B.*, and by articles it be agreed, the ſtatute and extent ſhall ſtand a ſecurity for the laſt money, and after *A.* die, and the 800 *l.* with intereſt be ſatisfied by reception of the profits; yet the iſſue in tail ſhall not be relieved againſt the penalty of the ſtatute; for though the heir has an equity, by reaſon of the tail made upon a conſideration, yet the money lent raiſes an equity for *B.*, ſo that *B.* hath both law and equity, whereas the iſſue in tail hath equity only till the penalty is ſatisfied.

2 Vern. 286. Pape v. Onſlow. [In *Ex parte* King, 1 Atk. 300. Lord Hardwicke ſaid, he was not ſatisfied that this was the eſtabliſhed rule of the court; that this caſe was very imperfect, and that he would not have it cited for the future till it had been compared with the entry in the regiſtrar's office. He ſaid farther, he was very apt to believe that the tenements were parcel, and holden of the manor of Dale; and that was the reaſon Lord Cowper ſo determined.—Search has ſince been made for it in the Editor's book, but no minute of it has been found there.—But the rule, as here ſtated, is recognized in other caſes, viz. Purefoy v. Purefoy, 1 Vern. 29. Shuttleworth v. Lawick, *Id.* 245.]

The plaintiff, as aſſignee of a ſtatute of bankruptcy, brought his bill to redeem a mortgage of the manor of *Newington* in *Kent*, made by the bankrupt to the defendant: the defendant by anſwer inſiſted, that he firſt lent the bankrupt 200 *l.* on a mortgage of a particular tenement, and afterwards lent him 300 *l.* on a mortgage of the manor of *Newington*, which was of greater value than the money due, but the firſt mortgage was deficient in point of value: it was held, that if the plaintiff would redeem one he muſt redeem both.

Vern. 29. 245. 2 Vern. 207.

So, if a man makes two ſeveral mortgages of ſeveral lands, and dies, and one of the mortgages is of an entailed eſtate, or is deficient in value, the heir of the mortgagor ſhall not be admitted to redeem one without the other; neither ſhall the mortgagee himſelf redeem the one, and leave the defective mortgage, but he muſt take both together.

Cator v. Charlton, 21ſt June 1775. in the regiſtrar's book, 1774. cited in 2 Vez. jun. 377. In Collet v. Munden, May 31, 1786, in the regiſtrar's book, 1785, cited alſo *ibid.*

[*Stokes* mortgaged to *Charlton* for 1400 *l.* Money was afterwards at different times advanced by the mortgagee, and different premiſes were added, and made redeemable on payment of 1900 *l.* with intereſt. Theſe ſecurities were regiſtered; and afterwards the mortgagor aſſigned to the plaintiff the premiſes firſt mortgaged. The defendant admitted, that there was no agreement between *Stokes* in writing or otherwiſe, that the laſt-mentioned premiſes ſhould be a ſecurity for more than 1400 *l.* and intereſt; but he inſiſted, that the plaintiff was not entitled to a redemption without paying the whole beyond the 1400 *l.*, and that regiſtering the incumbrances was full notice of them. The decree was, that the aſſignee could not redeem without paying the whole.

Sir L. Kenyon, upon the above authority, in the ſame ſort of caſe of ſeparate mortgages, declared, that both muſt be redeemed. "These caſes," ſaid the Maſter of the Rolls, in Jones v. Smith, 2 Vez. jun. 377. "amount to this; that if a man makes a mortgage, and afterwards makes another mortgage

" mortgage for a farther ſum, and then aſſigns the equity of redemption of one, both muſt be redeemed; " and the caſe of the aſſignee is not better than that of the original mortgagor."

A bill was filed by the widow and executrix of *James Vanderzee* to redeem ſecurities pledged by the teſtator to the houſe of *Moorhouſe* and Co. bankers, of which the defendants were the preſent partners. The caſe was as follows: In the year 1778, the deceaſed kept an account with the houſe of *Moorhouſe* and Co. as bankers; and upon the 10th of *Auguſt* in that year, he borrowed of the then partnerſhip 1000 *l.* (having then 400 *l.* in the hands of the houſe,) and gave a promiſſory note, and depoſited ſeveral bonds and other ſecurities as a pledge for the repayment thereof. Theſe ſecurities he frequently changed, and as one was taken away, another of equal value was depoſited in its room. In 1784, *Vanderzee*, owing the above 1000 *l.*, and above 400 *l.* on his banking account, the partnerſhip required an aſſignment of the ſecurities, and *Vanderzee*, being an attorney, prepared a bond and deed-poll for ſecuring 1000 *l.*, although there were 400 *l.* then due; and he overdrew his account, after the execution thereof, and was, at his death, in 1785, indebted to the partnerſhip in the ſum of 541 *l.* over and above the 1000 *l.*—The bill prayed, that the plaintiff might redeem, on payment of 1000 *l.* and intereſt only, inſiſting, that the depoſit was made as a ſecurity for that ſum only, and the rather, as a larger ſum was then due, and that the defendants had no lien on the ſecurities for any further ſum; and alſo ſtated that the perſonal and fee-ſimple real eſtate of the teſtator, were not more, or little more, than ſufficient to pay his ſpecialty debts, and that a bill had been filed by creditors againſt the preſent plaintiff and the heir at law, in which ſuit there had been a decree for the creditors to come in.—The defendants inſiſted, by their anſwer, upon a right to retain the ſecurities to the amount of their whole demand, ſtating their practice to be, never to ſuffer a cuſtomer to overdraw his account more than 100 *l.* without ſecurity, and that it was intended by the partnerſhip, that the aſſignment ſhould cover as well the balance due, and to become due from *Vanderzee*, on his caſh account, as the 100 *l.* and intereſt; and that the partnerſhip always conſidered themſelves to have a lien upon the ſecurities for the whole debt. Lord Chancellour—All caſes agree, that if the executor aſſigned the equity of redemption, it would put an end to the tacking: ſo it would, if the ſpecialty creditor brought the bill. I am afraid, the rule has been laid down too broad, and that there being a decree for creditors to come in, they muſt redeem on payment of the 1000 *l.* with intereſt.

Vanderzee v. Willis, 3 Br. Ch. Ca. 21.

Sir *James Cockburne* and *Henry Douglas*, carrying on buſineſs in partnerſhip as *Weſt India* merchants, borrowed from *Joſhua Smith* 2000 *l.*, for which they gave their joint promiſſory note dated April 25, 1775; and as a farther ſecurity Sir *James Cockburne* transferred 2000 *l. Scotch* mine ſtock to *Smith*, who ſigned a memorandum promiſing to transfer the ſame to the order of Sir *James* on payment of the note. By indentures of leaſe and release *December* 11th and 12th, 1775, Sir *James Cockburne*, Sir

Jones v. Smith, 2 Vez. jun. 372.

*George Colebrook*, and *John Nelſon*, mortgaged an eſtate in the iſland of *Dominica* to *Thomas Rumbold*, *George Wilſon*, and *Joſhua Smith*; and by indentures of the ſame date it was declared, that 10,000*l.*, part of that ſum, was the property of *Smith*; and a truſt was declared for him as to that; and the mortgagors joined in a bond to him for that ſum; and Sir *James Cockburne* and *Douglas* joined in a bond to him for the intereſt. Sir *James Cockburne* and *Douglas* had various money tranſactions with *Smith* ſubſequent to 1775; and upon *May* 7th, 1788, *Smith* having then in his hands, beſides the *Scotch* mine ſtock, and the joint note of the partners, ſeveral bills of exchange and notes delivered by them to him, an account was ſettled, and a memorandum ſigned by all parties, that the balance to *Smith* was 9246*l.* 13*s.* 7*d.*, and declaring, that that ſum ſhould carry intereſt from the 1ſt of the preceding *October*; and that the ſeveral bills and ſtock ſet forth in the account were paid to *Smith* at ſundry times by the partners, "which, when paid, are to be paſſed to the credit of their joint "or ſeparate notes and bills." Upon this occaſion no notice was taken of the mortgage of the *Weſt India* eſtate. In *October* 1788 *Douglas* died. By indentures of *March* 1, 1791, Sir *James Cockburne*, in conſideration of 500*l.* lent by *Jones*, tranſferred to him, his executors, and adminiſtrators, all the ſaid 2000*l. Scotch* mine ſtock, and the joint promiſſory note of *April* 25th, 1775, and a bill of exchange for 1575*l.*, dated *April* 6th, 1775, payable three years and a half after date, all then in the poſſeſſion of *Smith*, upon truſt ſubject to the rights of *Smith*, for ſatisfaction of the ſaid 500*l.*, and all other ſums then due by Sir *James Cockburne* to *Jones*; and then to pay the ſurplus to Sir *James*, his executors, and adminiſtrators. *Smith* having obtained judgment againſt the drawer and indorſer upon two bills for 5000*l.* and 5250*l.* drawn by *Ninian Horne* upon Sir *James Cockburne* and *Douglas*, indorſed by *Campbell*, and delivered by Sir *James Cockburne* and *Douglas*, to *Smith*, *Horne* gave *Smith* ten other bills and notes for 10,000*l.*, and by indentures of *September* 16th, 1778, *Smith* covenanted to ſtand poſſeſſed of the principal ſum of 10,000*l.* ſecured by the *Weſt India* mortgage, ſubject to the payment of the ſecurities ſo given to him by *Horne*, as to one moiety for *Horne*, his executors, and adminiſtrators; and as to the other, for ſuch perſons as ſhould be then entitled thereto. Upon theſe bills and notes *Smith* received 4200*l.* only; and by indentures of *May* 26th, 1787, in conſideration of 4200*l.* paid him by *George Horne*, he agreed to give up the remaining ſecurities; and aſſigned the remaining 5000*l.* of the mortgage-money ſecured upon the *Weſt India* eſtate. The bill was brought by *Jones* againſt *Smith* for an account of the money remaining due to the defendant in reſpect of the balance of the account of *May* 7th 1778; and that on payment of what ſhould be due on that account, the defendant ſhould transfer to the plaintiff the ſum of 2000*l. Scotch* mine ſtock, and deliver up the joint promiſſory note of Sir *James Cockburne* and *Douglas* for 5000*l.* dated *April* 25th 1775, and the bill of exchange of *April* 6th, 1775, for 1575*l.* upon

upon the truſts of the indentures of *March* 1791. It was admitted by the anſwer, that it was agreed, the defendant ſhould retain the ſeveral notes, bills, and ſtock, ſet forth in the account of *May* 7th, 1778, by way of mortgage for payment of the balance of 9246*l.* 13*s.* 7*d.*, and apply the ſums he ſhould receive on account thereof, in diſcharge of that balance; and pay the ſurplus to Sir *James Cockburne*; and that purſuant to that agreement he ſubſcribed a memorandum dated *May* 7th, 1788, acknowledging payment of the ſaid bills and ſtock to him: but the defendant referred to the memorandum for certainty as to the date and contents. The anſwer ſtated, that the defendant had received intereſt upon the *Weſt India* mortgage only to *December* 12th, 1776; and he claimed intereſt of the whole 10,000*l.* from that day to *September* 16th, 1778; and from that day he claimed the intereſt of a moiety of that ſum, and of ſo much of the other moiety, as he was entitled to under the deeds of *September* 16th, 1778, to *May* 26th, 1787; and ſo much of the intereſt of the laſt moiety during that period, as he was not ſo entitled to, and the intereſt of the whole 10,000*l.* from *May* 26th, 1787, he claimed as truſtee for *Ninian*, and *George Horne*, and *Campbell*; and he inſiſted, that the ſecurities, the redemption of which was ſought by the bill, could not be redeemed without paying thoſe arrears of intereſt upon the *Weſt India* mortgage; which was the only queſtion. The Maſter of the Rolls—It is determined, that in the caſe of two mortgages, both muſt be redeemed; but as to ſums advanced on other ſecurities, a mortgagor cannot tack thoſe to his mortgage, and inſiſt on a redemption of the whole. Here is a mortgage, in which Sir *James Cockburne* is one of three mortgagors, and the defendant one of three mortgagees: afterwards, the former and his partner pledge with the defendant bills and notes for payment of an account current between them, of which account the money due upon the mortgage makes no part. If they were depoſited expreſsly for one purpoſe, is there any pretence to ſay, the money was advanced upon ſecurity of the mortgage; and that he would not have advanced any more money but on ſecurity of the mortgage? I could not permit him to ſay that. What confuſion would ariſe, if upon a bill of redemption by the mortgagors they were not to redeem without paying what was due upon the diſtinct tranſaction with Sir *James Cockburne* and *Douglas?* They are tranſactions totally diſtinct. Nothing has happened ſince to make any variation. This is not a caſe, in which the plaintiff comes to take out of a mortgagee the legal eſtate he has acquired; but he comes to have theſe perſonal ſecurities; the debt, for which they were pledged, being diſcharged. The whole tranſaction proves, there was no intention of tacking at the time; and if the defendant ever could, he waived it in 1778. That tranſaction was an acknowledgment by him, that he had the legal poſſeſſion for one ſum; and then, according to *Green* v. *Farmer*, (*a*) he cannot ſet up another. Therefore, theſe ſecurities muſt be delivered over to the plaintiff on paying what is due upon that account in 1778. I rather think the defendant ought

(*a*) 4 Burr. 2214. and 1 Bl. Rep. 651.

ought to have his coſts; for it is not a frivolous point; therefore, let the account be directed, and coſts reſerved.]

Abr. Eq. 325. Challis v. Gaſborn. (*a*) In Vern. 244. it is held, that the mortgagor himſelf muſt pay both bond and mortgage. And in Prec. Chan. 419. it is ſaid by my Lord Chancellour, that if a ſum be ſecured by a mortgage of lands, the mortgagor ſhall not be admitted to redeem after the day of payment is lapſed, without paying likewiſe all that is due to the mortgagee on notes or ſimple contract; but that it is otherwiſe, if ſuch ſubſequent debts had been ſecured by bond. (*b*) But before the ſtatute, the deviſee of the equity of redemption was not obliged to pay both. Abr. Eq. 325. Prec. Ch. 89.

If a man has a debt owing to him by mortgage, and another on bond from the ſame perſon, he cannot tack them together againſt the (*a*) mortgagor, but he ſhall be let into a redemption without payment of both; becauſe the land in his hands is chargeable with the bond even at law. And (*b*) ſince the ſtatute againſt fraudulent deviſes, the deviſee of the equity of redemption is in the ſame caſe with the heir, and cannot redeem without payment of both; becauſe the ſtatute makes ſuch deviſe void, as againſt creditors, and then the deviſee ſtands in the place the heir muſt have done, if no deviſe had been made.

Prec. Ch. 511. Coleman v. Wince.

Alſo it hath been held, that if the heir of the mortgagor alien the lands, the purchaſer, on a bill brought by him for a redemption after forfeiture, ſhall not be obliged to pay both the mortgage-money, and alſo a bond-debt due from the mortgagor; for though the heir muſt have paid both in ſuch a caſe, yet the reaſon of that is, becauſe the heir is expreſsly bound, and his perſon is become debtor, and not the lands, and, conſequently, the lands in the hands of the alienee can be charged with nothing but what is an immediate *lien* thereon, which the bond is not.

Prec. Ch. 512. *per cur.*

So, if a man, poſſeſſed of a term for years, mortgages it, and dies indebted to the mortgagee in a bond-debt, if the executor brings a bill to redeem, he muſt pay both; becauſe the equity of redemption of the term is aſſets in his hands; but if he alien the equity of redemption of his term, though he ſhall be anſwerable for the value, as it is ſo far a *devaſtavit*, yet the purchaſer ſhall be charged with no more than was immediately borrowed upon it.

If a bill is brought by an heir at law, or any other perſon, againſt a mortgagee, whereby the party would avoid the mortgage, under pretence his anceſtor was only tenant for life, and he ſeeks for a diſcovery of deeds and writings to avoid the title of the mortgagee, he ſhall never have ſuch a diſcovery, unleſs he, by his bill, ſubmits to confirm the title, and then he ſhall.

2 Chan. Ca. 23. Bromley v. Hammond.

Father tenant for life, remainder to the ſon in tail; the father mortgages the land, and dies; the mortgagee, by a third hand, procures the ſon to borrow money of him, as tenant in fee, on a mortgage of the premiſes: this ſhall not enure to make good the money lent the father; for though the mortgagee hath got the legal eſtate, yet it is only pledged for money lent to the ſon, and the money lent to the father was on another eſtate, to which the ſon is an abſolute ſtranger; and therefore the court will not compel the ſon to pay the debt of the father, from whom he did not claim. But, if the tenant in tail had mortgaged without notice of the entail, and the mortgagee had got the deed into his poſſeſ-

ſion,

ſion, equity would not compel him to diſcover ſuch deed to overthrow his own poſſeſſion, ſince his eſtate ariſes upon a valuable conſideration, and the heir in tail claims under the anceſtor who made the mortgage, eſpecially if the mortgage work a diſcontinuance.

So, where a lunatick, before he became ſuch, made a mortgage of a good part of his eſtate for 50 *l.*, and the committee transferred this mortgage, and took up 3 or 400 *l.* more upon it; my Lord Chancellour declared the mortgage ſhould ſtand a ſecurity for the 50 *l.* only. Vern. 262. Foſter v. Merchant.

[A mortgage being aſſignable, a purchaſer ſhall hold it againſt *the mortgagor or his heirs* for the ſum due on the mortgage, although he bought it for leſs than was due, or for leſs than it was worth; for he ſtands in the place of the mortgagee who aſſigned, and who might have given it to him *gratis*. And what was due will be the meaſure of allowance, not what was given, for that might be more than it was worth as well as leſs; and he that runs the hazard if a loſs happens, ought to have the benefit in caſe it turns to advantage. Thus, where *A.* mortgaged his lands to *B.*, and *C.*, a ſtranger, bought the intereſt for leſs than was due on the mortgage, and the heir of the mortgagor brought his bill to redeem, the queſtion was, Whether *C.* ſhould be allowed more than he actually paid? And the Lord Chancellour ſaid, that this caſe had neither point nor edge, for there was no colour why, when the heir came to redeem, he ſhould not pay the whole money due on the mortgage: for that, if another man had met with a good bargain, there was no equity for the heir of the mortgagor to deprive him of the benefit of it, and take the advantage thereof himſelf. Williams v. Springfield, 1 Vern. 476. 1 Salk. 155. 4. Philips v. Vaughan, 1 Vern. 336. Baker v. Kellet, 3 Rep. Ch. 23.

But where a man dies in debt and under ſeveral incumbrances, namely, judgments, ſtatutes, mortgages, *&c.* and the *heir at law* buys in any of them that are of the firſt date; if creditors, who have the latter ſecurities, prefer their bill, the incumbrances bought in, ſhall not ſtand in their way for more than the heir really paid for them. For a creditor has equal equity with a purchaſer, and the taking away the gain of the latter to ſupply the loſs of the former, is making both equal; and therefore the gain the heir would make, if the whole money due on the incumbrance were allowed him, ſhall be taken from him to make up the loſs of the other incumbrancers upon the eſtate. 2 Vent. 353. 1 Vern. 49. 479. 1 Eq. Ca. Abr. 330. 3. 1 Salk. 155.

So, if an heir at law, truſtee, executor, or agent, compound debts or mortgages, and buy them in for leſs than is the due upon them, he ſhall not take the benefit of it himſelf, but the creditors and legatees ſhall have the advantage of it; and, for want of them, the benefit ſhall go to thoſe entitled to the ſurplus. Darcy v. Hall, 1 Vern 49. 1 Salk. 155. 2 Atk. 54.

And where a mortgagor in fee died, and the mortgagee bought in the mortgagor's wife's dower, it was decreed, that the heir of the mortgagor, on his bringing a bill to redeem, ſhould have the benefit thereof, on this principle, that the mortgagee is but a truſtee for the mortgagor after his money paid. Baldwyn v. Baniſter, 3 P. Will. 251. note A.

In

Biſhop v. Sharpe, 2 Vern. 471.

In the caſe of *Biſhop* and *Sharpe*, one as a guardian to an infant, took in an aſſignment of a mortgage; and the Lord Keeper, it is ſaid, was of opinion, that as to the profits received out of the mortgaged lands, the guardian ſhould be taken to be in poſſeſſion as mortgagee, and not as guardian. But the reporter puts a *quære;* and the law ſeems to be otherwiſe; for where a guardian compounded debts, it was decreed, it ſhould be for the benefit of the infant, and that caſe turns upon the ſame principle as that by which the caſe of *Biſhop* and *Sharpe* muſt be governed.

Powell v. Glover, 3 P. Will. 251. note A.

Williams v. Springfield, 1 Vern. 476.

And the equity ſeems to be the ſame if a ſtranger purchaſe, as againſt incumbrancers, creditors, or real purchaſers.

Long v. Clopton, 1 Vern. 464.

Thus, on a Maſter's ſpecial report, to whom the account in queſtion was referred to be taken, it was determined by the court, that an heir or any other perſon ſhould not, as againſt a real purchaſer, be allowed more on any incumbrance bought in than what he paid for it, without regard to what was actually due thereon.

Brathwaite v. Brathwaite, 1 Vern. 335.

If an heir purchaſes in an incumbrance on an eſtate charged with portions to younger children, he ſhall be allowed no more than what he really paid for it.

Darcy v. Hall, 1 Vern. 49.

But if an heir or truſtee buy in incumbrances to protect others to which he is himſelf entitled, the whole money due ſhall be allowed on account, although it was purchaſed for leſs.]

### 6. At what Time the Redemption muſt be.

Chan. Ca. 20.

When a man made a feoffment in fee upon condition, that if the feoffor paid a ſum of money at a day he ſhould re-enter at law; if the money was not paid at the day, the eſtate was gone for ever. This made pledging, according to the rules of the common law, very inſecure, and alſo made it neceſſary for a court of equity to interpoſe. For though the words of the condition bind down the conſtruction at common law to the payment at the preciſe day; yet a truſt is ſuppoſed between the mortgagor and mortgagee, that in caſe the payment be afterwards made, the mortgagor may have up the lands: and this the rather, becauſe the land is eſteemed only a pledge for money, and it would be a very unconſcionable thing, that the mortgagee ſhould take advantage of the non-payment at the preciſe day, when lands are generally pledged but for half value. And in this the chancellours, who were eccleſiaſticks, were more generally confirmed from the reaſonings of the civil law hereinbefore mentioned.

Chan. Ca. 102. Chan. Rep. 97. 184. 206. Abr. Eq. 313, 314. 2 Vern. 377.

But though a redemption has been allowed, yet no time has been limited when the ſame may be. But when a man comes in at an old hand, it hath been ſometimes decreed, that the poſſeſſor ſhall account no farther, than for the profits made in his own time, to diſcourage the ſtirring in ſuch dormant titles. However, it is the common doctrine in the courts of equity, that there is no time limited; for it is not within the ſtatute of limitations, and the courts of equity are tender of ſettling any ſet time; becauſe

cauſe a man can never be injured, if he receives principal, intereſt, and coſts; and the proprietor is injured, if he parts with his poſſeſſion under the true value. Sometimes, indeed, the court hath allowed length of time to be pleaded in bar, where the mortgaged eſtate hath deſcended, as a fee, without entry or claim from the mortgagor, and where the poſſeſſor would be entangled in a long account.

And therefore, at a rehearing before my Lord Keeper, aſſiſted with Juſtice *Vaughan* and *Turner*, concerning the redemption of a mortgage, which had been made above forty years, my Lord Keeper declared, that he would not relieve mortgages after twenty years; for that the ſtatute of limitations did adjudge it reaſonable to limit the time of one's entry to that number of years, unleſs there are ſome particular circumſtances that may vary the ordinary caſe; as, infants, femes covert, *&c.*, who are provided for by the very ſtatute; though theſe matters in equity are to be governed by the courſe of the court, and it is beſt to ſquare the rules of equity as near the rules of reaſon and law as may be. 2 Vent. 340. Ewre v. White.

A bill was exhibited to redeem a mortgage; to which the defendant demurred (*a*); becauſe, by the plaintiff's own ſhewing it appeared the mortgage was ſixty years old: but, upon argument, the demurrer was over-ruled; becauſe it was charged in the bill, that the mortgagor agreed the mortgagee ſhould enter and hold till he was ſatisfied, which is in the nature of a (*b*) *Welſh* mortgage. Vern. 418. Orde v. Herning.

[(*a*) Whether length of time can be taken advantage of by way of demurrer, ſee Jenner v. Tracy, and Belch v. Harvey, 3 P. Wms. note (B). Frazer v. Moor, Bunb. 54. Saunders v. Hard, 1 Ch. Ca. 184. Aggas v. Pickerell, 3 Atk. 225. Beckford v. Cloſe, cited in 3 Br. Ch. Rep. 644. Edſell v. Buchanan, 2 Vez. Jun. 83.] (*b*) In a conveyance by leaſe and releaſe there was a proviſo, that if *A.*, his heirs or aſſigns, ſhould on Michaelmas day then next enſuing, or any other Michaelmas day following, pay to *B.* his heirs or aſſigns, the ſum of 300 *l.* (the mortgage-money), and all arrears of rent or intereſt which ſhould be then due, then the ſaid conveyance was to ceaſe, without any other covenant for payment of the money: this was held to be a Welſh mortgage, being in nature of a conditional purchaſe, ſubject to be defeated on payment, by the mortgagor, or his heirs, of the ſum ſtipulated between them at any Michaelmas day, at the election of the mortgagor, or his heirs; and that here being an everlaſting ſubſiſting right of redemption, deſcendible to the heirs of the mortgagor, the ſame could not be forfeited at law, like other mortgages; and this was ſaid to be a common practice in Wales, (proceeding from their pride,) being done with a deſign to keep the eſtate for ever in their family. Prec. Chan. 423, 424.

[*A.*, in 1699, having borrowed 50 *l.* of *B.*, conveyed ſeveral houſes to the uſe of *B.* and his heirs, until he ſhould have received by the rents and profits thereof the 50 *l.* with intereſt, and all other ſums by him advanced to the mortgagor; and after payment by ſuch rent of the 50 *l.*, and all ſuch ſums as ſhould be advanced then to the uſe of *A.* for life, with remainder over. No application was made to redeem until 1740; and it was held, on a queſtion, whether this mortgage might be then redeemed, that the eſtate was then a redeemable intereſt, and that no bar aroſe from length of time. For it was ſaid, that this differed from a common mortgage, this being a conveyance of the inheritance, for ſecuring the money lent, or any other ſum advanced by the mortgagee, in truſt that the mortgagee ſhould continue in poſſeſſion till, by perception of the rents and profits, he ſhould be ſatisfied, the Yates v. Hambly, 2 Atk. 360.

the principal and intereſt upon ſuch ſums as he had already lent, or ſhould lend, and ſubject thereto in truſt for the mortgagor, &c. Now there never could be a forfeiture under this deed, becauſe the mortgagee was only in the nature of a tenant by elegit; and as ſoon as his principal and intereſt was ſatisfied by being paid off, or by perception of rents and profits, the eſtate ceaſed in *B.*, and *A.*, or thoſe claiming through him, might have brought an ejectment; nor would any bar have ariſen from length of time, unleſs the ſtatute of limitation had run by the mortgagee's continuing in poſſeſſion twenty years after the money had been paid off. And the mortgagor in ſuch caſe may alſo come into a court of equity for an account of the profits received, as on an *elegit*, and to have the ſurplus, if any, after diſcharging the mortgage, paid over to him; and in ſuch caſes there is nothing for the ſtatute of limitations, or the rule adopted in equity by analogy to operate upon, for there is no forfeiture. But it was obſerved, in the preceding caſe, that if, after the account ſhould be taken in Chancery, it ſhould appear that the mortgage was ſatisfied by perception of profits twenty years before, and that the mortgagee had continued in poſſeſſion from that time, the ſtatute of limitations would run.

Hartpole v. Walſh, 4 Brown's Parl. Ca. 369.

But, in the caſe of *Hartpole* v. *Walſh*, where *H.*, in conſideration of 600 *l.* lent him by *W.*, conveyed eſtates to him in fee, ſubject to a proviſo, that "the conveyance ſhould be void, whenever *H.*, his heirs, executors, adminiſtrators, or aſſigns, ſhould, "on any laſt day of *June* or *December*, pay unto *W.*, or his heirs, "the ſum of 600 *l.*;" and it was agreed by the indenture, that *W.* and his heirs ſhould receive the yearly rent of the premiſes in lieu of his intereſt, with a view to which, poſſeſſion was delivered to him; and afterwards *H.*, in conſideration of 2300 *l.* paid by *W.*, granted and conveyed the premiſes compriſed in the former mortgage, together with others, to him, his heirs and aſſigns, and covenanted that, whenever *W.* ſhould give to him, his heirs or aſſigns, eighteen months notice by letter in writing, requiring payment for the 2300 *l.*, *H.*, his heirs or aſſigns, ſhould pay the ſame with intereſt within eighteen months after ſuch requeſt; and *W.* was in like manner let into poſſeſſion of the laſt-mentioned premiſes; a bill for redemption brought, after the lapſe of one hundred years, was diſmiſſed, and that decree for diſmiſſion affirmed in the Houſe of Lords.

Proctor v. Cowper, 2 Vern. 377.

Where a bill was to redeem a mortgage made in 1642, it appeared the mortgagee entered in 1650, and there were three deſcents on the defendant's part, and four on the part of the plaintiff; but, the length of time being anſwered for the greateſt part by infancy or coverture, and an account having been made up by the mortgagee on a bill brought by him in 1686, to foreclose, the court decreed a redemption and an account from the foot of the account in 1686.

Anon, 2 Atk. 333.

Where a mortgage was made in 1713, and the clerk to the ſolicitor for the mortgagor, in order to pay off the mortgage, ſettled

tled an account, in 1730, of what was due for principal and intereſt, and no farther proceedings were had; yet that was held by Lord *Hardwicke*, on application in 1742, to ſave the right of redemption.]

A mortgage was made to *A.* in the year 1639, to indemnify him againſt debts for which he was engaged for the mortgagor; and in the year 1649, he entered into the mortgaged premiſes, and had poſſeſſion, and afterwards conveyed away ſeveral parts of the mortgaged premiſes to ſeveral perſons; and ſeveral ſales and marriage ſettlements had been made of them. In the year 1663, a bill was brought to redeem; but all the aſſignees were not parties; and a decree to account, and a report made, and exceptions taken to that report; and ſo it reſted for about eighteen years; and then another bill was brought; and another decree to redeem; but no proſecution upon it from the year 1676 till 1697, and then the plaintiff, having purchaſed the equity of redemption of thoſe lands (*inter alia*) from the heirs of the mortgagor, brought his bill to redeem. The objections againſt it were the length of time, the many derivative titles that had been made, and when no ſuit was depending, and the difficulty of taking the account. To which it was anſwered, that there had been freſh purſuits, and that the difficulty of the account had been occaſioned by the mortgagees themſelves, and that there were infants in the caſe. My Lord Keeper held, there ought to be no redemption; and that length of time excuſes the mortgagee for taking the eſtate as his own, and uſing it accordingly; and none that have come under him have done amiſs; and though there were infants in the caſe, yet the time having begun on the anceſtor, it ſhall run even upon infants, as it is at law in the caſe of a fine; and there is one great objection to a redemption in this caſe, that it does not appear that the plaintiff paid any thing for this equity of redemption, only had it thrown into his bargain. 2 Vern. 418. Abr. Eq. 314. Saint John v. Turner.

The plaintiff's grandfather, in the year 1686, had made a mortgage of the eſtate in queſtion, which was proved to be about nine or ten pounds *per annum*, for ſecuring about 100 *l.* In the year 1696 this mortgage was aſſigned over to the defendant; who by agreement was then let into poſſeſſion, and had continued ſo ever ſince, and was now about ninety years of age: the mortgagor died ſeveral years ſince, leaving the plaintiff's father his eldeſt ſon and heir of full age, who likewiſe died in the year 1714, leaving the plaintiff his eldeſt ſon and heir, then about twelve years of age; who brought this bill for an account, and to be let into a redemption of the eſtate in queſtion; of which the defendant had been in poſſeſſion thirty-three years, and ſo was greatly overpaid his principal and intereſt. But my Lord Chancellour diſmiſſed his bill; and ordered it to be entered down as one of the reaſons for diſmiſſing the bill, that the plaintiff had no remedy by ejectment at law, to recover the poſſeſſion, being barred by the ſtatute of limitations; and he thought that a reaſonable guide for this court to follow, as to the redemption in equity; and though the plaintiff was an infant at his father's death, yet the computation Abr. Eq. 315. Knowles v. Spence.

of

of time began long before, when there was no infancy in the caſe, and therefore will run on againſt infants after *.

* As twenty years poſſeſſion will bar an entry or ejectment, unleſs in caſes of infancy, coverture, impriſonment, or being beyond ſea (but not abſconding), ſo will it bar a redemption, Jenner v. Tracy. Belch v. Harvey, 3 P. W. 288. After the diſability removed, ten years ſhould be the rule in equity, as it is in the proviſo in the ſtatute of limitations. *Per* Talbot, C. *ibid.*

Orde v. Smith, Sel. Ca. Ch. 9. *ſupra.*

[Any act of the mortgagee, by which he acknowledges the tranſaction to be a mortgage within twenty years, will take the caſe out of this rule; as, by deviſing the money in caſe the mortgage ſhould be redeemed, or exhibiting a bill to foreclose.

So, a man, taking notice by a will, or any other deliberate act, that he is a mortgagee, will take the caſe out of the rule that a mortgagor ſhall not redeem after forty years.

Perry v. Marſton, 2 Bro. Rep. Chan. 397.

A ſurrender was made by *P.* to *M.*, the reconveyance to be to ſuch uſes as *P.* ſhould direct, or to himſelf in fee. There was a ſubſequent ſurrender to the uſe of himſelf for life, remainder to his wife for life, remainder to *M.* in fee, ſubject to the truſts of the former conveyance. Under theſe conveyances *P.* enjoyed the eſtate without paying intereſt until the year 1751, when he died, and after his death his wife enjoyed in like manner during her life. In the year 1751, upon the deceaſe of the huſband, part of the premiſes were ſold, and the wife joined in the conveyance. She dying ſoon after, *M.* took poſſeſſion, and held the ſame without any account to 1765, and from thence to 1779 no act was before the court to ſhew under what title *M.* held. In 1776 a bill was filed to redeem. In the firſt anſwer put in 1780, *M.* denied that he held as a mortgagee, and claimed to hold by title under the ſecond deed. In the ſame year the converſation paſſed, which was conſidered as a declaration, that *M.* held only as a mortgagee. It was a converſation between the ſon of *P.* and *M.*, in which *M.* aſked the ſon, *why his father did not pay the money; to which he anſwered, becauſe he was ſo poor that he could not pay it. The reply of* M. *to this was, he was ready to ſettle the matter without ſuit.* An amended bill was afterwards filed, and the cauſe was heard at the Rolls, and on the above evidence being read, a redemption was decreed. But, upon appeal to the Chancellour, the decree was reverſed, on the ground that the ſecond conveyance muſt have been in conſequence of a new agreement, not a mode of keeping up the mortgage; as otherwiſe the mortgagee would have got the equity of redemption for nothing, and the *P.*'s would have eſtates for life, ſubject to the mortgage money, which was more than they were worth: the words "ſubject to the truſts" muſt therefore mean, "ſubject to the life eſtates of the mortgagor and his wife." Then if it was conſidered as matter of title, the rule did not apply. If *M.* had been the ſurrenderor, (which he ought to have been) it could not have been, that a converſation ſhould defeat a clear act. Then there was evidence of a clear poſſeſſion in *P.* and his wife. After her death the *M.*'s took the eſtate, and treated it as their own. On the whole the Chancellour was of opinion, that the ſurrender was an inſtrument of title; and the decree was reverſed.

So,

So, where a bill was demurred to, becauſe it was to be relieved againſt a mortgage after forty-one years, yet, on a promiſe being proved that the mortgagor ſhould be at liberty to redeem after twenty-ſeven years, the demurrer was diſallowed; becauſe, though forty-one years had paſſed ſince the mortgage, yet but fourteen had elapſed after the time agreed for redemption. White v. Pigeon, Tothill, 232.

So, a mortgage was decreed to be redeemed upon the foot of an account ſtated previous to the mortgagee's entering upon the premiſes, notwithſtanding he had been in poſſeſſion forty years; the huſband of the heir of the mortgagee having entered into an agreement with the heir of the mortgagor, about ſeven years before the bill for redemption came to a hearing, for the purchaſe of the equity of redemption. For although, for reaſons ſufficiently evident in the caſe, the court refuſed to decree a ſpecifick performance of that agreement, yet it ſeems to have been conſidered, as an admiſſion by the mortgagee, that, at that time, he conceived the mortgagor had a right to redeem, which, occurring within ſeven years of the time of exhibiting the bill, brought this caſe within the reaſoning of that immediately preceding. Conway v. Shrimpton, 1 Bro. Parl. Ca. 309. Vin. vol. 5. p. 505. Ca. 5. 2 Eq. Ca. Abr. 596. Ca. 10. 738. Ca. 2.

Upon the ſame principle, a redemption was decreed upon a bill filed fifty-five years, after the original mortgage, and forty-ſeven years after the mortgagee got into poſſeſſion, after five ejectments brought to defeat his eſtate by a title paramount, and after refuſal by four different anſwers to come to an account upon the foot of the mortgage, and to redeem. For, the non-redemption for thirty-eight years of the time elapſed, being accounted for, by having been occupied in different ſuits brought by the contending parties, a period of ſeventeen years only had run out between the time of ſettling that diſpute, and the exhibiting the bill to redeem. Palmer *et al.* v. Jackſon *et al.* 5 Bro. Parl. Ca. 194.

And if the mortgagee *ſubmit* to be redeemed, time will be no bar. Thus, where a bill was brought to redeem after the mortgagee had been in poſſeſſion from 1707 to 1732, the year in which the bill was filed; and the defendant (it being a family affair) ſubmitted by his anſwer to be redeemed, notwithſtanding the length of time; Lord *Hardwicke*, though he ſaid he ſaw no colour for the redemption, yet, on the defendant's ſubmiſſion, decreed an account of what was due for principal, intereſt, and coſts, and directed the plaintiff to pay the ſame in ſix months after the Maſter's report, or, in default, the bill to be diſmiſſed without coſts. Proctor v. Oates, 2 Atk. Rep. 140.

Time will be no bar, if the mortgagor remain in poſſeſſion. Thus, a perſon had chambers in *Gray's Inn*, and mortgaged them in 1687, but continued the poſſeſſion till 1700; at which time an order of the Bench was made to deliver poſſeſſion of the mortgaged premiſes to the mortgagee; upon part of which he entered; but, as to the other part, the mortgagor continued in poſſeſſion till 1708, when he died, leaving the plaintiff an infant, who came of age in 1714. From the death of the mortgagor, the mortgagee had poſſeſſion of the whole. A bill was brought to redeem in 1726, and it was ſo decreed at the Rolls, and the decree was affirmed by Lord Chancellour *King*, who ſaid nothing was more Rakeſtraw v. Brewer, Sel. Ca. Ch. 55. Moſely, 190.

clear than that, if the mortgagor was in poſſeſſion of any part, he ſhould be admitted to redeem the whole; for part of the chambers he might redeem as being in poſſeſſion thereof, and part he could not, ſeparately from the whole; therefore he ſhould redeem the whole. If the mortgagee were in poſſeſſion for 20 years, and no intereſt paid, there ſhould be no redemption allowed. In this caſe the mortgagor was in poſſeſſion of part till 1708; from 1708 till 1714, the plaintiff was an infant, ſo that was accounted for, and from that time it did not amount to 20 years.]

### 7. Of the Manner of Redeeming and Foreclosing.

7 Geo. 2. c. 20. For the more eaſy redemption and foreclosure of mortgages.

The methods of redemption and foreclosing being dilatory, expenſive, and inconvenient, not only to the mortgagee but alſo to the mortgagor, the ſame ſeems now remedied by the 7 *G.* 2. *c.* 20., which reciting, that whereas mortgagees frequently bring actions of ejectment for the recovery of lands and eſtates to them mortgaged, and bring actions on bonds given by mortgagors to pay money ſecured by ſuch mortgages, and for performing the covenants therein contained; and likewiſe commence ſuits in his majeſty's courts of equity to foreclose their mortgagors from redeeming their eſtates; and the courts of law, where ſuch ejectments are brought, have not power to compel ſuch mortgagees to accept the principal money, and intereſt due on ſuch mortgages, and coſts, or to ſtay ſuch mortgagees from proceeding to judgment and execution in ſuch actions, but ſuch mortgagors muſt have recourſe to a court of equity for that purpoſe; in which caſe the courts of equity do not give relief until the hearing of the cauſe; for remedy thereof, and to obviate all objections relating to the ſame, it is enacted, "That where any action ſhall be brought on "any bond for the payment of the money ſecured by ſuch mort- "gage, or performance of the covenants therein contained; or "where any action of ejectment ſhall be brought in any of his "majeſty's courts of record at *Weſtminſter*, or in the court of "ſeſſions in *Wales*, or in any of the ſuperior courts in the coun- "ties palatine of *Cheſter*, *Lancaſter*, or *Durham*, by any mort- "gagee or mortgagees, his, her, or their heirs, executors, ad- "miniſtrators or aſſigns, for the recovery of the poſſeſſion of any "mortgaged lands, tenements, or hereditaments, and no ſuit ſhall "be then depending in any of his majeſty's courts of equity, in "that part of *Great Britain* called *England*, for or touching the "foreclosing or redeeming ſuch mortgaged lands, tenements, or "hereditaments; if the perſon or perſons having right to redeem "ſuch mortgaged lands, tenements, or hereditaments, and who "ſhall appear and become defendant or defendants in ſuch "action, ſhall, at any time pending ſuch action, pay unto ſuch "mortgagee or mortgagees, or, in caſe of his, her, or their re- "fuſal, ſhall bring into court, where ſuch action ſhall be depend- "ing, all the principal money and intereſt due on ſuch mort- "gage, and alſo all ſuch coſts as have been expended in any ſuit "or ſuits at law or in equity, upon ſuch mortgage, (ſuch money "for principal, intereſt, and coſts, to be aſcertained and com- "puted

" puted by the court where ſuch action is or ſhall be depending, " or by the proper officer by ſuch court to be appointed for that " purpoſe,) the money ſo paid to ſuch mortgagee or mortgagees, " or brought into ſuch court, ſhall be deemed and taken to be in " full ſatisfaction and diſcharge of ſuch mortgage; and the court " ſhall and may diſcharge every ſuch mortgagor or defendant of " and from the ſame accordingly; and ſhall and may, by rule or " rules of the ſame court, compel ſuch mortgagee or mortgagees, " at the coſts and charges of ſuch mortgagor or mortgagors, to " aſſign, ſurrender, or reconvey ſuch mortgaged lands, tenements, " and hereditaments, and ſuch eſtate and intereſt, as ſuch mort- " gagee or mortgagees have or hath therein, and deliver up all " deeds, evidences, and writings in his, her, or their cuſtody, re- " lating to the title of ſuch mortgaged lands, tenements, and he- " reditaments; and ſuch mortgagor or mortgagors who ſhall have " paid or brought ſuch monies into the court, his, her, or their " heirs, executors, or adminiſtrators, or to ſuch other perſon or " perſons as he, ſhe, or they ſhall for that purpoſe nominate or " appoint."

§ 2. " And where any bill or bills, ſuit or ſuits ſhall be filed, " commenced or brought, in any of his Majeſty's courts of equity " in that part of *Great Britain* called *England*, by any perſon or " perſons having or claiming any eſtate, right, or intereſt in any " lands, tenements, or hereditaments, under or by virtue of any " mortgage or mortgages thereof, to compel the defendant or de- " fendants in ſuch ſuit or ſuits, (having or claiming a right to " redeem the ſame) to pay the plaintiff or plaintiffs in ſuch ſuit " or ſuits the principal money and intereſt due on any ſuch " mortgage, or the principal money and intereſt due on ſuch " mortgage, together with any ſum or ſums of money due on " any incumbrance or ſpecialty, charged or chargeable on the " equity of redemption thereof; and, in default of payment " thereof, to foreclose ſuch defendant or defendants of his, her, or " their right or equity of redeeming ſuch mortgaged lands, tene- " ments, or hereditaments; ſuch court and courts of equity " where ſuch ſuit or ſuits ſhall be depending, upon application " made to ſuch court by the defendant or defendants in ſuch ſuit, " having a right to redeem ſuch mortgaged lands, tenements, or " hereditaments, and upon his or their admitting the right and " title of the plaintiff or plaintiffs in ſuch ſuit, may and ſhall, at " any time or times before ſuch ſuit or cauſe ſhall be brought to " hearing, make ſuch order or decree therein, as ſuch court or " courts might or could have made therein, in caſe ſuch ſuit or " cauſe had then been regularly brought to hearing before ſuch " court or courts; and all parties to ſuch ſuit or ſuits ſhall be " bound by ſuch order or decree ſo made, to all intents and " purpoſes, as if ſuch order or decree had been made by ſuch " court at or ſubſequent to the hearing of ſuch cauſe or ſuit; " any uſage to the contrary thereof in anywiſe notwithſtand- " ing."

§ 3. Provided always, "That this act, or any thing herein contained, shall not extend to any case, where the person or persons, against whom the redemption is or shall be prayed, shall (by writing under his, her, or their hands, or the hand of his, her, or their attorney, agent, or solicitor, to be delivered before the money shall be brought into such court at law, to the attorney or solicitor for the other side) insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; nor to any case where the right of redemption to the mortgaged lands and premises in question, in any cause or suit, shall be controverted or questioned, by or between different defendants in the same cause or suit; nor shall be any prejudice to any subsequent mortgagee or mortgagees, or subsequent incumbrancer; any thing in this act to the contrary thereof in anywise notwithstanding."

Yates v. Hambly, 2 Atk. 237.

[On a bill brought to redeem a mortgage of long standing, an objection was made for want of parties; namely, that as there had been an absolute conveyance made of this estate by the mortgagee without any clause of redemption, with several limitations over, the persons in remainder under this conveyance ought to have been parties. *Et per curiam*—When a mortgagee, who has a plain redeemable interest, makes several conveyances upon *trust*, in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, then it is not necessary that the plaintiff should trace out all the persons who have an interest in such trusts to make them parties. But, where the redemption depends upon equitable circumstances, and the plaintiff is not in the common case of redemptions, and where the mortgagee in fee has made an absolute conveyance with several limitations and remainders over, the decree cannot be complete without bringing at least the first tenant in tail before the court.

Fell v. Brown, 2 Bro. Rep. Chan. 276.

*H.* the elder, and *A.* the younger (his second son) by surrender conveyed the reversion of copyhold estates (after the decease of *H.* the elder) to *B.* in fee, subject to redemption on the payment of 30 *l.* and interest, and *B.* was admitted tenant to the lord. The estate was afterwards charged with a farther sum lent to *H.* the elder, and *H.* the younger by *B.* Then *H.* the younger, who survived his father, devised the estate to *S. H.*, subject to the mortgage, and died. Afterwards *S. H.* surrendered the same estate, subject to the first mortgages, to *F.* in fee, to secure the repayment of a sum borrowed of *F.* by himself. And by a deed bearing even date with the last-mentioned surrender, the use thereof were declared to be in trust to sell the same, and in the first place to pay himself the money by him advanced, with interest, and to pay the surplus to *S. H.*, his heirs, executors, or administrators. *F.* was admitted tenant to the lord. Then *B.*, the first mortgagee, entered into possession of the said copyhold estates. *S. H.* died, leaving *R. H.* of *Baltimore*, in the provin

of *Maryland*, his heir at law. *F.* filed a bill againſt *B.* and *R. H.*, charging the latter to be abroad in *America*, and praying an account of what was due to *B.* for principal and intereſt, and that *B.* might account for the rents and profits, and pay to *F.* what ſhould appear to be due to him, after paying ſuch principal and intereſt; and in caſe that ſhould not be ſufficient to ſatisfy *F.*'s demand, that the eſtate might be ſold, and proper parties join for that purpoſe, and *F.* be paid out of the purchaſe-money, and the reſidue paid and applied as the court ſhould direct. *B.* by his anſwer acknowledged the poſſeſſion, and ſaid, that he was ready to account to ſuch perſon as ſhould appear to be entitled to the equity of redemption; but that he did not know who was ſo entitled, not knowing what was become of *T. H*, whether he was living or dead, or whether he was ever married, or had left any child or children. One queſtion which aroſe in the cauſe was, Whether there were proper parties before the court, the ſuppoſed heir at law of *T. H.*, the mortgagor, being in *America*, and his perſonal repreſentative not being before the court? On the part of *F.* it was inſiſted that there were ſufficient parties; that *B.* had the real pledge in his hands, and although there might be a contract between the heir and the executor, that did not affect him. Between the firſt and ſecond mortgagees, it was not neceſſary to make the mortgagor a party. All the decree was redemption of the firſt mortgage, and a conveyance to the ſecond, not on account of rents and profits, unleſs the mortgagee was in poſſeſſion. That neither the mortgagor, nor the firſt mortgagee were hurt by its being unneceſſary to make the mortgagor a party to the bill between them; for the firſt mortgagee was liable to no farther account to the original mortgagor, the ſecond mortgagee being bound only to make him juſt allowances, and if he ſhould do otherwiſe, being liable to all charges which might have been made againſt the firſt mortgagor in his account with the original mortgagee. *Sed per curiam*—It is impoſſible that a ſecond mortgagee ſhould come into this court againſt the firſt mortgagee, without making the mortgagor or his heir a party. The natural decree is, that the ſecond mortgagee ſhall redeem the firſt mortgagee, and that the mortgagor ſhall redeem him or ſtand foreclоſed. It therefore muſt be neceſſary to have the real repreſentative before the court, though it is not neceſſary to have his perſonal repreſentative.

Where a mortgagee aſſigns without the mortgagor's joining, the heir of the mortgagor, on preferring a bill to redeem, has no occaſion to bring the original mortgagee before the court, for the aſſignee as ſtanding in his place will be decreed to convey. Hill v. Adams, 2 Atk. 39.

Where the mortgage is of money in the ſtocks, or the like, no decree of foreclоſure is neceſſary; therefore, where a bill was brought in 1729 by the plaintiff, to redeem the ſum of 2500*l.* *Eaſt-India* ſtock, transferred to the defendant in 1708, for the ſecuring the ſum of 2000*l.* and intereſt; the defendant having executed a defeazance, whereby he obliged himſelf to transfer the Lockwood v. Ewer, 2 Atk. 303. But, it is obſervable on the laſt-mentioned caſe, that

the period of time had elapſed between the mortgage and the bill to redeem, after which, it will be ſhewn hereafter, a court of equity refuſes its aid to a mortgagor, unleſs under ſpecial circumſtances. 2 Pow. Mortg. 284.

ſtock on payment of the 2000 *l.* and intereſt, on the 2d of *July* following the mortgage of it; the Lord Chancellour ſaid, this was a very plain caſe for the defendant. In a mortgage of land, a bill of foreclosure ought to be brought, but on a mortgage of ſtock, it was not neceſſary, and therefore a ſtrong reaſon for the mortgagor's departing from the right. And the ſtock having increaſed in value, which is a mere accident, will be no inducement to a court of equity to decree a redemption.

Lowe v. Morgan, Brown's Rep. Ch. 368.

If there be ſeveral mortgagees of an entire thing mortgaged, they muſt all be made parties to the bill of foreclosure. This was held to be neceſſary in the caſe of *Lowe* v. *Morgan*, where a ſhare of *Covent-Garden* theatre having been mortgaged, the mortgagee aſſigned the mortgage to a truſtee, in truſt for three perſons, who contributed equal proportions of the money. One of the three filed a bill to foreclose the equity of redemption. The cauſe was opened as a common bill of foreclosure, and the ordinary decree pronounced; but the Regiſtrar finding ſome difficulty in drawing up the decree, applied to the Lord Chancellour, who ſaid, it was a new caſe in reſpect of their being joint-tenants, and that it would be impoſſible for one to foreclose, without making the other two parties. The cauſe therefore ſtood over for that purpoſe.

Hobart v. Abbot, 2 P. Will. 643.

In a bill to foreclose, the caſe was:—*A.* made a mortgage for a term of five hundred years, for ſecuring three hundred and fifty pounds and intereſt to *B.*, who, ſo long before as 1705, aſſigned the term to *C.*, redeemable by himſelf, on the payment of 300 *l.* *B.* died; *C.* brought a bill againſt *A.* to redeem, or be foreclosed; and though but a derivative mortgagee, yet he did not make the repreſentatives of *B.*, the original mortgagee, parties. *Et per cur.* Here is plainly a want of proper parties; *B.* had a right to redeem *C.*; and to prevent another account, as to what is due upon the original mortgage, his repreſentatives ought to be before the court.

Bonham v. Newcomb, 2 Vent. 365. 1 Vern. 232. S. C. *ſupra.*

Courts of equity will never decree a foreclosure, until the period limited for payment of the money be paſſed, and the eſtate, in conſequence thereof, forfeited to the mortgagee; for it cannot ſhorten the time given by expreſs covenant and agreement between the parties, as that would be to alter the nature of the contract, to the injury of the party affected thereby.

Anonymous, 2 Ch. Ca. 244.

On a bill for foreclosure, the title of the mortgagee cannot be inveſtigated; but he will be left to purſue legal means to eſtabliſh it. And, therefore, where a mortgagee ſued to have his money, or that the defendant ſhould be barred of his equity of redemption; it happened that, by ſubſequent orders, poſſeſſion was directed to be given to the mortgagee, and contempt proſecuted for not delivering it accordingly; upon which, the heir of the mortgagor ſet forth a title in his examination, that the mortgagee would have debated, but he was not admitted; it being inſiſted, that the courſe of the court, upon ſuch a bill, was, and the court could go no farther than, to take away the equity of redemption, and leave the

mortgagee

mortgagee to ſuch title as he had at law, but could not amend it; which the Lord Chancellour agreed to, and diſcharged the contempt.

A mortgagee may bring an ejectment, at law, at the ſame time that he hath a bill of foreclosure depending; for he will not be prevented from purſuing *all* his remedies for the recovery of his debt. Booth v. Booth, 2 Atk. 344.

But ſpecial circumſtances may ariſe, which will take the caſe out of the common rule, and induce the court to grant an injunction, to ſtay proceedings upon the ejectment. Thus, where a bill was brought by the plaintiff againſt the defendant, for an account of the rents and profits of an eſtate, during the time that he was guardian to the plaintiff's brother, and for an injunction to ſtay proceedings upon an ejectment for the poſſeſſion thereof, it being mortgaged to him; the court, becauſe he was proceeding to foreclose the equity of redemption, it being entangled with an account of the perſonal eſtate, agreed to grant an injunction, provided the plaintiff conſented to give ſecurity to redeem. Ibid.

Although a mortgagee be, of right, entitled to a decree for foreclosure, after the eſtate becomes forfeited, if he act fairly, yet, if there be any injuſtice in the caſe, the court may refuſe ſuch decree. Thus, where a mortgagee, having notice of a voluntary ſettlement, procured the truſtees of the eſtate to convey to him to protect his incumbrance; the court, on a bill filed by him to foreclose the children claiming under the ſettlement, refuſed to do ſo; ſaying, that if he might be ſuffered to protect himſelf by getting in the legal eſtate, they would not carry it on by a decree in equity to foreclose. Saunders v. Dehew, 2 Vern. 271.

A mortgagee of a copyhold eſtate, who is not in poſſeſſion, may exhibit his bill againſt a mortgagor, before admittance, for a decree of foreclosure; and, after he has obtained ſuch a decree, may bring his ejectment for the poſſeſſion of the mortgaged premiſes. Sutton v. Stone, 2 Atk. 101.

Where a mortgagee is made party to a bill, praying relief is the ſame thing as praying to redeem, for redemption is the proper relief; and if, upon a reference to a Maſter to ſee what is due for principal, intereſt, and coſts, the plaintiff does not redeem the mortgagee, the court will, on his application, diſmiſs the bill, as againſt him, which is equivalent to decreeing a foreclosure. Cholmley v. Counteſs Dowager of Oxford, 2 Atk. 267.

If the heir of the mortgagee exhibit a bill to have the mortgagor pay the money, or, to be decreed to make farther aſſurance, and be foreclosed of redemption; it is a good cauſe of demurrer, that the executor of the mortgagee, who may have title to the mortgage-money, is no party. Freak v. Hearſey, 1 Ch. Ca. 51.

And, ſince it has been determined that, in all mortgages, the money belongs to the executor or adminiſtrator, and not to the heir; if it comes out, upon the hearing, that the executor or adminiſtrator are not parties, the plaintiff in the cauſe cannot be permitted to proceed. Meeker v. Tanton, 2 Ch. Ca. 29.

The executor of the mortgagor need not be party; for where, on a bill brought by a mortgagee againſt the mortgagor to foreclose, Duncomb v. Hanſley, 3 P. Wms. 333 in notes.

cloſe, it was objected, that he ought to have been a party, as it did not appear, but that he might have paid the debt; it was held by the Maſter of the Rolls and the Regiſtrar, that there was no neceſſity to make him party; becauſe, the bill being *only* to foreclose the equity, the plaintiff need *only* make *him* a party that *had* the equity, *viz.* the heir; and the courſe was ſo; neither was the mortgagee any ways bound to intermeddle with the perſonal eſtate, or to run into an account thereof; and, if the heir would have the benefit of any payment made by the mortgagor or his executor, he muſt prove it.

Clarkſon v. Bowyer *et al.* 2 Vern. 66.

But a foreclosure, obtained on a bill exhibited by the heir at law, will be binding, although the executor or adminiſtrator be not a party; for if the executor or adminiſtrator of the mortgagee ſhould afterwards come againſt the heir of the mortgagee, to have the benefit of the mortgage, the heir, in caſe the land be worth more than the money, may pay him the money, and take the benefit of foreclosure to himſelf.

Globe *et ux.* v. Earl of Carliſle, cited in the laſt caſe.

Where the heir of the mortgagee had foreclosed the mortgagor, the executor of the mortgagee being no party; upon a bill by the executor, againſt the heir of the mortgagee, and againſt the mortgagor, the land was decreed to the executor.

But it is obſervable that, in this caſe, the heir made no offer to pay the mortgage-money to the executor, which is the baſis of the reſolution in the former caſe.

Senhouſe v. Earl, 2 Vez. 450.

A plea of a decree for foreclosure in the common form, with an averment of non-payment of the money, *&c.*, *but no final order for foreclosure*, on appeal from Lord *King*, was held not to be good; for, although ſuch plea, and length of time, might be a good defence, yet, as a plea, it could not ſtand for want of a final order.

Anonymous, Barnard. 324. 2 Eq. Ca. Abr. 605. p. 38. S. C.

On a decree to foreclose at a period certain, the computation of time muſt be according to calendar months, and not according to lunar ones.

2 Atk. 103.

Although where there is a clear tenancy in tail, there is no occaſion for the remainder-man's being a party to a bill of foreclosure, yet, if there be an expreſs eſtate for life, the remainder-man ought to be a party.

Draper *et al.* v. Jennings *et al.* 2 Vern. 528.

If there be many incumbrancers, ſome of whom are not made parties to a bill to foreclose, the plaintiff, in the bill, may notwithſtanding foreclose ſuch defendants as he has brought before the court.

Sherman v. Cox, 3 Rep. Ch. 84. S. C. Nelſon's Rep. 71.

But thoſe not parties to the ſuit, will not be bound by ſuch decree.

How v. Vigures, 1 Ch. Rep. 33. 1 Eq. Ca. Abr. 318. 5.

If there be tenant for life, reverſion in fee, and he in reverſion mortgage his eſtate in fee, and the mortgagee deviſe it, the deviſee may bring his bill to foreclose againſt the mortgagor, and need not make the heir of the deviſor a party; becauſe he has no intereſt in the land, it being all deviſed away from him; and therefore the deviſee need only foreclose the mortgagor.

So,

So, where there is a clear tenancy in tail, there is no occaſion for the remainder-man being a party to a bill of foreclosure; but, if there be an expreſs eſtate for life, the remainder-man ought to be a party.] Sutton v. Stone, 2 Atk. 101.

## (F) Mortgagees and their Aſſignees, how to account, and what Allowances to make.

THE mortgagee is anſwerable in equity, when he comes into the poſſeſſion of lands, for the profits he has made of the lands, and not for the profits which he might have made, unleſs there be fraud; for it is the fault and laches of the mortgagor, that he would let the lands lapſe into the hands of the mortgagee, by the non-payment of the money, and when they do, he is only a bailiff for what he actually receives, but is not bound to the trouble and pains of making the beſt of what is another's. Chan. Ca. 258. Vern. 476.

And therefore a mortgagee ſhall not be bound by any proof, that the land was worth ſo much, unleſs it can likewiſe be proved that he did actually make ſo much of it, or might have done ſo had it not been for his wilful default; as, if he turned out a ſufficient tenant that held it at ſo much rent, or refuſed to accept a ſufficient tenant that would have given ſo much for it. Vern. 45.

[If the mortgagor make proof that the eſtate was let at *ſuch a* price, whilſt in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unleſs the mortgagee ſhew the contrary, which it is in his power to do, as being let by him. Blacklock v. Barnes, Sel. Ca. Ch. 53.

Where mortgagees or truſtees manage the eſtate themſelves, there is no allowance to be made them for their care and pains; but, if they employ a ſkilful bailiff, they will be allowed ſuch ſums as they have paid him; for a man is not bound to be his own bailiff. Bonithon v. Hockmore, 1 Vern. 316. 3 Atk. 518.

And though there be a private agreement between the mortgagee and the mortgagor, for an allowance for the mortgagee's trouble in receiving the rents and profits of the eſtate, yet the court will not carry it into execution, for equity will not allow him any more than his principal and intereſt. French Baron, 2 Atk. 120.

A mortgagee in poſſeſſion is not obliged to lay out money *any farther* than to keep the eſtate in neceſſary repair; but, if a mortgagee hath expended any ſum of money in ſupporting the right of the mortgagor to the eſtate, where his title hath been impeached, the mortgagee may certainly add this to the principal of his debt, and it will carry intereſt.] 3 Atk. 518.

If a mortgagee in poſſeſſion aſſigns over his mortgage without aſſent of the mortgagor, to an inſolvent perſon, the mortgagee is bound to anſwer the profits both before and after the aſſignment, though aſſigned only for his own debt; for he is under a truſt to anſwer the profits of the pledge, and it is a breach of truſt to aſſign ſuch pledge to a perſon inſolvent. But *quære*, if the mortgagor hides, ſo that he cannot be ſerved with a *ſubpœna* to foreclose, 3 Chan. Ca. 3. 1 Eq. Ca. Abr. 328.

cloſe, whether the mortgagee may not aſſign, and not be anſwerable for the profits after aſſignment?

Chan. Ca. 67, 258. Vern. 169. 2 Vern. 135. If the mortgagee aſſigns his mortgage, and the mortgagor comes to redeem againſt the aſſignee, all monies really paid by the aſſignee, either as principal or intereſt, ſhall be principal to the aſſignee, and ſhall bear intereſt; otherwiſe it is, if the aſſignee had not paid the money, and the aſſignment was only colourable, in order to load the mortgagor with compound intereſt.

Vern. 336. If a ſtranger get an aſſignment of a mortgage for leſs than is due, the mortgagor, or his heir, ſhall not redeem without paying all the money due; but if a man purchaſes the mortgaged lands, without notice of this incumbrance, whether he has not an equity to redeem them for what was really paid by the ſtranger is made a *quare?*

Vern. 476. But if there are ſubſequent incumbrances, or creditors in the caſe, a man who buys in a prior incumbrance, ſhall, againſt them, be allowed only what he really paid, though there was in truth a greater ſum due.

2 Vern. 516. Ramſden v. Langley. If an infant, by his guardian, endeavours to overthrow the mortgage by a ſuppoſed entail, and after a ſpecial verdict, and great agitation at law, the mortgagee prevails, and the infant brings his bill to redeem; the mortgagee having ſworn he paid and expended above 120 *l.* in defending his mortgage at law, although he had but 60 *l.* coſts allowed him there, ſhall not be held down to the taxation at law, but ſhall on the account be allowed all he laid out or expended; and if the mortgagee in this caſe, fearing that his mortgage would be defeated at law, gets adminiſtration, as principal creditor, in the ſpiritual court, he ſhall be allowed the coſts expended there alſo.

Coppring v. Cooke, Vern. 270. The mortgagee obtained judgment in ejectment, and entered on the mortgaged premiſes, and thereby prevented other creditors that had ſubſequent incumbrances from entering, and yet permitted the mortgagor to take the profits; and the other incumbrancers coming to redeem him, the court ordered, that the mortgagee ſhould be charged with all the profits he had, or might have, received ſince his entry.

Vern. 258. 267. So, where a bankrupt, before he became ſuch, had made a mortgage of his eſtate, and the aſſignees of the ſtatute brought an ejectment for recovery of the lands compriſed in the mortgage, and the mortgagee refuſed to enter, but ſuffered the bankrupt to take the profits, and to fence againſt the aſſignees with the mortgage; it was held, that the mortgagee ſhould be charged with the profits from the time of the ejectment delivered.

2 Vern. 401. Amhurſt v. Dawling. *A.* mortgaged the manor of *T.* to *B.* to which an advowſon was appendant; *B.* brought a bill to foreclose; the church became void, and he likewiſe brought a *quare impedit* at law; and on a motion to ſtay the proceedings on the *quare impedit*, the court held, that though *A.* had no bill, yet being ready, and offering to pay the principal, intereſt, and coſts; if *B.* would not accept his money, intereſt ſhould ceaſe, and an injunction to ſtay proceedings on the *quare impedit* ſhould be granted; for the mortgagee

gagee can make no benefit by preſenting to the church, nor can account for any value in reſpect thereof, to ſink or leſſen his debt; and the mortgagee therefore, in that caſe, is but in the nature of a truſtee for the mortgagor.

It was decreed, that a mortgagee having received 8 *l. per cent.* ſince the year 1660, when the intereſt was reduced by ſtatute to 6 *l. per cent.* ſhould account for the 2 *l. per cent.* over value to ſink the principal mortgage-money. But, if the principal and intereſt were overpaid, the parties muſt ſhake hands, for there ſhall be no refunding. Prec. Ch. 50. Walker v. Penrin, [This cauſe was firſt brought to a hearing before Lord Chancellour Nottingham, on the mortgagee's bill to foreclose, and he being of opinion, that the two *per cent.* ſhould go towards ſinking the principal, the then plaintiff diſmiſſed his bill. Afterwards, the mortgagor brought his bill to redeem, and that coming to a hearing before the Lord Chancellour Jeffries, he was of opinion, that the eight *per cent.* being paid, and received as intereſt, no part of it ought to be applied to ſink the principal; and that the ſtatute had no retroſpect beyond 1660, but looked forward to contracts and agreements then after to be made, and not to any contracts or agreements before that time, and decreed the account to be taken accordingly. 2 Vern. 78. But, upon a bill of review, Rawlinſon and Hutchins, Lords Commiſſioners, held, that the decree ſhould be reverſed, againſt Lord Trevor. 2 Vern. 145. It ſeems, however, to be now ſettled, that the ſtatute of 12 Ann. c. 16. which reduces the intereſt of money to 5 *l. per cent.* has not a retroſpect to any debts contracted before, but that they ſhall carry intereſt according to the intereſt allowed, or agreement made at the time when the debt was contracted. 1 Eq. Ca. Abr. 288.]

*A.* makes a jointure of an equity of redemption, and afterwards becomes a bankrupt, the commiſſioners aſſign this equity of redemption, and the aſſignees ſtate an account. The jointreſs brings her bill to be relieved, alleging combination between the aſſignees and the mortgagee, and that they had allowed more money than was due on the mortgage. Lord Keeper—The aſſignees ſtand in the place of the huſband, and the account ſtated by them ought to be as concluſive as if ſtated by the huſband, and the charge is not right in the bill, being too general. However, the plaintiff had leave to amend her bill. Vern. 179. Knight v. Bampfield.

Mortgagor and mortgagee ſettled an account before a maſter, and now a ſubſequent mortgagee ſues for a new account, ſuppoſing the former account to be falſe, and made by conſent, but did not inſiſt upon any particulars; and the Lord Chancellour declared, that the account ſhould bind the ſecond mortgagee, if the fraud and colluſion were anſwered. Chan. Ca. 299. Needler v. Deeble.

[But the account between the mortgagee and aſſignee will not conclude the mortgagor; but it will be referred to the Maſter to ſee what was really due, on making the aſſignment, and what money was *actually* paid thereon. 1 Chan. Ca. 68.]

An account on a bill to redeem or foreclose, taken in a cauſe, in which tenant for life of the equity of redemption is party, and when no other perſon is entitled, will be binding on any contingent remainder-man, when his title afterwards veſts; nor ſhall be open it, unleſs fraud or errors are ſhewn therein; for thereby accounts upon mortgages, to which all who can claim the equity of redemption are parties, would often be infinite. But, if a reaſonable objection be made againſt ſuch account, the court will ſo far open it. But the court will only give leave to ſurcharge and falſify the account; which often happens upon ſettlements, where there is tenant for life with limitations in remainder, upon a bill for 1 Vez. 164.

for an account, when none but tenant for life is in being, a child afterwards coming *in esse*, ſhall, if no fraud, only have liberty to ſurcharge and falſify.

Knight v. Bamfield *et al.* 1 Vern. 179.

And where a man made a mortgage, and, after a forfeiture for non-payment of the mortgage-money, married, and conveyed the equity of redemption to truſtees, to the uſe of himſelf for life, remainder to his wife for her jointure; and afterwards became a bankrupt; and the commiſſioners aſſigned the equity of redemption in truſt for the creditors, and the aſſignees ſtated an account with the mortgagee: The jointreſs brought her bill to be relieved againſt this account, alleging, that it was not fairly ſtated, but that the aſſignees, by combination with the mortgagee, had allowed more money than was really due on the mortgage; and the defendant pleaded this ſtated account: *per* Lord Keeper, the aſſignees ſtand in the place of the huſband, and the account by them ſtated ought to be as concluſive as if it had been ſtated with the huſband; and the bill is not right in charging a general fraud in the ſtating of this account, but the plaintiff ought to have aſſigned particular errors in the account.

Earl of Macclesfield v. Fitton, 1 Vern. 168. *Infra*, 427.

Where, upon the aſſignment of a mortgage, the debt was ſtated between the aſſignee, the mortgagee, and ſome of the coheirs that were looked upon to have a right to the redemption; it was inſiſted, that this ought to conclude the plaintiff, who claimed as deviſee under the will of the mortgagor, as a ſtated account: but he being no party thereto, that was over-ruled by the court.

Pearſon v. Pulley, 1 Chan. Ca. 102.

An aſſignee, after ſeveral aſſignments, will not be obliged to account for profits before his own time. Thus, where on a bill to redeem a mortgage made in 1632, it was inſiſted by the defendant, that he came in as an aſſignee at the third hand, and therefore that it would be hard to put him to an account *then*; the Lord Keeper ſaid, that as there had been no ſtint put to the time at which a mortgage was to be redeemed, the defendant ſhould account; but, in regard he came in at an old hand, it ſhould not be taken, but ſo far only as went in diſcount of his money, *not* for the ſurpluſage.

Cloberry v. Symonds, 2 Ch. Rep. 392.

So, where lands were extended in 1625, and held in extent, and then a bill was exhibited to redeem, and the lands not being redeemed, that bill was diſmiſſed in 1641; afterwards, he who had the extent, by virtue of the diſmiſſion, ſold the premiſes to the defendant, and the plaintiff having ſince bought the equity of redemption, came to redeem; the court, notwithſtanding the diſmiſſion, and length of time, ordered an account from the purchaſe not from any time before, but till then the profits to go againſt the intereſt.

Badham v. Odell, 4 Brown's Parl. Ca. 447. S.C. *infra*.

An account taken by a maſter upon a decree in a bill of revivor brought by an infant heir, will bind the heir, unleſs he can ſurcharge or falſify.

Gould v. Tancred, 2 Atk. 534.

Where the yearly rents and profits of an eſtate in mortgage greatly exceed the intereſt of the money lent, reſts are annually made on making up the account, and the ſurplus applied to ſink

the principal. But as this is often attended with great hardſhips to mortgagees (eſpecially when the ſum is large, and the mortgagee forced to enter upon the eſtate, and then can only ſatisfy his debt by parcels, and is a bailiff to the mortgagor, without ſalary, ſubject to an account) the Maſter is not obliged, on every ſmall exceſs of intereſt, to apply it to ſink the principal; nor has the court ever laid it down as an invariable rule, that the Maſter muſt always, in taking ſuch account, make annual reſts.

It is the conſtant practice of the court of Chancery, in decrees againſt a mortgagee upon a bill for redemption, or againſt an executor to account, to direct it with future words, to wit, to account for what they have received, or might have, if it had not been for their own default; and yet if the perſon, decreed to account, receive any thing ſubſequent to the decree, it is inquirable before the Maſter, and the defendants in ſuch caſe muſt bring ſuch ſums ſo received to account. Balſtrode v. Bradley, 3 Atk. 582.

*Thomas Odell*, an infant, to whom the equity of redemption of a mortgage for years deſcended on the death of his father, (who had exhibited his bill in the court of Exchequer in *Ireland*, againſt the mortgagee and his aſſignee, to redeem the premiſes, and for an account of the money due on the mortgage,) filed his bill of revivor; the cauſe was heard, and the court decreed, that it ſhould be referred to the Remembrancer, to ſtate and ſettle an account; who made his report, that 1883 *l.* 18 *s.* was due for principal *and intereſt*, which, there being no objections made, or exceptions taken thereto, was abſolutely confirmed. And the cauſe coming on for farther hearing, it was decreed, that upon the mortgagor's paying the ſum of 1883 *l.* 18 *s.* ſo reported due, *with intereſt for the ſame*, from the time of the report being confirmed *abſolute*, the premiſes ſhould be reconveyed, and all bonds and ſecurities delivered up. Afterwards, *Odell* neglecting to pay the money reported due, or any intereſt for the ſame, the mortgagee, who had likewiſe had a ſuit depending, filed an amendment and ſupplemental bill, in order to have the benefit of the decree, by a ſale or abſolute foreclоſure; and therein, in regard the account of what was due on the ſaid mortgage had been ſtated in the former cauſe, prayed to have the benefit thereof, and that the account ſhould be taken, in his preſent ſuit, on the foot of the report or decree made in the former ſuit. To this bill *Odell* put in his anſwer, and thereby, amongſt other things, admitted the former report, decree, and proceedings; but inſiſted that, apprehending he was much aggrieved by thoſe proceedings, he choſe to have his bill, upon which the ſaid decrees were made, diſmiſſed, rather than ſubmit thereto. Afterwards, the cauſe came on to be heard, when the court declared, they were of opinion that the defendant, the minor, was not to be concluded by the account taken in the ſaid former cauſe; but, that the plaintiff was entitled to an account, as between mortgagor and mortgagee; and therefore decreed, that it ſhould be referred to the Chief Remembrancer, or his deputy, to audit, and ſtate an account between the plaintiff and defendant, on the foot of the mortgages and ſecurities in the pleadings Baddam v. Odell an infant, and Fitzmaurice his guardian, 4 Brown's Parl. Ca. 447.

ings mentioned, in which account both parties were to have all juſt allowances. From this decree, the mortgagee appealed, inſiſting, that the infant ought to be concluded by the account, taken in the former cauſe, on a bill originally brought by his father, revived, and carried on by himſelf, confirmed by ſubſequent orders of the court, and ſigned and enrolled; and that he ought not to be permitted to waive or vary the ſame, eſpecially when neither fraud nor error in the account were even ſuggeſted. And ſo it was adjudged, as to that point, and the decree reverſed; and it was farther ordered, that the account taken upon the former decree ſhould ſtand, with liberty for the infant to ſurcharge, or falſify the ſame; and that, in caſe of any ſurcharge, or falſification, the Remembrancer ſhould deduct ſo much as ought to be deducted on account thereof; and that the Remembrancer ſhould carry on the account of the *ſubſequent intereſt, from the time of the confirmation of the former report*, for the ſum thereby reported due, after ſuch deductions made thereout as aforeſaid.]

Abr. Eq. 287. Earl of Cheſterfield v. Lady Cromwell. [On a bill, that an infant might redeem a mortgage, or be foreclоſed; it was decreed, upon the hearing, to an account, and that the infant ſhould pay what was reported due, unleſs he ſhewed cauſe to the contrary ſix months after he came of age. A report was made, and confirmed, of 2600 *l.* due; and upon a ſubſequent order being made to compute intereſt, the Lord Keeper doubted, whether intereſt ought to be allowed for the intereſt. Bennet v. Edwards, 2 Vern. 392.]

*J. S.* mortgaged his eſtate to the plaintiff, and died, leaving the defendant his daughter and heir, who was an infant, and had nothing to ſubſiſt on but the rents of the mortgaged eſtate; and the intereſt being ſuffered to run in arrear three years and a half, the plaintiff grew uneaſy at it, and threatened to enter on the eſtate, unleſs his intereſt might be made principal; upon which the defendant's mother, with the privity of her neareſt relations, ſtated the account, and the defendant herſelf, who was then near of age, ſigned it; and the account being admitted to be fair, it was held by my Lord Chancellour, that though regularly intereſt ſhall not carry intereſt, yet that in ſome caſes, and upon ſome circumſtances, it would be injuſtice if intereſt ſhould not be made principal; and the rather in this caſe, becauſe it was for the infant's benefit, who, without this agreement, would have been deſtitute of ſubſiſtence.

Brown v. Barkham, 1 P. Wms. 652.

[In general, intereſt ſhall not carry intereſt upon a mortgagor's ſigning an account, whereby he admits ſo much due for intereſt; becauſe that of itſelf does not ſhew any agreement, or intent to alter the intereſt or nature of that part of the debt, or to turn it into principal; nor does it appear to have ever been ſo determined; for it ſeems, that, to make intereſt on a mortgage principal, it is requiſite there ſhould be a *writing* ſigned by the parties, *the eſtate in the land being to be charged therewith.*

Howard v. Harris, 2 Ch. Ca. 147 to 150.

Lord Keeper *North* was of opinion, in the caſe of *Howard* v. *Harris*, that if there were a covenant in the mortgage-deed for payment of the intereſt, upon which an action of debt would lie, the court would allow intereſt on intereſt, though no account was taken before a Maſter. In that caſe, a mortgage for 1000 *l.* had been made upon a reverſion ten years, and in the deed there were covenants for payment of the principal and 60 *l. per annum* intereſt,

tereſt, and 7 *l. per annum* rent was *only* reſerved; and it was urged, that the mortgagee, againſt whom the bill was exhibited to redeem, ought, in this caſe, to have intereſt upon intereſt, otherwiſe he would be a great loſer. To which it was anſwered, that the bill had been filed ſix years, and that the mortgagee had, by anſwer, oppoſed the redemption, and therefore, from that time, he had no pretence for an allowance of intereſt for his damages; and that it was never known in the court that intereſt upon intereſt was at any time allowed in ſuch caſe. But the Lord Keeper was clearly of opinion, that as to ſo much intereſt as was reſerved in the body of the deed, that ſhould be reckoned principal; for it being aſcertained by the deed, an action of debt would lie for it, and therefore it was reaſonable that there ſhould be damages given for the non-payment of that money. As to what had been urged, that this had never been practiſed, and that there was not any ſuch precedent in the court, and that if this were to be eſtabliſhed for a rule, every ſcrivener would reſerve all his intereſt half-yearly, from time to time, as long as the money ſhould be continued out upon the ſecurity, which would be to change the law and practice of the court, and make all mortgagors pay intereſt upon intereſt; the Lord Keeper ſaid, that he was clear in the diſtinction between debt and damages, and he ſaw no inconvenience that could enſue; it would ſerve only to quicken men to pay their juſt debts. And it was decreed accordingly, that after a deduction of the yearly rents of the mortgaged premiſes out of the 60 *l.* a-year, payable for the intereſt, the defendant ſhould be allowed intereſt for the reſidue of the ſaid 60 *l.* a-year, *for which* the mortgagee might have *ſued at law*, and *recovered damages*.] S.C. 1 Vern. 194. 1 Vent. 364.

If *A.* mortgages for 450 *l.* payable at the end of five years, with intereſt at 5 *l. per cent.* in the mean time, and about two months before the end of the five years, the mortgagee aſſigns over the mortgage for 560 *l.*, being the principal and intereſt then due, the 560 *l.* ſhall carry intereſt, though the five years were not elapſed, the mortgage being forfeited by the non-payment of intereſt. 2 Vern. 135. Gladman v. Henchman.

[A bill was to have the redemption of a mortgage of the manors of *B.* and *S.*, in the county of *C.*, which mortgage had been aſſigned to *F.*; one point was, Whether, there being great arrears due at the time of the aſſignment, which were paid by *F.*, the money paid for intereſt, *then* in arrear, ſhould be reckoned principal as to him, and carry intereſt with it? And it was inſiſted for the mortgagor, that intereſt was never made principal, in ſuch caſe, unleſs the mortgagor had joined in the aſſignment; and the caſe of *Porter* and *Hubbart* was cited, where, in a like caſe, it was decreed that intereſt ſhould be reckoned principal; but the decree was reverſed in the Houſe of Lords, becauſe the executor of the mortgagor was no party. But the Lord Keeper ſaid, *that* precedent could not weigh much with him; he was of counſel therein, and it was hard in all its circumſtances. For although he thought it reaſonable, that the intereſt paid upon the aſſignment ſhould be reckoned principal, yet he would not now make a new Earl of Macclesfield v. Fitton, 1 Vern. 168. Porter v. Hubbart, 2 Ch. Rep. 86.

ings mentioned, in which account both parties were to have all juſt allowances. From this decree, the mortgagee appealed, inſiſting, that the infant ought to be concluded by the account, taken in the former cauſe, on a bill originally brought by his father, revived, and carried on by himſelf, confirmed by ſubſequent orders of the court, and ſigned and enrolled; and that he ought not to be permitted to waive or vary the ſame, eſpecially when neither fraud nor error in the account were even ſuggeſted. And ſo it was adjudged, as to that point, and the decree reverſed; and it was farther ordered, that the account taken upon the former decree ſhould ſtand, with liberty for the infant to ſurcharge, or falſify the ſame; and that, in caſe of any ſurcharge, or falſification, the Remembrancer ſhould deduct ſo much as ought to be deducted on account thereof; and that the Remembrancer ſhould carry on the account of the *ſubſequent intereſt, from the time of the confirmation of the former report*, for the ſum thereby reported due, after ſuch deductions made thereout as aforeſaid.]

Abr. Eq. 287. Earl of Cheſterfield v. Lady Cromwell. [On a bill, that an infant might redeem a mortgage, or be foreclоſed; it was decreed, upon the hearing, to an account, and that the infant ſhould pay what was reported due, unleſs he ſhewed cauſe to the contrary ſix months after he came of age. A report was made, and confirmed, of 2600 *l.* due; and upon a ſubſequent order being made to compute intereſt, the Lord Keeper doubted, whether intereſt ought to be allowed for the intereſt. Bennet v. Edwards, 2 Vern. 392.]

*J. S.* mortgaged his eſtate to the plaintiff, and died, leaving the defendant his daughter and heir, who was an infant, and had nothing to ſubſiſt on but the rents of the mortgaged eſtate; and the intereſt being ſuffered to run in arrear three years and a half, the plaintiff grew uneaſy at it, and threatened to enter on the eſtate, unleſs his intereſt might be made principal; upon which the defendant's mother, with the privity of her neareſt relations, ſtated the account, and the defendant herſelf, who was then near of age, ſigned it; and the account being admitted to be fair, it was held by my Lord Chancellour, that though regularly intereſt ſhall not carry intereſt, yet that in ſome caſes, and upon ſome circumſtances, it would be injuſtice if intereſt ſhould not be made principal; and the rather in this caſe, becauſe it was for the infant's benefit, who, without this agreement, would have been deſtitute of ſubſiſtence.

Brown v. Barkham, 1 P. Wms. 652.

[In general, intereſt ſhall not carry intereſt upon a mortgagor's ſigning an account, whereby he admits ſo much due for intereſt; becauſe that of itſelf does not ſhew any agreement, or intent to alter the intereſt or nature of that part of the debt, or to turn it into principal; nor does it appear to have ever been ſo determined; for it ſeems, that, to make intereſt on a mortgage principal, it is requiſite there ſhould be a *writing* ſigned by the parties, *the eſtate in the land being to be charged therewith.*

Howard v. Harris, 2 Ch. Ca. 147 to 150.

Lord Keeper *North* was of opinion, in the caſe of *Howard* v. *Harris*, that if there were a covenant in the mortgage-deed for payment of the intereſt, upon which an action of debt would lie, the court would allow intereſt on intereſt, though no account was taken before a Maſter. In that caſe, a mortgage for 1000 *l.* had been made upon a reverſion ten years, and in the deed there were covenants for payment of the principal and 60 *l. per annum* intereſt,

tereſt, and 7 *l. per annum* rent was *only* reſerved; and it was urged, that the mortgagee, againſt whom the bill was exhibited to redeem, ought, in this caſe, to have intereſt upon intereſt, otherwiſe he would be a great loſer. To which it was anſwered, that the bill had been filed ſix years, and that the mortgagee had, by anſwer, oppoſed the redemption, and therefore, from that time, he had no pretence for an allowance of intereſt for his damages; and that it was never known in the court that intereſt upon intereſt was at any time allowed in ſuch caſe. But the Lord Keeper was clearly of opinion, that as to ſo much intereſt as was reſerved in the body of the deed, that ſhould be reckoned principal; for it being aſcertained by the deed, an action of debt would lie for it, and therefore it was reaſonable that there ſhould be damages given for the non-payment of that money. As to what had been urged, that this had never been practiſed, and that there was not any ſuch precedent in the court, and that if this were to be eſtabliſhed for a rule, every ſcrivener would reſerve all his intereſt half-yearly, from time to time, as long as the money ſhould be continued out upon the ſecurity, which would be to change the law and practice of the court, and make all mortgagors pay intereſt upon intereſt; the Lord Keeper ſaid, that he was clear in the diſtinction between debt and damages, and he ſaw no inconvenience that could enſue; it would ſerve only to quicken men to pay their juſt debts. And it was decreed accordingly, that after a deduction of the yearly rents of the mortgaged premiſes out of the 60 *l.* a-year, payable for the intereſt, the defendant ſhould be allowed intereſt for the reſidue of the ſaid 60 *l.* a-year, *for which* the mortgagee might have *ſued at law*, and *recovered damages*.] S.C. 1 Vern. 194. 1 Vent. 364.

If *A.* mortgages for 450 *l.* payable at the end of five years, with intereſt at 5 *l. per cent.* in the mean time, and about two months before the end of the five years, the mortgagee aſſigns over the mortgage for 560 *l.*, being the principal and intereſt then due, the 560 *l.* ſhall carry intereſt, though the five years were not elapſed, the mortgage being forfeited by the non-payment of intereſt. 2 Vern. 135. Gladman v. Henchman.

[A bill was to have the redemption of a mortgage of the manors of *B.* and *S.*, in the county of *C.*, which mortgage had been aſſigned to *F.*; one point was, Whether, there being great arrears due at the time of the aſſignment, which were paid by *F.*, the money paid for intereſt, *then* in arrear, ſhould be reckoned principal as to him, and carry intereſt with it? And it was inſiſted for the mortgagor, that intereſt was never made principal, in ſuch caſe, unleſs the mortgagor had joined in the aſſignment; and the caſe of *Porter* and *Hubbart* was cited, where, in a like caſe, it was decreed, that intereſt ſhould be reckoned principal; but the decree was reverſed in the Houſe of Lords, becauſe the executor of the mortgagor was no party. But the Lord Keeper ſaid, *that* precedent could not weigh much with him; he was of counſel therein, and it was hard in all its circumſtances. For although he thought it reaſonable, that the intereſt paid upon the aſſignment ſhould be reckoned principal, yet he would not now make a new Earl of Macclesfield v. Fitton, 1 Vern. 168. Porter v. Hubbart, 2 Ch. Rep. 86.

precedent. However, his Lordſhip directed the defendant's counſel to ſearch for precedents, and ſaid, that if they could find any one, he would follow it in this caſe; but no ſuch precedent could be found.

Aſhenhurſt v. James, 3 Atk. 271.

But, where creditors procure a decree for ſale of an eſtate before a Maſter, and one, (by conſent of all parties entitled to the eſtate, being confirmed the beſt bidder by authority of the court, all the incumbrancers agreeing he ſhall be purchaſer) takes an aſſignment of all incumbrances; in this caſe, he will be a creditor of the mortgagor for the whole ſum, as well what he paid for intereſt due, as for principal, together with intereſt upon the intereſt, their conſent being the ſame thing, as if they had been made parties to the aſſignment.

Proctor v. Cooper, Prec. Ch. 116. Trin. 1700.

But, where *G.*, in 1641, made a mortgage in fee of lands, worth about 30 *l. per annum*, to *C.*, to ſecure 300 *l.*; in 1652, the mortgagee took poſſeſſion, and in 1660 deviſed the lands to *A.*; in 1680 the deviſee brought a bill to foreclose: the wife of the mortgagor had recovered a third part, as dower, againſt the mortgagee, ſo that the profits did not anſwer the intereſt of the money, which was then 8 *l. per cent.*, and there had been infancies on the plaintiff's part for ſeveral years: the Maſter of the Rolls decreed the plaintiff to redeem, and pay 8 *l. per cent. only*, that being then legal intereſt; and ſaid, that, though the profits were not ſufficient to anſwer the intereſt, yet the arrears could not carry intereſt, although the coſts and charges muſt.

Bacon v. Clerk, 1 P. Wms. 478. Prec. Ch. 500. S.C. Eq. Ca. Abr. 530. 9.

A Maſter's report, computing intereſt, makes that intereſt principal, and to carry intereſt; for a report is as the judgment of the court, and appoints a day for the payment, carrying on intereſt to that day; and the party's diſobedience to the court, in not complying with the time of payment, ought to ſubject him to intereſt.

1 P. Wms. 453. 480. Kelly v. Lord Bellew, 1 Brown's Parl. Ca. 202. *Ibid.* 566. Moſely, 27. Abr. 530.

But the report muſt be confirmed; for, where *A.*, the defendant, inſiſted that 800 *l.* was owing to him, and, upon the Maſter's report, only 180 *l.* appeared due; the court ordered intereſt for that ſum, from the time of confirming the report abſolute, *and not before*; becauſe, until then, it was not any liquidated ſum.

Attorney General v. Iſlington Overſeers et al. 1 P. Wms. 376-7. 2 Eq. Ca.

Moſely, 247.

Where creditors are decreed to be paid according to their priority, if the eſtate is deficient, the principal only ſhall bear intereſt after the confirmation of the report.

Harris v. Harris, 3 Atk. 722.

And although the report *be* confirmed, yet, if the ſuit be for a ſale, and not to foreclose, intereſt ſhall not carry intereſt, if there be other mortgagees, and bond creditors, parties thereto. Thus, the plaintiff, a mortgagee, brought a bill, in conjunction with ſeveral bond creditors, againſt the heir at law of the mortgagor, for a ſale of the mortgaged premiſes, and had a decree accordingly, with a direction to pay the mortgagee his principal and intereſt in the firſt place. The Maſter made a report of a ſtated ſum due, which was confirmed; the mortgagee then moved, that the Maſter might compute ſubſequent intereſt and coſts upon the ſum

ſum reported due. There was not near enough ariſing from the ſale, to pay the ſecond mortgagee and the bond creditors. The reſt of the creditors and the mortgagor oppoſed this motion, and endeavoured to ſhew a difference between the preſent bill and a bill of foreclоſure, inſiſting, that, in the latter, the court directs the Maſter to allow ſubſequent intereſt upon the ſum reported due, becauſe it is a compenſation to the mortgagee for being kept out of his money, by the court's allowing time to the mortgagor to redeem; but that here a ſale was directed in the firſt inſtance, and the intereſt of the other creditors was concerned; therefore, it would be hard to give intereſt upon intereſt in favour of one creditor, to the prejudice of the reſt. And the Lord Chancellour allowed the diſtinction, ſaying, that it would be rather too much to give ſuch an advantage to the mortgagee over the reſt of the creditors, eſpecially as the mortgage carried 5 *l. per cent*, and propoſed to the counſel, that, from the time of the Maſter's report being confirmed, it ſhould carry only 4 *l. per cent.*, in which the plaintiff acquieſced.

Where the court enlarges the time for a mortgagor, or a ſubſequent mortgagee, that is a favour, for they would otherwiſe be foreclоſed, and it is but juſt and reaſonable they ſhould pay for it, and that the firſt mortgagee ſhould be no loſer thereby; therefore, if on a bill to foreclоſe, principal, intereſt, and coſts, are lumped into one ſum by a Maſter; if the mortgagor, or a puiſne mortgagee, pray longer time to redeem, they always pay intereſt for the whole ſum.] Moſeley, 246, 247.

If the mortgagor tenders the money, and the mortgagee refuſes, he loſes the intereſt from the time of the tender; becauſe it is but a pledge for the money, and if the money be tendered, he ought not to keep the pledge; and no man ought to pay for the forbearance when he hath the money ready. Chan. Ca. 29. 2 Chan. Ca. 206.

The plaintiff had made a mortgage in fee of his eſtate, which by ſeveral meſne aſſignments was come to Sir *William Dodwell*, and there being likewiſe two ſeveral terms for years ſtanding out, they were aſſigned to truſtees, in truſt for Sir *William Dodwell* to protect the inheritance, and ſubject to the ſame equity of redemption: The plaintiff and Sir *William* ſettled an account of what was due; and there appearing to be due thereon 4400 *l.* principal money, the intereſt was then paid off, and at the ſame time Sir *William Dodwell* gave a note, whereby he promiſed, that on payment of the ſum of 4479 *l.*, or thereabouts, on the 23d *October* then next, being the intereſt computed to that time, he would reconvey the inheritance to the plaintiff and his heirs, and would procure his truſtees to aſſign the two terms for years, as the plaintiff ſhould direct. In *Auguſt* following Sir *William Dodwell* died, and the defendants were his executors; and he likewiſe left the defendant *Mary*, his only child and heir at law, an infant of about eight years of age; the plaintiff provided the money, and on the 23d of *October* tendered a bank-bill of 4500 *l.* to one of the executors (there being four in all), for him to take thereout what was then due for principal and intereſt; but the executors having none Abr. Eq. 318, 319. Sir John Auſten v. Executors of Sir William Dodwell.

none of them proved the will, he refuſed to accept the tender; upon which the plaintiff aſked him, if he objected to the legality of the tender, being in a bank-bill and not in money, and that if he did, he would immediately turn it into money; to which the other anſwered, he had no objection to the tender, but, not having proved the will, he could not accept of the money. Afterwards the plaintiff made the like tender to another of the executors, who likewiſe refuſed to accept of it, not having proved the will; but he objected to the legality of the tender, not being in money. Afterwards all the four executors proved the will; and the bill was brought to redeem, on payment of 4400 *l.* and intereſt, to the 23d *October*, being the time mentioned in the note, and that the plaintiff might not be obliged to pay intereſt beyond that time, as the executors inſiſted he ought. And it was held by my Lord Chancellour, that this tender in a bank-note was not, ſtrictly ſpeaking, a legal tender (*a*); but ſince it was proved the plaintiff offered to turn it into money, that made it a good tender. 2dly, It was clearly agreed, that any or either of the executors, before probate, might have received, and given a good diſcharge for the money, eſpecially when, as appeared in this caſe, they afterwards proved the will, and ſo were executors *ab initio*. 3dly, That though they were executors only in truſt for the daughter, who was an infant, yet none of them could be in a better caſe than Sir *William Dodwell* himſelf would have been, if he had been living; and as ſuch tender, under theſe circumſtances, would have bound him, ſo it will his executors and deviſee; and therefore decreed a redemption on payment of the 4400 *l.* and intereſt to the 23d *October*, the time mentioned in the note, and no longer, and no coſts on either ſide: and the infant, heir at law, on payment of the money to the executors, was to convey the inheritance deſcended to her, according to the act 7 *Ann. c.* 19. for obliging infant truſtees and mortgagees to aſſign and convey.

(*a*) Although it hath never yet been determined, that bank-notes are a legal tender, yet the court of King's Bench have holden, that if ſuch notes are preſented in payment, and no objection made to the receipt on that account, they are a *good tender*. Wright v. Reed, 3 Term Rep. 554.

[Although, according to the above caſe, a mortgagee, refuſing to receive his money on tender, after forfeiture, will loſe his intereſt from the time of the tender; yet notice of paying off the mortgage muſt have been given to the mortgagee, at leaſt *ſix calendar months* before, and the money muſt have been tendered on the day of the determination of that notice; for where the mortgagor omitted to tender the money on the *very* day on which the notice expired, and, in conſequence thereof, the mortgagee refuſed the tender, the payment of the intereſt was held by Lord *Hardwicke* not to be *thereby* ſuſpended; for that by the omiſſion of the mortgagor, the mortgagee was become entitled to a farther notice of *ſix calendar months*, at the expiration of which a ſtrict tender muſt be made.

Hix v. Ling, before Lord Hardwicke, 2 Pow. Mortg. 256.

But, it ſeems, the plaintiff ought to make oath, that the money was always ready, and no profit was made of it; which may be controverted by the mortgagee, who may prove the contrary; namely, that the mortgagor was not ready to pay it, in which caſe the intereſt muſt run on.

Sutton v. Rodd, 2 Ch. Ca. 206. Gyles v. Hall, 2 P. Wms. 378.

A ten-

A tender must be made by a person actually interested; and, accordingly, it was said by *Coke* to have been adjudged, *Trin.* 27 *Eliz.* that, where one, who was not guardian, nor was to have any interest in the land, tendered money upon a mortgage for an infant, it was adjudged a void tender. Watkins v. Ashwicke, Cro. Eliz. 132. The above case is reported more at large in Owen, by the name of Watkins and Astwick, and is thus stated: A man made a feoffment on condition, that if he, his heirs or executors, did pay 100 *l.* before such a day, that he might re-enter; the feoffor died, his heir within age; the mother, without any notice to the son, requested *I. S.*, that he would pay the money for her son. All this was found by special verdict, but it was not found of what age the son was. Clinch said, that if the jury had found, that the son was of the age of seventeen years, the payment had been good. But by Wray, if a bond be upon condition, that the obligor or his heirs shall pay 100 *l.*, and the obligor die, his heir within age, I conceive payment by the guardian, or by some other friend, is good. And afterwards, all the justices agreed, that if the infant were within the age of fourteen years, the tender of the money by his mother had been good, but otherwise if he had been more than fourteen years of age; and because no age was proved, but that he was within age, it should not be intended that he was within the age of fourteen years; and therefore, they advised the party to begin *de novo*, and that it might be found, that the infant was within the age of fourteen years. Owen, 137.

The money being a sum in gross, and collateral to the title of the land, the mortgagor must tender it to the *person* of the mortgagee, and it is not sufficient for him to tender it *upon the land*. Co. Lit. 210. b. 2 Eq. Ca. Abr. 603. 34.

But, if a time and place for payment of the money be appointed, in that case he need not seek for the mortgagee, or be in any other place but in that comprised in the indenture, or there longer than the time specified therein. Co. Lit. 211. b. 212.

And so it is, although a place be not appointed in the proviso, if the mortgagor give notice *where* he will pay it off. Thus, where the mortgagor gave personal notice, in writing, to the defendant the mortgagee, that he would tender the money and interest between the hours of ten and twelve in the morning, at *Lincoln's Inn Hall*, at a day and hour appointed therein, which accordingly was done; it was objected, that *Lincoln's Inn Hall* was not named in the proviso in the mortgage-deed, as the place for payment, and therefore, that the tender must be to the person; but it was held, that the money being lent in town, it would be very hard, after personal notice being given for payment thereof, and no objection made by the mortgagee to the place at the time of notice, to make the mortgagor travel with this sum of money to *Oxford*, where the mortgagee lived. Gyles v. Hall, 2 P. Wms. 378.

In some cases, a tender at the house of the mortgagee will be sufficient. Thus, where there was a mortgage, and the mortgagor afterwards meeting the mortgagee, said to him, I have monies now, I will come and redeem the mortgage; to which the mortgagee replied, he would hold the mortgaged premises as long as he could, and then when he could hold them no longer, let the devil take them if he would. Afterwards the mortgagor went to the mortgagee's house with money, more than sufficient to redeem, and tendered it there, but it did not appear that the mortgagee was within, or that the tender was made to him; the court decreed a redemption, and that the defendant should have no interest from the time of the tender, because of his wilfulness. And a like determination was made, in the case of *Peckham* and Haley. Manning v. Burgess, 1 Ch. Ca. 29.

But, if there be a deed of aſſignment preſented to be executed, at the time when the tender is made, in which there are covenants, the mortgagee is entitled to lay them before his attorney, and ſhall have reaſonable time allowed him ſo to do before the intereſt ſhall ſtop. Thus, a bill was brought, in *May* 1742, to redeem a mortgage, in which the plaintiff inſiſted upon a redemption, on paying the principal money only, for that the intereſt ought to determine in *February* 1741, becauſe he had given ſix months notice to pay it off, and had, on that day, tendered the principal and intereſt, with a deed of aſſignment, but the defendant abſolutely refuſed to take the money: the defendant ſwore, that he offered to take the money, provided he might have time to conſider of it, and to adviſe upon the deed of aſſignment, there being covenants therein on his part, upon which, as he was not of the profeſſion of the law, it was reaſonable he ſhould conſult his attorney, whether they were ſuch as he might ſafely execute. And the Lord Chancellour ſaid, that the plaintiff, not having ſent a draught of the aſſignment to the defendant any time before the money was tendered, as he ought to have done, he was in the wrong; for where there were covenants on the part of the mortgagee, it was very reaſonable that he ſhould have ſome time to look them over; the plaintiff's attorney ought to have left the deed for a week with the defendant, that he might have had an opportunity to adviſe upon it, and ſhould have appointed a time to pay the money, after the defendant had had ſufficient time to conſider it. And his Lordſhip decreed the mortgage-money, with intereſt, to be paid within ſix months, otherwiſe the plaintiff's bill to ſtand diſmiſſed.

Wiltſhire v. Smith, 3 Atk. 90.

So, if there be a controverſy, to whom the equity of redemption belongs, no aſſignment can be made until that point is ſettled; therefore the intereſt of the mortgage will not ceaſe, although the money be tendered to the mortgagee, and he refuſe it.

Sharpnel v. Blake, 2 Eq. Ca. 603. 34.

Lord *Milton*, being poſſeſſed, under a conveyance from his father, of divers mortgaged premiſes, and all the ſecurities for the ſame, and entitled to all the money due thereon, filed his bill in the court of Exchequer in *Ireland*, in *June* 1764, againſt *Moore Edgeworth* and *Damer Edgeworth*, infants, heirs to the mortgagor, praying the benefit of the proceedings in a former cauſe, and for an account; and that the money which ſhould appear due thereon might be paid the plaintiff by a ſhort day, or that the defendants might be foreclоſed, and the mortgaged premiſes ſold, for payment of what ſhould appear due. The defendants, by their anſwer to this bill, admitted moſt of the matters therein ſtated; but inſiſted upon the benefit of an agreement, which they alleged had been made between the plaintiff's father, *John Damer*, and the father of the defendants, for reducing the intereſt of the ſaid mortgages, which, by the deed, was originally at 8 *per cent.* to 6 *per cent.* Iſſue being joined in the cauſe, ſeveral witneſſes were examined, and the ſame came on to be heard in *November* 1771; when (upon reading an anſwer put in by the ſaid *John Damer*, in 1758, to a bill, filed againſt him by the defendant's father in 1757, whereby the former admitted, that, pending a former ſuit, the ſaid de-

Lord Milton v. Moore Edgeworth and Damer Edgeworth, infants, 6 Brown's Ca. Parl. 580.

fendant

fendant's father had told the said *John Damer*, "That the debts, "affecting the eſtates mortgaged, were ſo great, that if *John* "*Damer* did not make an abatement in the intereſt of the money "due to him, he would have little benefit in caſe he ſucceeded "in the ſaid ſuit," and that *Damer* then ſaid, "that if that "ſhould be the caſe, he would leave any reaſonable abatement "to his friend *Ambroſe Harding*." Whereby it appeared, that ſuch converſation had paſſed between them; and that the ſaid *Ambroſe Harding* underſtood, that *Damer* had agreed to accept of 6*l. per cent.* intereſt upon the money ſo due to him on the ſaid ſecurities; and alſo, upon reading other evidence, the court made an order, directing an iſſue to be tried at the next aſſizes, "Whether there was any, and what agreement between *John* "*Damer*, eſq. deceaſed, and *Packington Edgeworth*, deceaſed, at "any, and at what time, for any, and what abatement of in-"tereſt, on the principal ſums due to the ſaid *John Damer?*" From this order, Lord *Milton* appealed to the Houſe of Lords, and the principal objection urged by him againſt directing ſuch iſſue, was, that conſidering the ſtate of the evidence before the court, it was unjuſt to direct an iſſue; becauſe the anſwer of Mr. *Damer*, which was read by the defendants at the hearing, denied any agreement between him and *Packington Edgeworth*, to reduce the rate of intereſt; and this denial, being ſet in oppoſition to any concluſion drawn from *Harding*'s evidence, took away all ground for the court's interpoſing; whereas, by directing an iſſue, upon the trial of which Mr. *Damer*'s anſwer could not be read for the appellant, he would be deprived of that evidence which the defendants had made evidence at the hearing of the cauſe. But it was adjudged, that the order ſhould be affirmed, with this addition, viz. that the plaintiff ſhould be at liberty, at ſuch trial, to read the anſwer of *Damer*.

Intereſt due upon a mortgage of money which is in ſettlement, will not be conſidered as in the nature of rent, and, conſequently, go with the mortgage; but, if the tenant, under the ſettlement, die in the broken part of the quarter or half year, the intereſt will be apportioned; and what is due from the laſt day of payment, to the day of the death of the tenant for life, will be paid to his executor, and the reſidue to him in remainder. Edwards v. Counteſs of Warwick, 2 Will. 171.

The reaſon is, that intereſt increaſes on a mortgage from day to day; and the mortgagor, whenever he pays the principal and intereſt, muſt pay the intereſt up to the day of payment. Wilſon v. Harman, 2 Ves. 672.

In this, a mortgage likewiſe differs from ſtock, for dividends upon ſtock are by the legiſlature made payable only half-yearly, and are in nature of rents, and, conſequently, not liable to apportionment. Ibid.

On the ſtatute 12 *Ann. ſtat.* 2. *c.* 16. § 1. which enacts, "That all bonds and aſſurances for the payment of any principal, "or money to be lent upon uſury, whereupon there ſhall be re-"ſerved or *taken* above five in the hundred, ſhall be utterly void;" parol evidence has been admitted, to ſhew *uſurious* intereſt *taken* by a mortgagee, though there was none reſerved upon the face of the deed itſelf. 3 Atk. 154.

Mortmain. See Charitable Uses & Mortmain.

# Murder and Homicide.

THE taking away the life of another, whether it amount to felony or not, is called by the general name of homicide, and is thus branched out and diſtinguiſhed by our law:

Bract. 134. Stamf. 17. Kelyng, 121. & *vide* Forteſcue's Pref. to Abſolute and Limited Monarchy, 59.

1. Into *murder*, which is uſually defined the wilful killing of a perſon through malice prepenſe. And it is ſaid, that anciently it ſignified only the private killing of a man, for which, by force of law, introduced by King *Canutus*, for the preſervation of his *Danes*, the town or hundred, where the fact was done, was (*a*) amerced, unleſs it could be (*b*) proved, that the perſon ſlain was an *Engliſhman*, or unleſs they could produce the offender. And this law was provided to avoid the ſecret murder of the *Danes*, who were hated by the *Engliſh*, and oftentimes privately murdered by them.

(*a*) The amercement was forty-ſix marks. Wilk. Sax. Law, 280.

(*b*) This proof was called Engleſhire, and was various according to the cuſtom of ſeveral places, but moſt ordinarily it was by the teſtimony of two males, of the part of the father of him that was ſlain, and by two females of the part of the mother. Hal. Hiſt. P. C. 447.

Hal. Hiſt. P. C. 450. Hawk. P.C. c. 31. § 2.

But this law having been aboliſhed by 14 *E.* 3., the killing of any *Engliſhman* or foreigner, through malice prepenſe, whether committed openly or ſecretly, was by degrees called murder, and puniſhed with death. But by the common law, as alſo by the ſtatute of 25 *E.* 3. *c.* 4., clergy was promiſcuouſly allowed, as well in caſe of murder as of homicide or manſlaughter, before the ſtatutes of 23 *H.* 8. *c.* 1., 25 *H.* 8. *c.* 3., 1 *E.* 6. *c.* 12., 5 & 6 *Ed.* 6. *c.* 10., by which clergy is taken away from murder *ex malitiâ præcogitatâ*.

3 Inſt. 55. Dalt. c. 94. Hal. Hiſt. P. C. 450. Hawk. P.C. c. 30. § 1.

2. *Manſlaughter*, by which is underſtood ſuch killing, as happens either on a ſudden quarrel, or in the commiſſion of an unlawful act, without any deliberate intention of doing any miſchief at all, and in which the offender is allowed his clergy, though it be felony, and differ from murder only in degree and quality. Hence it is, that upon an indictment of murder, the party offending may be acquitted of murder, and yet found guilty of manſlaughter, as is every day's practice. As it is done without premeditation, it is held, that there can be no acceſſaries to it before the fact.

Hal. Hiſt. P. C. 477. Hawk. P.C. c. 29. § 1.

3. Homicide *per infortunium*, or *chance-medley*, is, where a man doing a lawful act, without any intent of hurt, unfortunately chances to kill another; and though this be not felony, yet, as the king hath loſt a ſubject, and in order to make men the more careful of their actions, the law puniſhes the offender with the loſs of his goods.

Hal. Hiſt. P. C. 478. Hawk. P.C. c. 29. § 13.

4. Homicide *ſe defendendo* is, where one who has no other poſſible means of preſerving his life from one who combats with him

on a ſudden quarrel, kills the perſon, by whom he is reduced to ſuch an inevitable neceſſity. And in this caſe, as in the former, the party forfeits his goods, though it be not felony.

*Juſtifiable homicide* is, 1ſt, Where, in defence of a man's houſe, he kills one who attempts to burn it, or to commit in it murder, robbery, or other felony. 2dly, Where, in defence of a man's perſon, he kills one who aſſaults him in the highway, with an intent to murder or rob him. 3dly, When the killing happens in the advancement and due execution of publick juſtice; and where a felon flies from thoſe who endeavour to apprehend him, *&c.* And this is ſo far from being felony, that it cauſes no forfeiture whatſoever. Hal. Hiſt. P. C. 424. Hawk. P.C. c. 28.

But for the better underſtanding theſe ſeveral ſpecies of homicide, it will be neceſſary to conſider,

(A) In what Caſes a Man may be ſaid to kill another.

(B) Who are ſuch Perſons, by killing of whom a Perſon may be ſaid to commit Murder.

(C) What ſhall be deemed Murder: And herein,

1. Where it ſhall be ſaid to be expreſs Murder, and of Malice prepenſe.

2. Where the Malice ſhall be ſaid to be implied, or by Preſumption of Law: And herein,

1. *Where the Homicide being voluntarily committed; and without Provocation, the Law implies Malice.*

2. *When done on an Officer or Miniſter of Juſtice.*

3. *When done by Perſons in the Execution of ſome other unlawful Act.*

(D) Of Manſlaughter: And herein of Manſlaughter exempt from Clergy by the Statute of 1 *Jac.* 1. *c.* 8.

(E) Of Juſtifiable Homicide: And herein,

1. As it happens in the due Execution and Advancement of Publick Juſtice.

2. As it happens in the Defence of a Man's Perſon, Houſe, or Goods.

(F) Of excuſable Homicide: And herein,

1. Of Homicide *per Infortunium*, or Chance-medley.

2. Of Homicide *ſe Defendendo*.

## (A) In what Cases a Man may be said to kill another.

3 Inst. 48. Palm. 548. Hal. Hist. P.C. 431. 2. 1 Hawk. P.C. c. 31. §4.

AS there are as many ways of killing, as there are modes by which one may die, *moriendi mille figuræ*, it is laid down in general, that not only he, who by a wound or blow, or by poisoning, strangling, or famishing, &c. directly causes another's death; but also, in many cases, he, who by wilfully and deliberately doing a thing, which apparently endangers another's life, thereby occasions his death, shall be adjudged to kill him.

Cromp. 24. b. Dalt. c. 93. Hal. Hist. 432. 1 Hawk. P.C. c. 31. §6.

Hence, in the case of that unnatural mother, who left her child in an orchard covered only with leaves, in which condition it was struck by a kite, and died thereof, it was adjudged murder.

Cromp. 24. b. Pult. 122. Dalt. c. 93. Hale's Hist. 432. 1 Hawk. P.C. c. 31. §5.

So, in the case of that unnatural son, who carried his sick father, against his consent, in cold frosty weather from one town to another, by reason whereof he died.

Britt. c. 11. §38. Fitz. Indictment, 3. Lamb. 240. Stamf. 36. 3 Inst. 52. Palm. 548. Hale's Hist. 466 — And that therefore where any person dies in gaol, the coroner ought to be sent for to inquire of the manner of his death. Hale's Hist. 412.

So, if by duress of imprisonment a prisoner die, it is murder in the gaoler. And this duress is said to be inflicted on every one, that by the usage of his keeper is brought nearer to death and further from life; and therefore it is said, not to be material whether it proceeds from the neglect and carelessness of the gaoler, or from any actual violence; and may be effected by confining the prisoner too closely in a noisome place, loading him with fetters, &c. (*a*)

[(*a*) A gaoler, knowing that a prisoner infected with the small-pox, lodged in a certain room in the prison, confined another prisoner, *against his will*, in the same room. The second prisoner, who had not had the distemper, *of which the gaoler had notice*, caught the distemper, and died of it. This was holden to be murder in the gaoler. 2 Str. 856. Fost. Cr. L. 322. Another straitly confined his prisoner in a low, damp, unwholesome room, without allowing him the common necessaries of chamber-pot, &c. for keeping things sweet and clean about him. The prisoner, having been long confined in this manner, contracted an ill habit of body, which brought on distempers, of which he died. This likewise was holden to be murder in the party guilty of the duress. 2 Str. 884. 2 Ld. Raym. 1578. Fost. Cr. L. 322.]

Stamf. 36. 3 Inst. 91.

So, where one, by duress of imprisonment, compels a man to accuse an innocent person, who on his evidence is condemned and executed; this is murder. *Nil refert an quis mortem inferat, aut causam mortis præbeat. Sed quære.*

Plow. 19. 2. Dalt. c. 93. Hale's Hist. 434.

So, in judgment of law, a man may be said to kill one, who in truth is killed by another, or by himself; as, where a man incites a madman to kill himself, or another; or, where *A.* by force takes the arm of *B.*, and the weapon in his hand, and therewith stabs *C.*, whereof he dies; this is murder in *A.*

9 Co. 81. Plow. 474.

So if a man lays poison with an intent to kill one man, which is accidentally taken by another, who dies thereof; this is murder.

Hale's Hist. 425.

So, if a woman be with child, and a person give her a potion to destroy the child within her, and she take it, and it work so strongly that it kills her; this is murder.

Also,

Also, a person, who wilfully neglects to prevent a mischief, which he may, and ought, to provide against, is answerable for any ill consequences that may ensue his neglect: And on this foundation it is held by some opinions, that if a man have an ox, horse, &c. which he knows to be mischievous, by being used to gore or strike those who come near them, and he neglects to tie them up, by which they kill a person, that the owner may be indicted, as having himself feloniously killed him; which seems agreeable to the (a) *Jewish* law. But herein my Lord *Hale* lays down the following particulars, which, he says, seem to him to be agreeable to law:

Fitz. Coron. 311. Stamf. 17. Cromp. 24. Hawk. P. C. c. 31. § 8.

(a) Exod. c. xxi. v. 29

1. If the owner have notice of the quality of his beast, and it do any body hurt, he is chargeable with an action for it.

Hale's Hist. 430.

2. Though he have no particular notice that he did any such thing before, yet, if it be a beast that is *feræ naturæ*, as, a lion, a bear, a wolf, yea, an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage; as was adjudged in *Andrew Baker*'s case, whose child was bit by a monkey that broke his chain and got loose.

Hale's Hist. 430.

3. And therefore in case of such a wild beast, or in case of a bull or cow that doth damage, where the owner knows it, he must, at his peril, keep him up safe from doing hurt; for though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages.

Hale's Hist. 430.

4. But as to the point of felony, if the owner have notice of the quality of the ox, &c., and use all due diligence to keep him up, yet the ox break loose, and kill a man; this is no felony in the owner, but the ox is a deodand.

Hale's Hist. 431.

5. But if he do not use that due diligence, but through negligence the beast go abroad, after warning or notice of his condition, and kill a man, it is manslaughter in the owner.

Hale's Hist. 431.

6. But if he did purposely let him loose, or wander abroad, with design to do mischief; nay, though it were with design only to fright people, and make sport, and it kill a man, it is murder in the owner; and this, he says, he had heard had been so ruled at the assizes held at *St. Albans*; but he adds, this is only a hearsay.

[Whether taking away the life of an innocent man by perjury in a course of legal proceeding amounts to murder?]

See Post. Cr. L. 131. 4 Bl. Comm. 190. note.

If a physician gives a person a potion, without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and, contrary to the expectation of the physician, it kills him, this is no homicide; and the like of a surgeon.

Hale's Hist. 429.

But some hold, that if a person, not duly authorised to be a physician or surgeon, undertake a cure, and the patient die under his hand, he is guilty of felony. But this opinion, says my Lord *Hale*, is erroneous; for physick and salves were before licensed physicians and surgeons; and therefore, if they be not licensed according to the statutes of 3 *H.* 8. *c.* 11., or 14 & 15 *H.* 8. *c.* 5., they are liable to the penalties in the statutes, but are not guilty

Stamf. 16. b. Pult. 22. b. Crom. 27. 43 E. 3. 33. b. Fitz. Coron. 163. Hale's Hist. 429. Hawk. P. C. c. 32. § 62.

guilty of murder or manſlaughter. And herewith agreeth *Hawkins*, who ſays, that the charitable endeavours of thoſe gentlemen, who ſtudy to qualify themſelves to give advice of this kind, in order to aſſiſt their poor neighbours, can by no means deſerve ſo ſevere a conſtruction from their happening to fall into ſome miſtakes in their preſcriptions, from which the moſt learned and experienced cannot always be ſecure. But as it is highly raſh and preſumptuous for unſkilful perſons to undertake matters of this nature, the law cannot well be too ſevere in this caſe, in order to deter ignorant people from endeavouring to get a livelihood by ſuch practice, which cannot be followed, without the manifeſt hazard of the lives of thoſe that have to do with them.

Hale's Hiſt. 432. If a perſon, who is infected with the plague, having a plague-ſore running upon him, goes abroad to the intent to infect another, and another is thereby infected, and dies; this it ſeems is murder by the common law. But, if no ſuch intention evidently appear, though *de facto* by his converſation another be infected, it is no felony by the common law, though it be a great miſdemeanour.

Hale's Hiſt. 429. If a man, either by working upon the fancy of another, or poſſibly by harſh or unkind uſage, put another into ſuch paſſion of grief or fear, that the party either die ſuddenly, or contract ſome diſeaſe, whereof he dies; though, as the circumſtances of the caſe may be, this may be murder or manſlaughter in the ſight of God; yet *in foro humano* it cannot come under the judgment of felony, becauſe no external act of violence was offered, whereof the common law can take notice; and ſecret things belong to God.

Stamf. 21. Dalt. c. 93. Hawk. P.C. 79. But in all theſe caſes it is agreed, that no perſon ſhall be adjudged, by any act whatever, to kill another, who doth not (*a*) die thereof within a year and a day after; in the computation whereof the whole day on which the hurt was done ſhall be reckoned the firſt.

(*a*) Antiently a barbarous aſſault with an intent to murder, ſo that the party was left for dead, but yet recovered again, was adjudged murder and petit treaſon; but that holds not now; for the ſtroke without the death of the party ſtricken, nor the death without the ſtroke, or other violence, makes not the homicide or murder. Hale's Hiſt. P. C. 425-6.

3 Inſt. 53. Kely. 26. Keb. 17. If a perſon hurt by another, die thereof within a year and a day, it is no excuſe for the other, that he might have recovered, if he had not neglected to take care of himſelf.

Hale's Hiſt. P. C. 428. But if the wound or hurt be not mortal, but with ill applications by the party, or thoſe about him, of unwholſome ſalves or medicines, the party dies; if it can clearly appear that this medicine, and not the wound, was the cauſe of his death, it ſeems it is not homicide. But then that muſt appear clearly and certainly to be ſo.

## (B) Who are ſuch Perſons, by killing of whom a Perſon may be ſaid to commit a Murder.

IT is agreed, that the malicious killing of any perſon, whatſoever (*a*) nation or religion he be of, or of whatſoever (*b*) crime attainted, is murder. Hawk. P. C. c. 31. § 15.

(*a*) If a man kill an alien enemy within this kingdom, yet it is felony; unleſs it be in the heat of war, and in the actual exerciſe thereof. Hal. Hiſt. P. C. 433. (*b*) Though outlawed of felony, or attainted in a *præmunire*, for the execution of the ſentence muſt be by a lawful officer, lawfully appointed; and therefore, if a perſon be condemned to be hanged, and the ſheriff behead him, this is murder, and the wife may have an appeal. Hale's Hiſt. P. C. 433.

If a woman be quick or great with child, if ſhe take, or another give her, any potion to make an abortion, or, if a man ſtrike her, whereby the child within her is killed; it is not murder nor manſlaughter by the law of *England*, becauſe it is not *in rerum natura*, and it cannot be legally known whether it was killed or not; though it be a great crime, and by the judicial law of *Moſes*, was puniſhable with death. So, (*c*) if, after, ſuch child were born alive and baptized, and after die of the ſtroke given the mother, this is not homicide. Hale's Hiſt. P. C. 433. (*c*) But this *per* Hawkins is clearly murder, notwithſtanding ſome opinions to the contrary. Hawk. P. C. c. 31. § 16.

But, if a man procure a woman with child to deſtroy her infant when born, and the child be born, and the woman, in purſuance of that procurement, kill the infant; this is murder in the mother, and the procurer is acceſſory to murder; and this, whether the child were baptized or not. 7 Co. 9. Dyer, 186. Hale's Hiſt. P. C. 433. Hawk. P. C. c. 31. § 17.

## (C) What ſhall be deemed Murder: And herein,

### 1. What ſhall be ſaid to be expreſs Murder, and of Malice prepenſe.

HEREIN it ſeems to be agreed, that any (*d*) formed deſign of doing miſchief may be called malice; and therefore, that not ſuch killing only as proceeds from premeditated hatred or revenge againſt the perſon killed, but alſo in many other caſes, ſuch as is accompanied with thoſe circumſtances that ſhew the heart to be perverſely wicked, is adjudged to be a malice prepenſe. Hawk. P. C. 80. (*d*) My Lord Hale defines malice in fact to be a deliberate intention of doing any bodily harm to another, whereunto by law he is not authoriſed; and the evidences of ſuch a malice, ſays he, muſt ariſe from external circumſtances diſcovering that inward intention; as, lying in wait, menacings antecedent, former grudges, deliberate compaſſings, and the like, which are various, according to variety of circumſtances. Hale's Hiſt. P. C. 451.

If two perſons in cool blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder; and this the law adjudges to be of malice, and that the party cannot help himſelf by alleging, that he was firſt ſtruck by the deceaſed, or that he often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his only intent to Roll. Rep. 360. 2 Bulſt. 147. Crump. 22. b. 1 Hawk. P. C. c. 31. § 21. Foſt.

Cr. L. 297. to vindicate his reputation; or that he meant not to kill, but only to diſarm his adverſary; for ſince he deliberately engaged in an act highly unlawful, in defiance of the laws, he muſt, at his peril, abide the conſequences thereof. And not only he who kills, but alſo his ſeconds, are guilty of murder. And ſome hold (*a*), that the ſeconds of the deceaſed are alſo equally guilty.

(*a*) By reaſon of the countenance they give, and it being done by compact and agreement.

But this conſtruction is ſaid to be too rigid; and that it would be hard to make a man, by ſuch reaſoning, the murderer of his friend, to whom he was ſo far from intending any miſchief, that he was ready to hazard his own life in his quarrel. 1 Hawk. P. C. c. 31. § 31. Hale's Hiſt. P. C. 453.

Keil. 56. Sid. 177. Lev. 180. Oneby's caſe, 2 Str. 773. 2 Ld. Raym. 1489.

A man is eſteemed to fight in cool blood, when he meets in the morning on an appointment over night; or in the afternoon, on an appointment in the morning; or, as ſome ſay, if he fell into other diſcourſe after the quarrel, and talked calmly upon it; or, if he have ſo much conſideration as to obſerve, that it is not proper or ſafe to fight at preſent, for ſuch and ſuch reaſons, which ſhew him to be maſter of his temper.

Maſon's caſe, Foſt. Cr. L. 132.

[*A.* and *B.*, two brothers, were at play together; they then wreſtled; afterwards cudgelled: *A.* gave *B.* a ſmart ſtroke; *B.* grew angry, threw away his cudgel: they fought in earneſt, and were parted. *A.* went away angry, threatening to fetch ſomething and ſtick *B.* He went home, took off a thin coat, and put on a thick one, returned with a ſword concealed under his coat, drew on a diſcourſe of the quarrel, and offered to cudgel, if *B.* would keep off his hands. *B.* went to him, and took up the cudgel which *A.* dropped, and gave him two blows on the ſhoulders. *A.* drew out the concealed ſword, ſaid, "Stand off, or I'll ſtab "you," thruſt at, but miſſed him. *B.* went back, *A.* ſhortened his ſword, leaped towards *B.*, ſtabbed him, and killed him. This was adjudged murder.]

Hawk. P. C. c. 31. § 24.

If *A.* on a quarrel with *B.* tell him he will not ſtrike him, but that he will give *B.* a pot of ale to ſtrike him, and thereupon *B.* ſtrike, and *A.* kill him, he is guilty of murder; for he ſhall not elude the juſtice of the law by ſuch a pretence to cover his malice.

Hawk. P. C. c. 31. § 25. Hale's Hiſt. P. C. 453.

In like manner, if *B.* challenge *A.*, and *A.* refuſe to meet him, but, in order to evade the law, tell *B.* that he ſhall go the next day to ſuch a town about his buſineſs; and accordingly *B.* meet him the next day in the road to the ſame town, and aſſault him, whereupon they fight, and *A.* kill *B.*, he ſeems guilty of murder; unleſs it appear by the whole circumſtances that he gave *B.* ſuch information accidentally, and not with a deſign to give him an opportunity of fighting.

Cromp. 22. b. Dalt. c. 93. Keil. 58. 129.

And at this day it ſeems ſettled, that if a man aſſault another with malice prepenſe, and after be driven by him to the wall, and kill him there in his own defence, he is guilty of murder, in reſpect of his firſt intent.

Kelyng, the Queen v. Mawbridge. Hawk. P. C. c. 31. § 27. Foſt. Cr. L. 295. 6.

And it hath been adjudged, that even upon a ſudden quarrel, if a man be ſo far provoked by any words or geſtures of another, ſo as to make a puſh at him with a ſword, or to ſtrike at him with any ſuch weapon as manifeſtly endangers his life, before the other's ſword is drawn, and thereupon a fight enſue, and he who made

made ſuch aſſault kills the other, he is guilty of murder; becauſe that by aſſaulting the other in ſuch an outrageous manner, without giving him an opportunity to defend himſelf, he ſhewed that he intended not to fight with him, but to kill him; which violent revenge is no more excuſed by ſuch a ſlight provocation, than if there had been none at all.

But it is ſaid, that if he, who draws upon another in a ſudden quarrel, make no paſs at him till his ſword is drawn, and then fight with him and kill him, he is guilty of manſlaughter only; becauſe that by neglecting the opportunity of killing the other, before he was on his guard, and in a condition to defend himſelf, with like hazard to both, he ſhewed that his intent was not ſo much to kill as to combat with the other, in compliance with thoſe common notions of honour, which prevailing over reaſon, during the time that a man is under the tranſports of a ſudden paſſion, ſo far mitigate his offence in fighting, that it ſhall not be adjudged to be of malice prepenſe. Keil. 55. 61. 131. Hawk. P.C. c. 31. § 28.

And if two happen to fall out upon a ſudden, and preſently agree to fight, and each of them fetch a weapon, and go into the field, and there one kill the other, he is guilty of manſlaughter only, becauſe he did it in the heat of blood. Hawk. P.C. c. 31. § 29.

And ſuch an indulgence is ſhewn to the frailties of human nature, that where two perſons, who have formerly fought on malice, are afterwards to all appearance reconciled, and fight again on a freſh quarrel, it ſhall not be preſumed that they were moved by the old grudge, unleſs it appear by the whole (*a*) circumſtances of the fact. Hawk. P.C. c. 31. § 30. (*a*) If upon circumſtances it appears, that the reconciliation was but pretended, or counterfeit, and that the hurt done was upon the ſcore of the old malice, then it is murder. Hale's Hiſt. P. C. 452.

[Three *Scotch* ſoldiers were drinking together in a publick houſe; ſome ſtrangers, who were ſitting in the next box, uſed ſeveral opprobrious epithets, and reviled the character of the *Scotch* nation; whereupon one of the ſoldiers ſtruck one of them with a *ſmall rattan cane.* An altercation enſued; and one of the ſtrangers laid hold of the ſoldier who had ſtricken, and threw him againſt a ſettle. The altercation increaſed; and when the ſoldier had paid his reckoning, the ſtranger again ſhoved him from the room into the paſſage. Upon this, the ſoldier exclaimed, that "*he did not mind killing an* Engliſhman *more than eating a meſs of* "*crowdy.*" The ſtranger, aſſiſted by another perſon, then violently puſhed the ſoldier out of the houſe, whereupon the ſoldier inſtantly turned round, drew his ſword, and ſtabbed the ſtranger to the heart. This was adjudged manſlaughter. Rex v. Taylor, 5 Burr. 2794.

A quarrel aroſe between ſeveral ſoldiers, and a number of keelmen: one of the ſoldiers, to protect himſelf and his comrades from the aſſaults of the mob, drew his ſword, and miſtaking a perſon paſſing by for one of the keelmen, ſtruck him on the head with his ſword, of which blow he died. This was adjudged *manſlaughter.* Brown's caſe. Leach's Caſes, 135.

*A.* and *B.* ſuddenly quarrelled: upon ſome provoking language *B.* ſeized *A.* by the collar; a fight enſued; they both fell to the ground; Snow's caſe, *Id.* 138.

ground; and while ſtruggling on the ground, *B.* received a mortal wound from a knife which *A.* held in his hand. This alſo was adjudged manſlaughter.]

Hawk. P.C. c. 31. § 33, 34. and ſeveral authorities there cited.

If a man be ſo far provoked by a breach of promiſe, or by a treſpaſs on his lands or goods, or by any words or geſtures whatſoever, as thereupon immediately to puſh at another with a ſword, or ſtrike him with a dangerous weapon before his ſword is drawn, and thereupon a fight enſue, and the perſon aſſaulted be ſlain, the aſſailant is guilty of murder, though he was driven to the wall when he gave the mortal wound; for by aſſaulting the other in ſuch abuſive manner, he ſhews that his intent was not to fight with him, but to kill him. But if he had made no paſs till the other's ſword had been drawn, or had only beaten him, in ſuch manner as made it appear that he meant only to chaſtiſe him, he would have been guilty of manſlaughter only.

Hawk. P.C. c. 31. § 35.

So, if a perſon, ſeeing two others fighting together on a private quarrel, whether ſudden or malicious, takes part with one of them, and kills the other, it is but manſlaughter.

Hawk. P.C. c. 31. § 36.

So, if two ſtrive for the wall, and one happen to kill the other, or a man happen to kill another, who, claiming a title to his houſe, attempts forcibly to enter it, *&c.*, or to kill one who endeavours unlawfully to arreſt him; or to force him from his poſſeſſion of a room in a publick houſe; or, if a man immediately kills one whom he finds in bed with his wife; or that pulls him by the noſe; or fillips him in the forehead, or actually ſtrikes him; in all theſe caſes, the party is, at moſt, only guilty of manſlaughter.

12 Co. 87. Cro. Jac. 296. Hale's Hiſt. P. C. 453. Rowley's caſe.

So, where *A.* the ſon of *B.*, and *C.* the ſon of *D.*, fall out in the field, and fight, *A.* is beaten, and runs home to his father all bloody, *B.* preſently takes a (*a*) ſtaff, runs into the fields, being three quarters of a mile diſtant, and ſtrikes *C.* that he dies; this is not murder in *B.*, becauſe done in a ſudden heat and paſſion.

[(*a*) According to Croke's report, *a ſmall cudgel*, and according to Godbolt's, *a rod*. "It may be fairly collected," ſaith Sir Mr. Foſter, "from Croke's manner of ſpeaking, [and Godbolt's report,] that the accident happened by *a ſingle ſtroke* with a cudgel *not likely to deſtroy*, and that death did not immediately enſue." The words of Croke are, "*Rowley ſtruck* the child with *a ſmall cudgel*, of which *ſtroke* he *afterwards* died." The ſtroke was given in heat of blood, and not with any of the circumſtances which import malice, and therefore manſlaughter. Obſerve that Lord Raymond (Ld. Raym. 1498.) layeth great ſtreſs on this circumſtance, *that the ſtroke was with a cudgel not likely to kill!* Foſt. Cr. L. 295.]

Hawk. P.C. c. 31. § 38, 39. (*b*) Cro. Car. 131. Jon. 198. Holloway's caſe. Keil. 127. S. C. cited.

If a perſon in cool blood, by way of revenge, deliberately beat another in ſuch a manner that he dies of it; or, if a man, upon a ſudden provocation, execute his revenge in ſuch a manner as ſhews a cruel and deliberate intent of doing a perſonal hurt, he is guilty of murder; as (*b*), where the keeper of a park, finding a boy ſtealing wood, tied him to a horſe's tail, and beat him, whereupon the horſe ran away, and killed him.

1 Hale's Hiſt. P. C. 454. S. C. cited and agreed; becauſe the correction was exceſſive, and it was an act of deliberate cruelty.

Foſt. Cr. L. 292.

[There being an affray in the ſtreet, one *Stedman* a foot-ſoldier ran haſtily towards the combatants. A woman ſeeing him run in that manner cried out, "You will not murder the man, will you?" *Stedman* replied, "What is that to you, you bitch?" The woman thereupon

thereupon gave him a box on the ear, and *Stedman* ſtruck her on the breaſt with the pommel of his ſword. The woman then fled, and *Stedman* purſuing her ſtabbed her in the back. *Holt* was at firſt of opinion, that this was murder, *a ſingle box on the ear from a woman not being a ſufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear;* and it was propoſed to have the matter found ſpecially. But it afterwards appearing in the progreſs of the trial, that the woman ſtruck the ſoldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manſlaughter.

The ſmart of the man's wound, and the effuſion of blood, might poſſibly keep his indignation boiling to the moment of the fact.

Mr. *Lutterel*, being arreſted for a ſmall debt, prevailed on one of the officers to go with him to his lodgings, while the other was ſent to fetch the attorney's bill, in order, as *Lutterel* pretended, to have the debt and coſts paid. Words aroſe at the lodgings about *civility money*, which *Lutterel* refuſed to give; and he went up ſtairs pretending to fetch money for the payment of the debt and coſts, leaving the officer below. He ſoon returned with a brace of loaded piſtols in his boſom, which, at the importunity of his ſervant, he laid down on the table, ſaying, *He did not intend to hurt the officers, but he would not be ill-uſed.* The officer, who had been ſent for the attorney's bill, ſoon returned to his companion at the lodgings; and words of anger ariſing, *Lutterel* ſtruck one of the officers on the face with a walking-cane, and drew a little blood. Whereupon both of them fell upon him, one ſtabbed him *in nine places, he all the while on the ground begging for mercy, and unable to reſiſt them;* and one of them fired one of the piſtols at him *while on the ground,* and gave him his death's wound. This is reported to have been holden manſlaughter *by reaſon of the firſt aſſault with the cane.*]

Rex v. Tranter, 1 Str. 499. This is the caſe as reported by Sir John Strange; and an extraordinary caſe it is, that all theſe circumſtances of aggravation, two to one, he helpleſs and on the ground begging for mercy, ſtabbed in nine places, and then diſpatched with a piſtol; that all theſe circumſtances, plain indications of a deadly revenge or diabolical fury, ſhould not outweigh a ſlight ſtroke with a cane. But in the printed trial (6 St. Tr. 195.) there are ſome circumſtances ſtated, which are entirely dropped, or very ſlightly mentioned by the reporter:—1. Mr. Lutterel had a ſword by his ſide, which, after the affray was over, was *found drawn and broken.* How that happened did not appear in evidence; for part of the affray was at a time when no witneſs was preſent, nobody ſpake to the whole. 2. When Lutterel laid the piſtols on the table, he declared that he brought them down, *becauſe he would not be forced out of his lodgings.* 3. He threatened the officers ſeveral times. 4. One of the officers appeared to have been wounded in the hand by a piſtol-ſhot, (for both the piſtols were diſcharged in the affray,) and ſlightly on the wriſt by ſome ſharp-pointed weapon: and the other was ſlightly wounded in the hand by a like weapon. 5. The evidence touching Lutterel's begging for mercy was not, that he was on the ground *begging for mercy*; but that on the ground he held up his hands AS IF *he was begging for mercy.* The Chief Juſtice directed the jury, that if they believed Mr. Lutterel endeavoured to reſcue himſelf, which he ſeems to think was the caſe, and very probably was the caſe, it would be juſtifiable homicide in the officers. However, as Mr. Lutterel gave the firſt blow *accompanied with menaces to the officers, and the circumſtance of producing loaded piſtols to prevent their taking him from his lodgings*, which it would have been their duty to have done, if the debt had not been paid, or bail given, he declared IT COULD BE NO MORE *than manſlaughter.* Foſt. Cr. L. 293.

2. Where

2. Where the Malice ſhall be ſaid to be implied, or by Preſumption of Law: And herein,

1. *Where the Homicide being voluntarily committed, and without Provocation, the Law implies Malice.*

Hale's Hiſt. P. C. 445. Herein it is laid down, that when one voluntarily kills another, without any provocation, it is murder; for the law preſumes it to be malicious, and that he is *hoſtis humani generis;* and therefore it is neceſſary for him, who happens to kill another, to ſhew ſuch a provocation as will take off the preſumption of malice.

Hale's Hiſt. P. C. 455. He that wilfully gives poiſon to another, whether he had provoked him or not, is guilty of wilful murder; becauſe it is an act of deliberation odious in law, and preſumes malice.

Hale's Hiſt. P. C. 445. If *A.* comes to *B.*, and demands a debt of him; or comes to ſerve him with a *ſubpœna ad reſpondendum*, or *ad teſtificandum*, and *B.* thereupon kills *A.*, this is murder; for herein there is no provocation.

Cro. Eliz. 778. Brain's caſe. Hale's Hiſt. P. C. 455. cited. *Watts* came along by the ſhop of *Brains*, and diſtorted his mouth, and ſmiled at him: *Brains* kills him; it is murder; for it was no ſuch provocation as would abate the preſumption of malice in the party killing.

Hale's Hiſt. P. C. 455, 456. If *A.* be paſſing the ſtreet, and *B.* meeting him, there being a convenient diſtance between *A.* and the wall, take the wall of *A.*, and thereupon *A.* kill him, this is murder. But if *B.* had juſtled *A.*, this juſtling had been a provocation, and would have made it manſlaughter. And ſo it would be, if *A.* riding on the road, *B.* had whipped the horſe of *A.* out of the track, and then *A.* had alighted, and killed *B.*, it had been manſlaughter.

Hawk. P. C. c. 31. § 33. It ſeems agreed, that no affront by bare words or geſtures, however ſlighting, or however falſe and malicious they may be, and aggravated by the moſt provoking circumſtances, will excuſe him from being guilty of murder, who is ſo far tranſported thereby, as immediately to attack the perſon who offends him, in ſuch a manner as manifeſtly endangers his life. But if *A.* gives indecent language to *B.*, and *B.* thereupon ſtrikes *A.*, but not mortally, and then *A.* ſtrikes *B.* again, and then *B.* kills *A.*, this is but manſlaughter; for the ſecond ſtroke made a new provocation; and ſo it was but a ſudden falling out. And though *B.* give the firſt ſtroke, and after a blow received from *A.*, *B.* gives him a mortal ſtroke; this is but manſlaughter, according to the proverb, *The ſecond blow makes the affray.*

Hale's Hiſt. P. C. 456.

Hale's Hiſt. P. C. 457. *A.* and *B.* are at ſome difference; *A.* bids *B.* take a pin out of the ſleeve of *A.*, intending thereby to take occaſion to ſtrike or wound *B.*, which *B.* doth accordingly, and then *A.* ſtrikes *B.*, whereof he died; this was ruled murder; 1. Becauſe it was no provocation, when he did it by the conſent of *A.* 2. Becauſe it appeared to be a malicious and deliberate artifice, thereby to take occaſion to kill *B.*

If

If there be chiding between husband and wife, and the husband strike his wife thereupon with a pestle, that she dies presently, it is murder; and the chiding will not be a provocation to extenuate it to manslaughter. Hale's Hist. P. C. 457.

It is said, that if a person happen to occasion the death of another unadvisedly, doing an idle wanton action, which cannot but be attended with the manifest danger of some other, as by riding with a horse, known to be used to kick, among a multitude of people, by which he means no more than to divert himself, by putting them into a fright; he is guilty of murder. Hawk. P. C. c. 31. § 61.

2. *When done on an Officer or Minister of Justice.*

It hath been adjudged, and hath frequently been agreed, that if a justice of peace, constable, watchman, &c. be killed in the execution of their offices, he, by whom any such person is killed, is guilty of murder; for herein the law implies malice; and the indictment need not be special, but general, *Ex malitiâ suâ præcogitatâ interfecit & murdravit;* because the malice in law maintains the indictment. 9 Co. 68. 4 Co. 40. Cromp. 25. 3 Inst. 52. Savil. 67. Keil. 66. Hawk. P. C. c. 31. § 48. Hale's Hist. P. C. 457.

So, if (*a*) a private person be killed in endeavouring to part those whom he sees fighting, the person by whom he is killed is guilty of murder; and he cannot excuse himself by alleging, that what he did was in a sudden affray, in the heat of blood, and through the violence of passion. But, if such person do not give notice for what purpose he comes, by commanding the parties in the king's name to keep the peace, or otherwise manifestly shewing his intention to be not to take part in the quarrel, but to appease it; he who kills him, is guilty of manslaughter only. Keil. 66. Hawk. P. C. c. 31. § 48. (*a*) Killing the assistant of the constable is as well murder as the killing of the constable himself; so those who come to the constable's assistance, though not specially called thereunto, are under the same protection, as they that are called to his assistance by name. Hale's Hist. P. C. 463.

Whoever kills a sheriff, or any of his officers, in the lawful execution of a civil process, as, on arresting a person, a *capias*, &c. is guilty of murder. Hawk. P. C. c. 31. § 55.

Nor is it any excuse to such person, that the process was erroneous (*b*), (for it is not void by being so,) or that the arrest was in the night, or that the officer did not tell him for what cause he arrested him, and out of what court, (which is not necessary when prevented by the party's resistance,) or that the officer did not shew his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand, if he be a special one. Hawk. P. C. c. 31. § 56. [(*b*) If the process, be it by writ or warrant, be not defective in the frame of it, and issue in the ordinary course of justice from a court or magistrate having jurisdiction in the case; though there may have been error or irregularity in the proceeding previous to the issuing of the process, yet, if the officer or other minister be killed in the execution of it, this will be murder. And therefore if *a capias ad satisfaciendum, fieri facias*, writ of assistance, or any other writ of the like kind, issue directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for this murder, to produce the writ and warrant, without shewing the judgment or decree. So ruled by Lord Hardwicke, in the case of one Roger, at the summer assizes in Cornwall in the year 1735. Foft. Cr. L. 311.——In the case of a warrant from a justice of the peace, *in a matter wherein he hath jurisdiction*, the person executing such warrant is under the special protection of the law; though such warrant may have been obtained by gross imposition on the magistrate, and by false information touching matters suggested in it. Curtis's

Curtis's case, Foſt. Cr. L. 135.——An attachment iſſued out of the county court, and ſigned by the county clerk in his own cauſe, is legal proceſs; and if the officer be reſiſted and killed in the execution of it, it will be murder. Baker's caſe, Leach's Caſes, 106.]

Hawk. P.C. c. 31. § 57. (a) So, if the name of the bailiff, plaintiff, or defendant be interlined, or inſerted after the ſealing thereof, by the bailiff himſelf, or any other; if ſuch bailiff be killed it is but manſlaughter. Hal. Hiſt. P. C. 457.——So, if the proceſs be executed out of the juriſdiction of the court, the killing of the officer is only manſlaughter. 1 Hal. Hiſt. P. C. 458. ——The conſtable of the vill of *A.*, comes into the vill of *B.*, to ſuppreſs ſome diſorder, and in the tumult the conſtable is killed in the vill of *B.*, this is only manſlaughter, becauſe he had no authority in B., as conſtable. Hal. Hiſt. P. C. 459.——But it ſeems, that if the conſtable of the vill of *A.*, had a particular precept from a juſtice of peace directed to him by name, or by the name of the conſtable of *A.*, to ſuppreſs a riot in the vill of *B.*, or to apprehend a perſon in the vill of *B.* for ſome miſdemeanor, and within the juriſdiction and conuſance of the juſtice of peace, and, in purſuance of that warrant, he go to arreſt the party in *B.*, and in execution of his warrant is killed in *B.*, this is murder; for though, in ſuch caſe, the conſtable was not bound to execute the warrant out of his juriſdiction; neither could he do it ſingly, *virtute officii*, as conſtable of *A*, yet he may do it as bailiff or miniſter, by virtue of the warrant, and the killing of him is murder, as well as if he had been conſtable of the hundred wherein *A* and *B.* lie; or ſheriff of the county; for a juſtice of the peace may, for a matter within his juriſdiction, iſſue his warrant to a private perſon as ſervant, but then ſuch perſon muſt ſhew his warrant, or ſignify the contents of it. Hal. Hiſt. P. C. 459.

But, where the warrant, by which he acts, gives him no authority to arreſt the party; as (*a*), where a bailiff arreſts *J. S.* baronet, who never was knighted, by force of a warrant to arreſt *J. S.* knight, it is but manſlaughter.

Hale's Hiſt. P. C. 460.

And as to the point of notice, it is herein further laid down by my Lord *Hale*, that if he be a bailiff, conſtable, or watchman, *jurus & conus*, the killing of him is murder, though the party does not know him to be ſuch; alſo it is not neceſſary for him to notify himſelf to be ſuch by expreſs words; but it ſhall be preſumed that the offender knew him.

Hal. Hiſt. P. C. 461.

But, if he be a private bailiff, either the party muſt know that he is ſo, or there muſt be ſome ſuch notification thereof whereby the party may know it; as by ſaying, *I arreſt you*, which is of itſelf ſufficient notice; and it is at the peril of the party, if he kill him after theſe words, or words to that effect pronounced; for it is murder, if *de facto* it fall out that he were a bailiff, and had a warrant.

Hal. Hiſt. P. C. 461.

A conſtable coming to appeaſe a ſudden affray in the day-time, in the village whereof he is conſtable, it ſeems every man, *ex officio*, is bound to take notice that he is the conſtable, becauſe he is to be choſen and ſworn in the leet, where all reſiants are to attend; but it is not ſo in the night-time, unleſs there be ſome notification that he is the conſtable.

Hal. Hiſt. P. C. 461.

But whether it be in the day or night, it is ſufficient notice, if he declare himſelf to be the conſtable, or command the peace in the king's name; and the like for any who come in his aſſiſtance, or for a watchman, *&c.*, and therefore, if any of them are killed after ſuch notification, it is murder in them that kill him.

Hal. Hiſt. P. C. 465. Hugget's caſe, 25th April 1666, at Newgate, Kel. 59. 137.

A preſs-maſter ſeized *B.* for a ſoldier, and with the aſſiſtance of *C.* laid hold on him; *D.* finding fault with the rudeneſs of *C.*, there grew a quarrel between them, and *D.* killed *C.* By the advice of all the judges, except very few, it was ruled, that this was but manſlaughter.

[Where

[Where an officer on the impreſs ſervice, *fired in the uſual manner* at the hallyards of a boat, in order to *bring her to*, and happened to kill a man, this was adjudged to be only manſlaughter. Rex v. Philips, Cowp. 830.

A captain of a ſhip had a preſs-warrant, directing *that no perſon but a commiſſioned officer was to be intruſted with the execution of it;* and his name to be inſerted on the back of it. The captain appointed his lieutenant to execute it, and ſent his boat with ſome of the crew to preſs, but the lieutenant ſtaid in the ſhip. The boat's crew ſome leagues off boarded a ſhip, and attempted to preſs, when one of them was killed. This was ruled to be only manſlaughter, for they did not act according to the warrant.] Broadfoot's caſe, Foſt. Cr. L. 154.

If a legal warrant be executed in an unlawful manner; as, if a bailiff be killed in breaking open a door or window to arreſt a man; or, perhaps, if he arreſt one on a *Sunday* (*a*), ſince the ſtatute 29 *Car.* 2. *c.* 7. by which all ſuch arreſts are made unlawful, and he be killed; this is but manſlaughter. Hawk. P.C. c. 31. § 58. (*a*) This had been murder before the ſtatute. Hal. Hiſt. P. C. 457.

[So, where a peace officer about to take a man to priſon under a warrant, which turned out to be illegal, was killed in the attempt by a woman whom the man kept, this was adjudged to be only manſlaughter.] Mary Adey's caſe, Leach's Caſes, 188.

3. *When done by Perſons in the Execution of ſome other unlawful Act.*

It ſeems agreed, that wherever a man happens to kill another in the execution of a deliberate purpoſe to commit any felony, he is guilty of murder; as, where a perſon, ſhooting at tame fowl with an intent to ſteal them, accidentally kills a man; this is murder. Kelyng, 117. Dalt. c. 93. Moor, 87. Plow. 101.

So, if *A.* come to rob *B.* in his houſe, or upon the highway, or otherwiſe, without any precedent intention of killing him; yet, if in the attempt, either without, or upon the reſiſtance of *B.*, *A.* kill *B.*, this is murder. 3 Inſt. 52. Hal. Hiſt. P. C. 465.

So, if men come to ſteal deer in a park or foreſt, or to rob a warren of conies, and the parker, foreſter or warrener reſiſts, and is killed, this is murder. Hal. Hiſt. P. C. 465.

And not only in ſuch caſes, where the very act of a perſon having ſuch a felonious intent, is the immediate cauſe of a third perſon's death, but alſo, where it any way occaſionally cauſes ſuch a misfortune, it makes him guilty of murder. And ſuch was the caſe of the huſband, who gave a poiſoned apple to his wife, who eat not enough to kill her, but innocently, and againſt the huſband's will and perſuaſion, gave part of it to a child, who died thereof. Such alſo was the caſe of the wife, who mixed ratſbane in a potion ſent by an apothecary to her huſband, which did not kill him, but afterwards killed the apothecary, who to vindicate his reputation taſted it himſelf, having firſt ſtirred it about. Neither is it material in this caſe, that the ſtirring of the potion might make the operation of the poiſon more forcible than otherwiſe it would have been; for inaſmuch as a murderous intention, Plow. 473. 9 Co. 81. Hawk. P.C. c. 31. § 42.

tion, which of itſelf perhaps, in ſtrictneſs, might juſtly be puniſhed with death, proves now, in the event, the cauſe of the king's loſing a ſubject, it ſhall be as ſeverely puniſhed, as if it had had the intended effect, the miſſing whereof is not owing to any want of malice, but of power.

Hal. Hiſt. P. C. 466. So, if *A.*, by malice forethought, ſtrikes at *B.*, and miſſing him ſtrikes *C.*, whereof he dies; though he never bore any malice to *C.*, yet it is murder, and the law transfers the malice to the party ſlain.

Savil, 67. Moor, 86. Palm. 35. Crom. 24. Dyer, 128. 5 Mod. 289. Hawk. P.C. c. 31. § 46. If divers perſons reſolve generally to reſiſt all oppoſers in the commiſſion of any breach of the peace, and to execute it in ſuch a manner as naturally tends to raiſe tumults and affrays; as, by committing a violent diſſeiſin with great numbers of people, hunting in a park, *&c.*, and in ſo doing happen to kill a man, they are all guilty of murder; for they muſt, at their peril, abide the event of their actions, who wilfully engage in ſuch bold diſturbances of the publick peace in open oppoſition to, and defiance of the juſtice of the nation.

Crom. 28. Hawk. P.C. c. 31. § 47. Yet, where divers rioters, having forcibly poſſeſſion of a houſe, afterwards killed the perſon whom they had ejected, as he was endeavouring in the night forcibly to regain the poſſeſſion, and to fire the houſe, they were adjudged guilty of manſlaughter only, notwithſtanding they did the fact in maintenance of a deliberate injury; perhaps for this reaſon (ſays *Hawkins*), becauſe the perſon ſlain was ſo much in fault himſelf.

Hawk. P.C. c. 31. § 48. But, if in ſuch caſe, or any other quarrel, whether it were ſudden or premeditated, a juſtice of peace, conſtable or watchman, or even a private perſon be ſlain in endeavouring to keep the peace, and ſuppreſs the affray, he who kills him is guilty of murder; for though it was not his primary intention to commit a felony, yet, inaſmuch as he perſiſts in a leſs offence with ſo much obſtinacy, as to go on in it to the hazard of the lives of thoſe, who no otherwiſe offend him, but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection, he ſeems to be in this reſpect equally criminal, as if his intention had been to commit a felony.

1 Hal. Hiſt. P. C. 475. If *A.* throw a ſtone with an intent to kill the poultry or cattle of *B.*, and the ſtone hit and kill a by-ſtander, it is manſlaughter, becauſe the act was unlawful; but not murder, becauſe he did it not maliciouſly, or with an intent to hurt the by-ſtander.

Hal. Hiſt. P. C. 475. And though by the ſtatute 33 *H.* 8. *c.* 6. no perſon not having lands, *&c.* of the yearly value of 100 *l. per ann.* may keep, or ſhoot in a gun, upon pain of forfeiting 10 *l.*, yet, if a perſon not qualified ſhoots with a gun at a bird or at crows, and by miſchance it kills a by-ſtander, by the breaking of the gun, or ſome other accident that, in another caſe, would have amounted only to chance-medley; this will be no more than chance-medley in him; for though the ſtatute prohibit him to keep or uſe a gun, yet the ſame was but *malum prohibitum*, and that only under a penalty, and will not enhance the effect beyond its nature.

If

If a man, knowing that people are passing along the street, throws a stone, or shoots an arrow over the house or wall, with an intent to do hurt to people, and one is thereby slain, this is murder; and if it were without such intent, yet it is manslaughter, and not barely *per infortunium*, because the act itself was unlawful. But if the man were tiling an house, and let fall a tile knowingly, and gave warning, and yet a person be killed, this is *per infortunium;* but if he gave not convenient warning, it is manslaughter, *quia non adhibuit debitam diligentiam* *.

Hal. Hist. P. C. 475. * This is upon supposition, that the house do not stand near an highway or place of resort, for then, though he should cry out first, it is manslaughter. See Hull's case, 1664. Kel. 40.

## (D) Of Manslaughter: And herein of Manslaughter exempt from Clergy by the Statute of 1 *Jac.* 1. *c.* 8.

MAnslaughter, or simple homicide (*a*), is the voluntary killing of another without malice express or implied, and differs not, in substance of the fact, from murder, but only differs in these ensuing circumstances.

Hal. Hist. P. C. 466. (*a*) By manslaughter is understood such killing as happens either on a sudden quarrel, or in the commission of any unlawful act, without any deliberate intention of doing mischief. Hawk. P. C. c. 30. § 1.

1. In the degree of the offence, murder being aggravated with malice presumed or implied, but manslaughter not; and therefore in manslaughter there can be no accessaries before. 2. In the form of the indictment, the former being always *felonicè ex malitiâ præcogitatâ interfecit & murdravit*, the latter only *felonicè interfecit.* 3. In the point of clergy (*b*), murder being by the statute of 23 *H.* 8. *c.* 1. exempt from the benefit of clergy, but not manslaughter. 4. In the form of the pardon of murder; for though at common law a pardon of all felonies had pardoned murder, yet, by the statute of 13 *Rich.* 2. *c.* 1. the pardon of murder must either be by the express word of *murder*, or it must be a pardon of *felonicè interfectio*, with a special *non obstante* of the statute of 13 *Rich.* 2.

Hal. Hist. P.C. 466-7. [(*b*) The punishment of murder, and that of manslaughter, were originally one and the same; both having the benefit of clergy: So that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. But now, by several statutes, 23 H. 8. c. 1., 1 Edw. 6 c. 12., 4 & 5 P. & M. c. 4., the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors. It is also enacted by stat. 25 G. 2. c. 37. that the judge, before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it, and shall, in passing sentence, direct him to be executed the next day but one, (unless the same shall be Sunday, and then on the Monday following) and that his body be delivered to the surgeons to be dissected and anatomized; and that the judge may direct his body to be afterwards hung in chains, but in nowise to be buried without dissection. And during the short, but awful, interval between sentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But a power is allowed to the judge, upon good and sufficient cause, to respite the execution, and relax the other restraints of this act. 4 Bl. Comm. 200. Fost. 295. 141.]

But there is a particular kind of manslaughter from which the benefit of clergy is taken away by the (*c*) 1 *Jac.* 1. *c.* 8. "Where any person shall stab or thrust any person or persons, that hath not then any weapon drawn, or that hath not then first stricken the party that shall so stab or thrust, so as the person or persons, so stabbed or thrust, shall thereof die within the space of six

[This statute was made at a critical time, and, as tradition hath it, upon a very special

occaſion. It is ſuppoſed to have been principally intended to put an effectual ſtop to outrages then frequently committed by perſons of inflammable ſpirits and deep reſentment; who, wearing ſhort daggers under their clothes, were too well prepared to do quick and effectual execution upon provocation extremely ſlight. Foſt. Cr. Law, 277.]

"months then next following; although it cannot be proved that "the ſame was done of malice forethought, the offender is ouſted "of clergy, provided it ſhall not extend to him that kills *ſe de-* "*fendendo*, or by miſfortune, or in preſerving the peace, or "chaſtiſing his child or ſervant."

(*c*) It is generally holden, that this ſtatute is but declarative of the common law. Bulſ. 87. Kelyng, 55. Hawk. P. C. c. 30, § 5. ["Whether it "was merely a declaratory law," ſaith Sir M. Foſter, "I will not take upon me to determine. But "certain it is, that though the words deſcriptive of the offence are very general, probably *in terrorem*, "yet in the conſtruction of the ſtatute the circumſtances which at common law will ſerve to juſtify, "excuſe, or alleviate in a charge of murder, have always had their due weight in proſecutions grounded "on the ſtatute." Foſt. Cr. Law, 298.]

In the conſtruction of this ſtatute, the following opinions have been holden:

Jon. 240. 3 Lev. 266. Hawk. P.C. c. 30. § 6.

That wherever a perſon, who happens to kill another, was ſtruck by him in the quarrel before he gave the mortal wound, he is out of the ſtatute, though he himſelf gave the firſt blow.

Allen, 44. Salk. 542. pl. 2. Hawk. P.C. c. 30. § 7. Hal. Hiſt. P. C. 468.

That he only who actually gives the ſtroke, and not any of thoſe who may be ſaid to do it by conſtruction of law, as being preſent and aiding and abetting the fact, are within the ſtatute; from whence it follows, that if it cannot be proved by whom the ſtroke was given, none can be found guilty within the ſtatute. But the indictment, though formed ſpecially upon the ſtatute, and concluding *contra formam ſtat.* is yet a good indictment of manſlaughter againſt them that were preſent aiding and abetting; and upon ſuch a ſpecial indictment of manſlaughter upon the ſtatute, the priſoner may be convicted of ſimple manſlaughter, and acquitted of manſlaughter upon the ſtatute, and the indictment ſerves for a common manſlaughter, as well as a man upon an indictment of murder may be acquitted of murder, and convicted of manſlaughter.

Jon. 432. 3 Lev. 266. Hawk. P.C. c. 30. § 7.

That the killing of a man with a (*a*) hammer, or ſuch like inſtrument, which cannot come properly under the words *thruſt* or *ſtab*, is not a killing within the ſtatute. But it ſeems that the diſcharging a (*b*) piſtol, or throwing a pot, or other dangerous weapon at the party, is within the equity of the words *having a weapon drawn*; for penal ſtatutes are conſtrued ſtrictly, and favourably, and equitably for the ſubject.

(*a*) If the ſtabbing or thruſting were with a ſword or with a pike-ſtaff, it is within the ſtatute; but if by a ſhot of a piſtol, blow with a ſword or ſtaff, *quære*, Hal. Hiſt. P. C. 470.

(*b*) So, if the party ſlain had a cudgel in his hand, it is a weapon drawn within this ſtatute; but this muſt be intended of ſuch a cudgel as might probably do hurt, not a ſmall riding rod or cane. Hal. Hiſt. P. C. 470.

Hal. Hiſt. P. C. 463.

The indictment to ouſt the priſoner of his clergy, muſt be ſpecially formed purſuant to the ſtatute, *viz.* that he did with a ſword, *&c.* ſtab the party dead; he having no weapon drawn, nor having ſtruck firſt; otherwiſe it will be but a common manſlaughter, and the party will have his clergy.

Styl. 86. Hal. Hiſt. P. C. 468.

The indictment need not conclude *contra formam ſtatuti*, no more than in burglary or robbery; for the ſtatute doth not ma[ke]

the offence to be felony, but ouſts the priſoner of his clergy, where the crime is ſo circumſtanced as the ſtatute expreſſeth.

But yet it doth not vitiate the indictment, though it do conclude *& ſic interfecit contra formam ſtatuti*, and accordingly, for the moſt part, to this day the indictments upon this ſtatute do conclude *contra formam ſtatuti*. So, it is good with or without ſuch concluſion; but it is beſt to follow the common uſage, becauſe every man doth not readily obſerve the reaſon of the omiſſion of that concluſion. Cro. Jac. 283. Hal. Hiſt. P. C. 468.

Alſo, the uſe hath been, in caſes of this nature, to prefer two indictments againſt offenders in this kind, *viz.* one of murder, another upon this ſtatute, and put the priſoner to plead to both; and to charge the jury firſt with the indictment of murder, and if they find it not to be murder, then to charge them to inquire upon the other bill; becauſe, if convict upon either, the offender is ouſted of clergy. Hal. Hiſt. P. C. 468.

In the year 1657, at *Newgate*, before *Glyn*, who then ſat as Chief Juſtice, a man was indicted upon this ſtatute, and a ſpecial verdict found, that a bailiff, having a warrant to arreſt a man, preſſed early into his chamber, with violence, but not mentioning his buſineſs. The man not knowing him to be a bailiff, or that he came to make an arreſt, ſnatched down a ſword that hung in his chamber, and ſtabbed the bailiff, whereof he preſently died. There was ſome diverſity of opinion among the judges, whether this were within the ſtatute; but at length the priſoner was admitted to his clergy; for though this caſe was within the words of the ſtatute, and not within the particular exceptions, yet it was held, that this caſe was never intended in the ſtatute; for the priſoner did not know but that the party came in to rob or kill him, when he thus violently broke into his chamber, without declaring his buſineſs. Hal. Hiſt. P. C. 470.

[Upon an outcry of thieves in the night-time, a perſon, who was concealed in the cloſet, but no thief, was, in the hurry and ſurpriſe the family was under, ſtabbed in the dark. This was holden to be an innocent miſtake, and ruled chance-medley. Poſſibly, obſerves Sir *M. Foſter*, it might have been better ruled manſlaughter at common law, due circumſpection not having been uſed; but it was not manſlaughter within the ſtatute.] 1 Hale, 42. 474. Cro. Car. 538. Sir Wm. Jones, 429. Foſt. Cr. Law, 299.

## (E) Of juſtifiable Homicide: And herein,

### 1. As it happens in the due Execution and Advancement of publick Juſtice.

SUCH killing as happens in the due execution and advancement of publick juſtice, is deemed juſtifiable homicide; the miniſters of juſtice being under the ſpecial protection of the law; and therefore, if a perſon, having actually committed a felony, will not ſuffer himſelf to be arreſted, but ſtand on his own (*a*) defence, or fly, ſo that he cannot poſſibly be apprehended alive 22 Aſſ. 55. Bro. Coron. 87. 89. Stamf. 13. 3 Inſt. 221. Dalt. c. 98. Crump. 30. Fitz. Coron.

192. 258. Hale's Hiſt. P. C. 489. Hawk. P.C. c. 28. § 11. by thoſe who purſue him, whether private perſons or publick officers, with or without a warrant from a magiſtrate, he may be lawfully ſlain by them.

(*a*) But, if the priſoner makes no reſiſtance, but flies, and the officer, being fearful, left the priſoner ſhould eſcape, ſtrikes him, whereof he dies, this is murder. Hale's Hiſt. P. C. 481. For here was no aſſault firſt made by the priſoner, and ſo it cannot be *ſe defendendo* in the officer.

Hawk. P.C. c. 28. § 12. So, if an innocent perſon be indicted of felony, where, in truth, no felony was committed, and will not ſuffer himſelf to be arreſted by the officer who has a warrant for that purpoſe; he may lawfully be killed by him, if he cannot otherwiſe be taken; for there is a charge againſt him on record, to which, at his peril, he is bound to anſwer.

9 Co. 68. Hal. Hiſt. P. C. 481. So, if a priſoner, endeavouring to break the gaol, aſſault his gaoler, he may lawfully be killed by him in the affray.

Hawk. P.C. c. 28. § 14. So, if thoſe who are engaged in a riot, or forcible entry, or detainer, ſtand in their defence, and continue the force, in oppoſition to the command of a juſtice of peace, *&c.*, or reſiſt ſuch juſtice endeavouring to arreſt them, the killing of them may be

Poph. 121. juſtified; and ſo, perhaps, may the killing of dangerous rioters by any private perſon, who cannot otherwiſe ſuppreſs them, or defend himſelf from them; inaſmuch as every private perſon ſeems to be authoriſed by the law to arm himſelf for the purpoſes aforeſaid.

Cromp. 30. Dyer, 326. Hawk. P.C. c. 28. § 15. So, if treſpaſſers in a foreſt, chaſe, park, or warren, or any incloſed ground, wherein deer are kept, will not render themſelves to the keepers, upon an hue and cry made to ſtand to the king's peace, but fly from, or defend themſelves againſt them; they may be ſlain, by force of the ſtatute *de malefactoribus in parcis*, and 3 & 4 *W. & M. c.* 10.

Plow. 9. b. Dalt. c. 98. 3 Inſt. 221. 37 H. 6. 21. a. If either of the parties fighting in a combat, allowed by law for the trial of ſome ſpecial caſes, be ſlain, he who kills him is juſtified; and the death of the other is imputed to the juſt judgment of God, who is preſumed to give the victory to him who fights in the maintenance of truth.

Roll. Rep. 189. 3 Inſt. 56. Cromp. 24. Dalt. c. 98. Hawk. P.C. c. 28. § 17. If a ſheriff, being reſiſted by one whom he attempts lawfully to arreſt in a civil action, or to retake after he has arreſted him, unavoidably kill him in the affray, he may juſtify it; though he never gave back, but ſtood his ground, and attacked the party. But if a perſon barely fly from the execution of (*b*) civil proceſs, the ſheriff cannot juſtify killing him.

(*b*) Herein, ſays my Lord Hale, the difference is between civil actions and felonies; that if a man be in danger of arreſt by a *capias* in debt or treſpaſs, and he fly, and the bailiff kill him, it is murder; but if a felon fly, and he cannot be otherwiſe taken, if he be killed, it is no felony; and in that caſe the officer for killing forfeits nothing, but the perſon ſo aſſaulted and killed forfeits his goods. Hale's Hiſt. P. C. 481.

Homicide may be juſtified in the due execution of publick juſtice; but herein theſe rules muſt be obſerved:

10 Co. 76. Dalt. c. 98. 22 E. 4. 33. a. Hawk. P.C. c. 28. § 4. 1. That the judgment, by virtue whereof the party was put to death, be given by one who had juriſdiction in the cauſe; for otherwiſe both judge and officer may be guilty of felony; as, if the court of Common Pleas give judgment on an appeal of death,

or

or juſtices of peace on an indictment of high treaſon, and award execution, which is executed. But if juſtices of peace condemn a man to death on an indictment of treſpaſs, and he be executed, they only, and not the officers, are guilty of felony; becauſe they had a juriſdiction over the offence, and therefore their proceedings are erroneous only, and not void.

A man hath the liberty of *Infangthief*, the ſteward of the court gives judgment of death againſt a priſoner againſt law; this was a cauſe of ſeizure of the liberty, but was not murder in the judge, *quia factum judicialiter licet ignoranter*, 2 *R.* 3. 10. *a.* The caſe of the ſteward of the liberty of the abbot of *Crowland*. Hal. Hiſt. P. C. 454.

The judgment muſt be executed by the lawful officer; for thoſe ancient opinions, that any one may kill a perſon attainted of felony, and that a man condemned in an appeal of death is to be executed by the relations of the deceaſed, are now obſolete; and at this day, even the judge who condemns a man, cannot execute his own ſentence; neither can the proper officer do it, but by a lawful command, without being guilty of felony. Hawk. P.C. c. 28. § 7, 8, 9. Hal. Hiſt. P. C. 455.

The execution muſt purſue the judgment; therefore, if the ſheriff behead a man, where beheading is no part of the ſentence, it is the general opinion that he is guilty of felony. Hawk. P.C. c. 28. § 10. Hal. Hiſt. P. C. 433.

S. P. Becauſe an act of deliberate cruelty.

2. As it happens in the Defence of a Man's Perſon, Houſe, or Goods.

It is clear, that the killing of a perſon in the defence of a man's perſon, houſe, or goods, is juſtifiable in the following inſtances: As, where a man kills one who aſſaults him in the highway to rob or murder * him; or the owner of a houſe, or any of his ſervants, or lodgers, *&c.* kills one who attempts to burn it, or to commit in it murder, robbery, or other felony; or a woman kills one who attempts to raviſh her; or a (*a*) ſervant coming ſuddenly and finding his maſter robbed and ſlain, falls upon the murderer immediately, and kills him; for he does it in the height of his ſurpriſe, and under juſt apprehenſions of the like attempt upon himſelf. But in other circumſtances he could not have juſtified the killing of ſuch an one, but ought to have apprehended him. Hawk. P.C. c. 28. § 21. and ſeveral authorities there cited. Hal. Hiſt. P. C. 484.

(*a*) So, of a huſband in defence of his wife, a child of his parent, & *e converſo*; for the act of the aſſiſtant ſhall have the ſame conſtruction, in ſuch caſes, as the act of the party aſſiſted ſhould have had, if it had been done by himſelf. Hal. Hiſt. P. C. 484.—* By 24 H. 8. c. 5. it is no forfeiture for killing a man attempting to commit murder or robbery.

But a man cannot juſtify the killing another in defence of his houſe or goods, or even of his perſon, for a bare private treſpaſs; and therefore he who kills another, who claiming title to his houſe attempts to enter it by force, and ſhoots at it, or that breaks open his windows in order to arreſt him, or that perſiſts in breaking his hedges, after he is forbidden, is guilty of manſlaughter; and he, who in his own defence kills another that aſſaults him in his houſe in the day-time, and plainly appears to intend to beat him only, is Hawk. P.C. c. 28. § 23. Hal. Hiſt. P. C. 485.

guilty of homicide *ſe defendendo*, for which he forfeits his goods, but is pardoned of courſe; yet it ſeems, that a private perſon, and *à fortiori*, an officer of juſtice, who happens unavoidably to kill another in endeavouring to defend himſelf from, or ſuppreſs dangerous rioters, may juſtify the fact, inaſmuch as he only does his duty, in aid of the publick juſtice.

Hawk. P.C. c. 28. If a man be dangerouſly aſſaulted by another, as with a drawn ſword, *&c.* without any previous affray, though in a town, or other place where help may be expected, and uſe the ſame caution to avoid fighting as would make the killing the aſſailant homicide *ſe defendendo* only, if there had been a previous affray, and then unavoidably kill the aſſailant, it ſeems reaſonable that he may juſtify it.

Dalt. c. 98. It ſeems alſo, that in ſome ſpecial caſes, a man may juſtify even killing an innocent perſon; as, where in a ſhipwreck two perſons get upon the ſame plank, which will not ſupport them both, and one thruſts the other off.

Cro. Car. 538. March, 5. *Vide ſupra.* So, if a man be awakened in the night with an alarm that thieves are in his houſe, and ſearching for them in the dark, with his ſword drawn, happen to kill a perſon lying hid in part of the houſe, who in truth had no ill deſign, and was brought thither by a ſervant in order to aſſiſt in cleaning the houſe; it ſeems, he may juſtify the fact, inaſmuch as it hath not the appearance of a fault.

Hawk. P.C. c. 28. §2. But a man ſhall never juſtify himſelf under a neceſſity which he brought upon himſelf by his own fault; and therefore, if rioters, wrongfully detaining a houſe by force, kill the party ejected, or any of his aſſiſtants who attack it from without, and endeavour to burn it, they are guilty of manſlaughter.

Vailor's caſe, Foſt. Cr. Law, 278. [The priſoner was indicted for the murder of his brother, and the caſe upon evidence appeared to be, that the priſoner on the night the fact was committed came home drunk. His father ordered him to go to bed, which he refuſed to do; whereupon a ſcuffle happened betwixt the father and ſon. The deceaſed, who was then in bed, hearing the diſturbance got up, and fell upon the priſoner, threw him down, and beat him upon the ground, and there kept him down, ſo that he could not eſcape, nor avoid the blows; and as they were ſo ſtriving together, the priſoner gave the deceaſed a wound with a penknife, of which wound he died.

Holt, Tracy, and Bury. The Judges preſent doubted, whether this were manſlaughter or *ſe defendendo*, and a ſpecial verdict was found to the effect here ſet forth. At a conference of all the judges of *England*, it was unanimouſly holden to be manſlaughter; for there did not appear to be *any inevitable neceſſity ſo as to excuſe the killing in this manner.*]

Hawk. P.C. c. 28. § 3. (*a*) But herein my Lord Hale ſays, it is generally to be obſerved, It ſeems a reaſonable opinion, and countenanced by the old books, that a fact amounting to *juſtifiable* homicide, being ſpecially (*a*) pleaded, and proved to the court on an indictment or appeal of murder, the party ſhall be diſmiſſed without being arraigned, *&c.* But it is certain, that a fact amounting to *excuſable* homicide cannot be ſo pleaded; but the party muſt plead not guilty, and

and give the ſpecial matter in evidence: alſo, it is certain, that where a fact amounting to *juſtifiable* homicide is found by a jury, the party is to be diſmiſſed, without being obliged to purchaſe a pardon, *&c.*

that in caſe of any indictment, or charge of felony, the priſoner

cannot plead any thing by way of juſtification, as, that he did it in his own defence, or *per infortunium*, but muſt plead not guilty; and, upon his trial, the ſpecial matter is to be found by the jury, and thereupon the court gives judgment. Hal. Hiſt. P. C. 478.

## (F) Of excuſable Homicide: And herein,

### 1. Of Homicide *per Infortunium*, or Chance-medley.

EXcuſable or involuntary homicide is of two kinds. 1ſt, When it is purely involuntary and caſual; as the killing of a man *per infortunium*. 2dly, When it is partly involuntary, and partly voluntary, but occaſioned by a neceſſity which the law allows, which is commonly called homicide *ex neceſſitate;* as killing a man in his own defence. Hal. Hiſt. P. C. 472.

Homicide *per infortunium* is where a man is doing a lawful act, and without intention of bodily harm to any perſon, and by that act, death of another enſues; as, if a man be ſhooting at butts or pricks, and by caſualty his hand ſhakes, and the arrow kills a by-ſtander. Hal. Hiſt. P. C. 474.

And though the killing of another *per infortunium* be not in truth felony, nor ſubject the party to a capital puniſhment; and therefore, in ſuch caſes the verdict uſually conclude *quod interfecit per infortunium & non per feloniam;* yet the party forfeits his goods; and though he ought to have, *quaſi de jure*, a pardon of courſe, upon the certificate of the conviction, yet he is not to be diſcharged out of priſon, but bailed to the next term, or ſeſſions, to ſue out his pardon of courſe; for though it was not his crime, but his misfortune, yet, becauſe the king hath loſt a ſubject, and that men may be the more careful, he forfeits his goods; and is not preſently abſolutely diſcharged of his impriſonment, but bailed. Hal. Hiſt. P. C. 477.

Alſo, it is agreed, that no one can excuſe the killing of another, by ſetting forth in a ſpecial plea, that he did it by miſadventure, or *ſe defendendo*, but that he muſt plead not guilty, and give the ſpecial matter in evidence. Hawk. P.C. c. 29. § 24.

As, where, without any intent of doing hurt, a perſon chances to kill another by the head of a hatchet flying off at work; this being proved in evidence, the party is guilty of homicide *per infortunium* only. Hal. Hiſt. P. C. 472.

So, where a perſon happens to kill another by a piece of timber flung down from a houſe ſtanding out of any road, after loud warning to all perſons to ſtand clear; or by a gun diſcharged at wild-fowl; or by an unlucky fall or kick at wreſtling or football, or other ſuch like ſports; or in fighting at barriers; or tilting by the king's command; or by moderate correction of a child, ſcholar, Hal. Hiſt. P. C. 473. Hawk. P.C. c. 29.

lar, or ſervant. But, if the correction be immoderate, the offence will be manſlaughter at leaſt; and if the inſtrument be ſuch as apparently endangers life, as, an iron bar, &c. it will be murder.

Hawk. P.C. c. 29. So, if a man whip a horſe on which another is riding, whereupon he ſprings out and runs over a child, and kills him, the rider is guilty of homicide *per infortunium*, the other of manſlaughter.

Hal. Hiſt. P. C. 473. &c. Hawk. P. C. c. 29. But, regularly, if the act, which occaſions the death of a man, be a treſpaſs, or cannot but be attended with the manifeſt danger of hurt to the perſon of ſome man, or be of ſuch a nature, that it cannot be uſed without manifeſt hazard of life, and there were no deliberate intent of miſchief, the killing is eſteemed manſlaughter; as, if a man kill another by ſhooting at deer in a third perſon's park; or by ſlinging down a piece of timber into a common ſtreet or highway, though in work, and after warning to ſtand clear; or by throwing ſtones at another wantonly at play; or by tilting without the king's command; or by parrying with naked ſwords covered with buttons at the points, or with ſwords in the ſcabbards.

[The priſoner came to town in a chaiſe, and before he got out of it, he fired his piſtols, which by accident, killed a woman. King, C. J. ruled it to be manſlaughter. Rex v. Burton, 1 Str. 481.]

Hawk. P.C. c. 29. Hal. Hiſt. P. C. 475. But, if a man in the execution of a deliberate purpoſe to commit a felony, or to do a perſonal hurt to another, or to do any unlawful act, which cannot but manifeſtly be attended with danger of great perſonal hurt to ſome other, happen to kill another, though it be not intended againſt any one in particular, he is guilty of murder; as, where a man kills another by maliciouſly beating or wounding him; or by ſhooting at tame fowl, with an intent to ſteal them; or by knowingly and deliberately diſcharging a gun; or throwing a great ſtone or piece of timber; or riding with a horſe, uſed to ſtrike, among a multitude, though he do it only with an intent to divert himſelf by frighting them; or by engaging in a riot; or robbing in a park, &c.

[By ſtat. 10 *Geo.* 2. *c.* 31. if any waterman between *Graveſend* and *Windſor* receives into his boat or barge a greater number of perſons than the act allows, and any paſſenger ſhall then be drowned, ſuch waterman is guilty (not of manſlaughter, but) of felony, and ſhall be tranſported as a felon.]

Foſt. Cr. Law, 261. A man at the diverſion of cock-throwing at *Shrovetide* miſſed his aim, and a child looking on received a blow from the ſtaff, of which he ſoon died; this was ruled manſlaughter.

## 2. Of Homicide *ſe Defendendo*.

Hawk. P.C. c. 29. § 13. (*a*) In homicide *ſe defendendo* there ſeems neceſſary

Homicide (*a*) *ſe defendendo* is where one is forced to fight on a ſudden affray, retreats as far as he can without endangering his own life, and then, and not before, in order to ſave his life, or to defend his perſon from a battery, (eſpecially if the aſſault were in his own houſe) gives the other a mortal wound. It is ſaid by

ſome not to be material who ſtruck firſt. But, if a man attack another upon malice, in ſuch a manner as endangers his life, and then fly to the wall, and kill him, he is guilty of murder. ſome act to be done by the party killing; for if he be merely paſſive, this will make it only a killing *per infortunium*; and though it be not felony, not being accompanied with a felonious intent, yet it ſubjects the party to a forfeiture of his goods and chattels. Hal. Hiſt. P. C. 478, &c.

Regularly, it is neceſſary that the perſon, who kills another in his own defence, fly as far as he may to avoid the violence of the aſſault, before he turn upon his aſſailant; for though, in caſes of hoſtility between two nations, it is a reproach and piece of cowardice to fly from an enemy, yet in caſes of aſſaults and affrays between ſubjects under the ſame law, the law owns not any ſuch point of honour; becauſe the king and his laws are to be the *vindices injuriarum*; and private perſons are not truſted to take capital revenge one of another. Hal. Hiſt. P. C. 481.

There is malice between *A.* and *B.*, they appoint a time and place to fight, and meet accordingly, *A.* gives the firſt onſet, *B.* retreats as far as he can with ſafety, and then kills *A.*, who had otherwiſe killed him; this is murder; for they met by compact and deſign, and therefore neither ſhall have the advantage of what they themſelves created. Hal. Hiſt. P. C. 479.

There is malice between *A.* and *B.*, they meet caſually, *A.* aſſaults *B.* and drives him to the wall, *B.* in his own defence kills *A.*; this is *ſe defendendo*, and ſhall not be heightened by the former malice into murder; for it was not a killing upon the account of the former malice, but upon a neceſſity impoſed upon him by the aſſault of *A.* Hal. Hiſt. P. C. 479.

In *Fleet-ſtreet* *A.* and *B.* were walking together, *B.* gave ſome provoking language to *A.*, *A.* thereupon gave *B.* a box on the ear, they cloſed, *B.* was thrown down and his arm broken, he runs to his brother's houſe preſently, which was hard by, *C.* his brother, taking the alarm, came out with his ſword drawn and made towards *A.* who retreated ten or twelve yards, *C.* purſued him, *A.* drew his ſword and made a paſs at *C.* and killed him; *A.* being indicted at *Newgate* ſeſſions for murder, the court directed the jury upon the trial to find this manſlaughter, not murder; becauſe upon a ſudden falling-out; not *ſe defendendo*, partly becauſe *A.* made the firſt breach of the peace, by ſtriking *B.* and partly becauſe, unleſs he had fled as far as might be, it could not, by way of interpretation, be ſaid to be in his own defence; and it appeared plainly upon the evidence, that he might have retreated out of danger; and his ſtepping back was rather to have an opportunity to draw his ſword, and with more advantage to come upon *C.* than to avoid him. And accordingly at laſt it was found manſlaughter, 1671, at *Newgate*. Hal. Hiſt. P. C. 483.

# Nonſuit.

(A) Of the Nature thereof, and how it differs from a *Retraxit.*

(B) Who may be Nonſuit.

(C) In what Actions there may be a Nonſuit.

(D) At what Time a Nonſuit may be.

(E) How far the Nonſuit of one ſhall be the Nonſuit of another.

(F) How far a Nonſuit for Part of the Thing in Demand ſhall be a Nonſuit for the Whole.

(G) Of the Effect of a Nonſuit: And herein of its being a peremptory Bar.

## (A) Of the Nature thereof, and how it differs from a *Retraxit.*

Co. Lit. 139. a. 2 Lil. Reg. 230.

WHERE a plaintiff is demanded and doth not appear, he is ſaid to be nonſuit. And this uſually happens, where upon the trial, and when the jury are ready to give their verdict, the plaintiff diſcovers ſome error or defect in the proceedings, or is unable to prove a material point, for want of neceſſary witneſs, *&c.* and thereupon being demanded, (as he muſt be) his default is recorded by the ſecondary. And the (*a*) entry is *in miſericordiâ quia non proſecutus eſt breve ſuum;* upon which the defendant recovers his coſts againſt him. But this ariſing from ſome ſuppoſed neglect or overſight, the plaintiff, except in ſome particular caſes, is not (*b*) barred from commencing a new action.

(*a*) For the form of the entry, *vide* Cro. Jac. 213. 2 Leon. 177. 2 Salk. 456. pl. 6.

(*b*) That where a plaintiff is nonſuit, if he will again proceed in the ſame cauſe, he muſt put in a new declaration; for by his being nonſuit, it ſhall be intended that he had no ſuch cauſe of ſuit as he declared in, and ſo that declaration is void, and he hath no day in court. 1 Lil. Reg. 231.——But a nonſuit by miſtake may be ſet aſide, and a *diſtringas de novo* awarded, for which *vide* Cro. Car. 203. Cro. Jac. 669. Godb. 328. Raym. 38. 73. 2 Salk. 455.——A motion to ſet aſide a nonſuit occaſioned by the judge's miſtaking the law. Ca. Law and Eq. 315.——Nonſuit diſcharged, being entered on *niſi prius* without *habeas corpus.* Sid. 164.——* A plaintiff ſometimes ſubmits to be nonſuited, where the opinion of the judge is againſt him, the judge giving him leave to move the court to ſet the nonſuit aſide, without coſts.——If the judge does not give ſuch leave, but directs a nonſuit, the plaintiff, if he conceives the judge miſtaken in the law, may move to ſet the nonſuit aſide; and if the court is of opinion the judge was miſtaken, will ſet

ſet ſame aſide, and generally without coſts: In ſome particular caſes, however, there may be reaſons ſufficient to induce the court to refuſe to ſet aſide the nonſuit, unleſs the plaintiff will pay coſts.——If there are ſeveral defendants, and all found guilty, plaintiff may enter a *noli proſequi* againſt any one; therefore, if in trover againſt a defendant executor, and other defendants not executors, there is a verdict againſt theſe, and the executors found not guilty, judgment ſhall not be arreſted, for plaintiff may enter *noli proſequi* as to him. Dale v. Eyre, T. 24 & 25 Geo. 2. 1 Wilſ. 306.

A *retraxit* is, when the plaintiff is preſent in court (as regularly he is ever by intendment of law, till a day be given over, unleſs it be when a verdict is given, and then he is but demandable); and this is either privative, when the entry is *quod ſolemniter exactus non venit, ſed a ſecta ſua in contemptum curiæ ſe retraxit*, &c. or poſitive, when the entry is *quod fatetur ſe, ſeu cognoſcit ſe ulterius nolli proſequi*, &c. It is called a *retraxit*, becauſe that is the effectual word uſed in the entry, and is (*a*) a bar to all actions of the like or inferior nature. Co. Lit. 139. a. (*a*) 8 Co. 58. 52. S. P. laid down as a rule. 4 Mod. 87. S. P.

A *retraxit* is always of the part of the plaintiff or demandant, and cannot be, unleſs the plaintiff or demandant be in court in proper perſon *. 9 Co. 58. Beecher's caſe, Cro. Jac. 211.

S. C. Co. Lit. 138. b. S. P.——* *Sed qu.* If plaintiff's counſel, with conſent of the attorney, may not conſent to a *retraxit*, though the plaintiff is not preſent in court? A juror is thus frequently withdrawn, when thoſe concerned for the plaintiff clearly ſee it is for his benefit.

It is held, that a *retraxit* cannot be entered (*b*) before the plaintiff hath declared, and if entered before, it hath but the effect of nonſuit. Dalſ. 78. 3 Leon. 19. (*b*) Whether a *retraxit* may be entered after a general verdict. Cro. Eliz. 465. *dubitatur*.

Debt was brought upon a bond againſt *A.*, wherein *A.* and *B.* were jointly and ſeverally bound, and after plea pleaded the plaintiff entered a *retraxit*, and in an action after brought againſt *B.* upon the ſame bond, whether this ſhould be a bar, between (*c*) *Dennis* and *Paine*, *Cro. Jac.* 551. *dubitatur & adjornatur*. It was ſaid, that a *retraxit* was in nature of a releaſe, and a releaſe to one joint obligor diſcharged the other; but on the other ſide it was ſaid to be a bar only by way of eſtoppel between the parties, whereof no other ſhould take advantage. (*c*) Jon. 451. S. C. and judgment given for the plaintiff, becauſe of a defect in the plea. March, 95. S. C. *dubitatur*, but varies in the ſtating it; for by this report, debt was brought both againſt *A.* and *B.*, and the plaintiff entered a *retraxit* againſt *A.*, and whether this was a diſcharge of *B.* is made the queſtion. *Vide* Cro. Eliz. 762.——* None but the defendant can demand the plaintiff. If neither plaintiff nor defendant appear after cauſe called, and jury ſworn, the only way is to diſcharge the jury. Arnold v. Johnſton, Str. 267. Smith v. Whiſtler, Ca. temp. Hard. 305. S. P.——If a cauſe is tried by proviſo, there muſt be a rule given in the office, *but niſi prius per proviſo ſi querens fecerit defaltam*; and if there is not, and plaintiff is nonſuited, the nonſuit ſhall be ſet aſide. Dodſon v. Taylor, Str. 1055. [Proude v. Willimote, 1 Barnard. B. R. 18. acc. But it is ſufficient if the defendant obtain this rule any time before the trial. King v. Pippet, 1 Term Rep. 695.]——If it appears on the record, that no iſſue is joined, the jury muſt be diſmiſſed. Heath v. Walker, Str. 1117.——By ſtat. 14 Geo. 2. c. 17. If plaintiff neglects to bring the iſſue to trial according to the courſe of the court, the court, on motion, on notice, ſhall give judgment as in caſe of a nonſuit, unleſs they allow farther time, and defendant ſhall have coſts as in caſe of a nonſuit.—But if in action againſt two on a joint-promiſe, there is judgment againſt one by default; and on plaintiff's neglecting to bring iſſue joined by the other on to trial, rule is obtained for judgment as in caſe of a nonſuit, yet coſts cannot be taxed; for plaintiff could not have been nonſuited on a trial. Weller v. Goytou, 1 Bur. 358.——A nonſuit at *niſi prius* muſt be recorded by the judge of *niſi prius*, and cannot afterwards be recorded in bank. Gardner v. Davis, 1 Wilſ. 301.——If defendant has obtained a rule for coſts for not proceeding to trial, he cannot afterwards move for judgment as in caſe of nonſuit. Barnes, 131. 314. 316. [Yet, where the plaintiff does not countermand notice of trial, but withdraws the record after the cauſe is called on, the court will make it a condition for diſcharging a rule for judgment as in caſe of a nonſuit, (on a peremptory undertaking to try,) that he ſhall pay the defendant the coſts incurred by omitting to try. Jordaine v. Sharpe, 2 H. Bl. 280.]——*Non proſ.* for want of declaration demanded in the country, ſhall be

ſet

ſet aſide. Barnes, 311.——If a judge of aſſize directs nonſuit erroneouſly, there is no remedy, Barnes, 311.——[It is now ſettled, that ſuch nonſuit may be ſet aſide. Lady Windſor's caſe, 4 Burr. 1984.]——If plaintiff dies after nonſuit, and before day in bank, it is not helped by the ſtatute, but is error. Barnes, 312.——Rule to declare in *C. B.* muſt be in the office where plaintiff's attorney practiſes, Barnes, 312.——On motion for judgment, as in caſe of a nonſuit, there is a rule for the plaintiff to enter iſſue; if he does not, defendant may have *non proſ.* if he enters it, the roll muſt be produced, and defendant may move for a nonſuit; if the court admit cauſe, why the nonſuit ſhould not, &c. they appoint day for trial; on ſuch motion, there muſt be an affidavit that the cauſe is not tried. Barnes, 313. 316.——Sickneſs of plaintiff—marriage of *feme* plaintiff—that the bankrupt did not attend aſſignees, plaintiffs—that material witneſſes were ill—or that the record was offered to be entered, though a little out of time. Barnes, 313, 314, 315, 316. 464.—— [the inſolvency of the defendant ſince the action brought, Bailey v. Wilkinſon, Dougl. 671. or, that the cauſe was carried down and made a *remanet*, Mewburn v. Langley, 3 Term Rep. 1. are ſufficient cauſes to prevent judgment as in caſe of a nonſuit. Indeed, the court of Common Pleas have lately holden, that in all caſes where an application is made for the firſt time for judgment as in caſe of a nonſuit, it is a ſufficient anſwer to it, to undertake peremptorily to try, without alleging any reaſon for not having before tried the cauſe; and that whatever might have been formerly the practice, in future, it ſhould be underſtood, that the firſt motion for judgment as in caſe of a nonſuit, is only a mode of obtaining a peremptory undertaking to try. Mallet v. Hilton, 2 H. Bl. 119.—It ſeems now by the practice of the courts both of *B. R.* and *C. P.*, that the judgment as in caſe of a nonſuit cannot be moved for till the third term after that in which iſſue is joined. Hall v. Buchanan, 2 Term Rep. 734. Da Coſta v. Ledſtone, 2 H. Bl. 558.]——Replevins and actions *qui tam* are within the ſtatute. Barnes, 315. 317.——[A replevin is not; for in replevin both parties are actors, and the defendant may carry down the record by proviſo. Jones v. Concannon, 3 Term Rep. 661. Shortridge v. Hiern, 5 Term Rep. 400. Judgment as in caſe of a nonſuit may be given in a traverſe of a return to a mandamus. Rex v. Mayor, &c. of Stafford, 4 Term Rep. 689.]——If plaintiff was ready, but the cauſe did not come on becauſe the view was not returned by ſix jurors, judgment ſhall not be ſigned. Barnes, 498.——If defendant has obtained a rule for judgment *niſi*, the court will not give plaintiff leave to amend his declaration by ſtriking out allegation, but judgment ſhall be abſolute. Barnes, 318.——Judgment as in caſe of a nonſuit, may be moved for without term's notice, though no proceedings in a year. Barnes, 308.——In replevin, if plaintiff does not appear at the trial, but defendant brings down record, nonſuit ſhall be entered, and not verdict for defendant; if it is, it ſhall be ſo amended at defendant's coſt. Barnes, 458. [Where a plaintiff has once proceeded to trial, judgment as in caſe of a nonſuit cannot be entered for not proceeding to a new trial. Porzelius v. Maddocks, 1 H. Bl. 101.]

## (B) Who may be Nonſuit.

Bro. Nonſuit, 68. Co. Lit. 139. b. Roll. Abr. 131. * But *qu.* if this does not

IT is every where agreed that the king, being in ſuppoſition of law always preſent in court, cannot be nonſuit in any information or action wherein he himſelf is the ſole plaintiff. But it is held, that any informer *qui tam*, or plaintiff in a popular action, may be nonſuit, and thereby wholly * determine the ſuit, as well in reſpect of the king as of himſelf.

mean a nonſuit on the merits, and if ſuch plaintiff, by colluſion with the defendant, does not chooſe to proceed, whether the king may not proceed for his ſhare of the penalty?—In a *qui tam* action, judgment as in caſe of a nonſuit may be entered on a rule to ſhew cauſe. Watſon v. Johnſon, P. 25 G. 2. 1 Wilſ. 325.

39 Aſſ. pl. 1. 2 Roll. Abr. 130. S. C.

If an infant bring an aſſize by guardian, although that the infant diſavow the ſuit in proper perſon, yet no nonſuit ſhall be awarded.

6 Mod. 181.

Where an executor need not name himſelf executor, he ſhall pay coſts upon a nonſuit, and the naming himſelf executor ſhall not exempt him from it.

20 H. 6. 44. b. Roll. Ab. 581. S. C.

If an attorney of Common Pleas is ſued in an action there, he ſhall not be demanded, becauſe he is ſuppoſed always preſent aiding the court.

## (C) In what Actions there may be a Nonſuit.

A Perſon may be nonſuit in a writ of error. 2 Roll. Abr. 130.

A perſon may be nonſuit in a writ of falſe judgment. Sid. 255. S.P.

20 H. 6. 18. b. 2 Roll. Abr. 130. S. C.

One cannot be nonſuit in any action in which he is not an actor or demandant; and though he afterwards become an actor, yet, not being originally ſo, he cannot be nonſuit as an avowant. So, of garniſhees who become actors, but were not ſo originally. 22 E. 4. 10.

So, if a perſon outlawed hath a charter of pardon, and ſues a *ſcire facias* againſt the party, though hereby he is an actor, yet he cannot be nonſuit. 2 Roll. Abr. 130.

So, if a man traverſe an office he cannot be nonſuit, although he is actor, for he hath no original pending againſt the king. 2 Roll. Abr. 130. Dyer, 141. pl. 47. this is made a *quære*.

But in a petition of right againſt the king the plaintiff may be nonſuit. 11 H. 4. 52. 2 Roll. Abr. 130.

So, in an *audita querela* to avoid a ſtatute, the plaintiff may be nonſuit, for he is plaintiff in this action. 47 E. 3. 5. b.

If to two *nihils* returned on a *ſcire facias* on a charter of pardon, the plaintiff does not appear, he ſhall be nonſuit; for the ſtatute ordains, that upon his appearing he ought to count againſt the defendant. 45 E. 3. 16.

## (D) At what Time a Nonſuit may be.

AT the common law, upon every continuance, or day given over before judgment, the plaintiff was demandable, and upon his non-appearance might have been nonſuit. Co. Lit. 139. b. That at common law if he did not like the damages given by the jury, he might be nonſuit. 5 Mod. 208.

But now by the 2 *H.* 4. *c.* 7. it is enacted in the words following: "Whereas, upon verdict found before any juſtice in aſſiſe "of *novel diſſeiſin*, *mort d'anceſtor*, or any other action whatſoever, "the parties before this time have been adjourned upon difficulty "in law, upon the matter ſo found; it is ordained and eſta-"bliſhed, that if the verdict paſs againſt the plaintiff, that the "plaintiff ſhall not be nonſuited."

But notwithſtanding this ſtatute it hath been held, that the plaintiff may be nonſuited after a ſpecial verdict, or after a demurrer and (*a*) argument thereupon. Co. Lit. 139. 2 Jon. 1. 2 Roll. Abr. 131-2.

3 Lem. 28. & *vide* 2 Hawk. P. C. c. 23. § 95. (*a*) In debt upon an obligation, upon demurrer, the caſe being argued, the opinion of the court was againſt the plaintiff, and rule given, that judgment ſhould be entered for the defendant; and the plaintiff prayed that he might be nonſuited; and becauſe he had the ſame term appeared, and argued by his counſel, and had prayed judgment, he could not be nonſuited the ſame term. Cro. Jac. 35.

If there be judgment to account, and auditors aſſigned, and thereupon a *capias ad computandum*, the plaintiff cannot be nonſuited, 2 Roll Abr. 131. *Vide* Co. Lit. 139. b.

on

on the original, becauſe the original is determined by the judgment to account.

3 H. 6. 13. 2 Roll. Abr. 131. If the defendant wages his law, and a day is given him over to another term to make his law, if the plaintiff does not appear that day he will be nonſuited: otherwiſe, if he wages his law immediately, or, as ſome hold, on a day in the ſame term.

## (E) How far the Nonſuit of one ſhall be the Nonſuit of another.

Co. Lit. 139. 2 Inſt. 563. 2 Roll. Abr. 132. Several caſes to this purpoſe. IN real or mixt actions, the nonſuit of one demandant is not the nonſuit of both; but he that makes default ſhall be ſummoned and ſevered; but regularly, in perſonal actions, the nonſuit of the one is the nonſuit of both.

Co. Lit. 139. a. *Vide* head of Executors. But in perſonal actions, brought by executors, there ſhall be ſummons and ſervice, becauſe the beſt ſhall be taken for the benefit of the dead; and ſo it is in action of treſpaſs by them, as executors, for goods taken out of their own poſſeſſion. Like law in account by them, as executors, by the receipt of their own hands.

Co. Lit. 139. (*a*) In an *audita querela*, *ſcire facias*, attaint, the nonſuit of one ſhall not prejudice the other. 6 Co. 26. In an (*a*) *audita querela* concerning the perſonalty, the nonſuit of the one is not the nonſuit of the other; becauſe it goeth by way of diſcharge, and freeing themſelves, and therefore the default of the one ſhall not hurt the other.

Co. Lit. 139. a. In a *quid juris clamat*, the nonſuit of the one is the nonſuit of both, becauſe the tenant cannot attorn according to the grant.

Co. Lit. 139. a. b. 2 Roll. Abr. 133. (*b*) But where a plaintiff may enter a *nolli proſequi* againſt one, and have judgment againſt the reſt, *vide* 2 Roll. Abr. 101. Cro. Car. 239. 243. Hob. 70. 180. Carth. 19. 3 Mod. 101. Some actions follow the nature of thoſe actions whereupon they are grounded; as, the writs of error, attaint, *ſcire facias*, and the like. If a real action be brought by ſeveral *præcipes* againſt two or more, if the demandant be nonſuit againſt one, he is nonſuit againſt (*b*) all; for, as to the demandant, it is but one writ under one *teſte*.

Cro. Eliz. 460. pl. 6. Dyer, 120. 2 Roll. Abr. 133. Sid. 387. In an appeal againſt divers, whether they plead the ſame or ſeveral iſſues, it hath been adjudged, that a nonſuit againſt one, at the trial of any one of the iſſues, is a nonſuit as to all, becauſe ſuch a nonſuit operates in nature of a releaſe to the whole.

2 Salk. 455. pl. 1. Comyns, 74. (*c*) There is a nonſuit before appearance at the return of the writ, or after appearance at ſome day of continuance. Co. Lit. 138. b. A *latitat* was ſued out againſt four defendants in treſpaſs, the plaintiff was nonſuit for (*c*) want of a declaration, and the defendants' attorney entered four nonſuits againſt him; and it was held to be irregular, becauſe the treſpaſs is joint; and though the plaintiff may count ſeverally againſt the defendants, yet it remains joint till it is ſevered by the count.

Harris v. Butterley, Cowp. 483. [In treſpaſs againſt ſeveral, if any of them ſuffer judgment by default, the plaintiff cannot be nonſuited.]

## (F) How far a Nonſuit for Part of the Thing in Demand ſhall be a Nonſuit for the Whole.

IT is laid down as a general rule, that a nonſuit for part is a nonſuit for the whole. But it hath been held, that if a defendant plead to one part, and thereupon iſſue be joined, and demur to the other, the plaintiff may be nonſuit as to one part, and proceed for the other. 2 Leon. 177. Hob. 180.

If in debt the defendant acknowledges the action as to part, and joins iſſue as to the reſidue, and the plaintiff hath judgment for that which is ſo confeſſed, but there is a *ceſſat executio*, by reaſon of the damages to be aſſeſſed by the jury; if the plaintiff be nonſuited in this iſſue, this ſhall not be a nonſuit for the damages to be given, becauſe that he had judgment. 2 Roll. Abr. 134.

If in trover for divers goods the defendant pleads, that as to ſome of the goods they were fixed to his freehold, as to others that he had them of the gift of the plaintiff, and as to the reſt not guilty; and as to the firſt, the plaintiff enters *non vult ulterius proſequi*; this amounts only to a *retraxit*, and is no nonſuit, ſo as to bar the plaintiff from proceeding on the other parts of the plea, on the rule, that a nonſuit for part is a nonſuit for the whole. 2 Leon. 177. Sir John Sands v. Packſal Brocas.

## (G) Of the Effect of a Nonſuit: And herein of its being a peremptory Bar.

A Nonſuit, as hath been obſerved, is regularly no peremptory bar; but the plaintiff may, notwithſtanding, commence any new action of the ſame or like nature. But this general rule hath the following exceptions:

1. It is peremptory in a *quare impedit*; and in that action a diſcontinuance is alſo peremptory; and the reaſon is, for that the defendant had, by judgment of the court, a writ to the biſhop; and the incumbent, that cometh in by that writ, ſhall never be removed; which is a flat bar to that preſentation. Co. Lit. 139. a.

2. Nonſuit in an appeal of murder, rape, robbery, &c. after (a) appearance, is peremptory, and this *in favorem vitæ* (b). But the nonſuit of the plaintiff in an appeal is not ſuch an acquittal, on which the defendant ſhall recover damages againſt the abettors, by *Weſt.* 2. *c.* 12. unleſs, after the nonſuit, he were arraigned at the king's ſuit upon the appeal, and acquitted. Co. Lit. 139. a.

(a) But the bare taking out of a writ of appeal, and cauſing it to be delivered of record to the ſheriff, and a nonſuit upon it, is no bar of a ſecond appeal; becauſe it doth not appear of record, but that it might be done by a ſtranger; and therefore the nonſuit muſt be after an appearance in proper perſon of record. 2 Hawk. P. C. c. 23. § 131. (b) 2 Inſt. 385.

3. So, if the plaintiff, in an appeal of mayhem, be nonſuit after appearance, it is peremptory; for the words therein are *felonicè mayhemavit*. Co. Lit. 139. a.

Co. Lit. 139. a. Cro. Eliz. 881.

4. A nonſuit after appearance is alſo peremptory in a *nativo habendo*, and the nonſuit of one plaintiff in that action nonſuits both *in favorem libertatis*. But in a *libertate probandâ* ſuch nonſuit is not peremptory; neither is the nonſuit of one plaintiff the nonſuit of both.

Co. Lit. 139. a.

5. Such nonſuit is alſo peremptory in an attaint, but a diſcontinuance in an attaint is not, becauſe there is a judgment given upon the nonſuit, but not upon the diſcontinuance.

---

# Nuiſances.

2 Roll. Abr. 83. Hawk. P.C. c. 75.

A Common nuiſance is an offence againſt the publick, either by doing a thing which tends to the annoyance of all the king's ſubjects, or by neglecting to do a thing which the common good requires.

Under which deſcription we ſhall conſider,

(A) What ſhall be ſaid a Nuiſance.

(B) How far the Indictment muſt charge it to be an Annoyance to all the King's Subjects.

(C) How a Nuiſance is to be removed or abated.

(D) How the Offence is puniſhable.

For Nuiſances relating to the Highways, *vide* title *Highways*.

For thoſe relating to Bridges, tit. *Bridges*.

For thoſe relating to publick Houſes, tit. *Inns and Innkeepers*.

---

## (A) What ſhall be ſaid a Nuiſance.

3 Inſt. 205. Kitchen, 11. Hawk. P.C. c. 75. § 6. 2 Bur. Rep. 1232.

IT is clearly agreed, that keeping a bawdy-houſe is a common nuiſance, as it endangers the publick peace, by drawing together diſſolute and debauched perſons; and alſo has an apparent tendency to corrupt the manners of both ſexes, by ſuch an open profeſſion of lewdneſs.

Salk. 348. pl. 35. The Queen v. Williams.

Alſo it hath been adjudged, that this is ſuch an offence, of which a feme covert may be guilty as well as if ſhe were ſole; and

that ſhe, together with her huſband, may be indicted and condemned to the pillory for keeping a bawdy-houſe; for the keeping the houſe does not neceſſarily import property, but may ſignify that ſhare of government which the wife has in a family as well as the huſband; and in this ſhe is preſumed to have a conſiderable part, as thoſe matters are uſually managed by the intrigues of her ſex.

It is clearly agreed, that all common gaming-houſes are nuiſances in the eye of the law, being detrimental to the publick, as they promote cheating and other corrupt practices, and incite to idleneſs, and avaricious ways of gaining property, great numbers, whoſe time might otherwiſe be employed for the general good of the community. Alſo, it hath been (*a*) adjudged, that this is ſuch an offence, for which a feme covert may be indicted; for as, in the preceding caſe, the wife may be concerned in acts of bawdry, ſo here ſhe may be active in promoting gaming, and furniſhing the gueſts with all conveniencies for that purpoſe. Hawk. P.C. c. 75. § 6.

(*a*) Trin. 2 G. 1. The King v. Dixon.

It ſeems to be the better opinion, that all common ſtages for rope-dancers, *&c.* are nuiſances, not only becauſe they are great temptations to idleneſs, but alſo becauſe they are apt to draw together numbers of diſorderly perſons, which cannot but be very inconvenient to the neighbourhood. Mod. 76. 2 Keb. 846. 3 Keb. 464. Vent. 169. 5 Mod. 142. Hawk. P.C. c. 75. § 6.

But it ſeems the better opinion, that playhouſes, having been originally inſtituted with a laudable deſign of recommending virtue to the imitation of the people, and expoſing vice and folly, are not nuiſances in their own nature, but may only become ſuch by accident; as, where they draw together ſuch numbers of coaches or people, *&c.* as prove generally inconvenient to the places adjacent; or, when they pervert their original inſtitution, by recommending vicious and looſe characters under beautiful colours to the imitation of the people, and make a jeſt of things commendable, ſerious, and uſeful. Ruſhworth's Coll. part ii. vol. i. fol. 220. 247. Roll. Rep. 109. 5 Mod. 142. Skin. 625. pl. 21.

And now for the better regulation of players and playhouſes, by the 10 *G.* 2. *c.* 28. it is enacted, "That every perſon who "ſhall for hire, gain or reward, act, repreſent, or perform, or "cauſe to be acted, repreſented, or performed, any interlude, "tragedy, comedy, opera, play, farce, or other entertainment of "the ſtage, or any part or parts therein, in caſe ſuch perſon ſhall "not have any legal ſettlement in the place where the ſame ſhall "be acted, repreſented, or performed, without authority by virtue "of letters patent from his Majeſty, his heirs, ſucceſſors, or pre"deceſſors, or without licence from the Lord Chamberlain of his "Majeſty's Houſehold for the time being, ſhall be deemed to be a "rogue and a vagabond, within the intent and meaning of the "12 *Ann. ſtat.* 2. *c.* 23. and ſhall be liable and ſubject to all ſuch "penalties and puniſhments, and by ſuch methods of conviction, "as are inflicted on, or appointed by the ſaid act, for the puniſh"ment of rogues and vagabonds who ſhall be found wandering, "begging, and miſordering themſelves, within the intent and "meaning of the ſaid act." And ſee 25 G. 2. c. 36. made perpetual by 28 G. 2. c. 19. for preventing thefts and robberies, regulating places of publick entertainment, and puniſhing perſons keeping diſorderly houſes. And note: theſe ſort of players are within the deſcription of the vagrant

act 17 G. 2. c. 5.—* By 25 G. 2. c. 36. § 2. houſes and gardens of entertainment in London and Weſtminſter, or within twenty miles thereof, are not to be kept without licence.—By 30 G. 2. c. 24. § 14. penalties are inflicted on publicans, permitting journeymen to game in their houſes.

And § 2. it is further enacted, "That if any perſon having, "or not having a legal ſettlement as aforeſaid, ſhall, without ſuch "authority or licence as aforeſaid, act, repreſent, or perform, or "cauſe to be acted, repreſented, or performed, for hire, gain or "reward, any interlude, tragedy, comedy, opera, play, farce, or "other entertainment of the ſtage, or any part or parts therein, "every ſuch perſon ſhall, for every ſuch offence, forfeit the ſum "of fifty pounds; and in caſe the ſaid ſum of fifty pounds ſhall "be paid, levied, or recovered, ſuch offender ſhall not, for the "ſame offence, ſuffer any of the pains or penalties inflicted by "the ſaid recited act."

And by § 3. it is further enacted, "That no perſon ſhall for "hire, gain, or reward, act, perform, repreſent, or cauſe to be "acted, performed, or repreſented, any new interlude, tragedy, "comedy, opera, play, farce, or other entertainment of the "ſtage, or any new prologue or epilogue, unleſs the copy there-"of be ſent to the Lord Chamberlain of the King's Houſehold for "the time being, fourteen days at leaſt before the acting, repre-"ſenting, or performing thereof, together with an account of the "playhouſe or other place where the ſame ſhall be, and the time "when the ſame is intended to be firſt acted, repreſented, or per-"formed, ſigned by the maſter or manager, or one of the maſters "or managers of ſuch playhouſe, or place, or company of actors "therein."

And it is further enacted by § 4. "That it ſhall and may be "lawful to and for the ſaid Lord Chamberlain for the time being, "from time to time, and when and as often as he ſhall think fit, "to prohibit the acting, performing, or repreſenting any interlude, "tragedy, comedy, opera, play, farce, or other entertainment "of the ſtage, or any act, ſcene, or part thereof, or any prologue "or epilogue; and in caſe any perſon or perſons ſhall for hire, "gain, or reward, act, perform, or repreſent, or cauſe to be acted, "performed, or repreſented, any new interlude, tragedy, comedy, "opera, play, farce, or other entertainment of the ſtage, or any "act, ſcene, or part thereof, or any new prologue or epilogue, "before a copy thereof ſhall be ſent as aforeſaid, with ſuch ac-"count as aforeſaid; or ſhall for hire, gain, or reward, act, per-"form, or repreſent, or cauſe to be acted, performed, or repre-"ſented, any interlude, tragedy, comedy, opera, play, farce, "or other entertainment of the ſtage, or any act, ſcene, or part "thereof, or any prologue or epilogue, contrary to ſuch prohibi-"tion as aforeſaid; every perſon ſo offending ſhall, for every ſuch "offence, forfeit the ſum of 50*l.*; and every grant, licence, and "authority, (in caſe there be any ſuch,) by or under which the "ſaid maſter or maſters, manager or managers, ſet up, formed, "or continued ſuch playhouſe, or ſuch company of actors, ſhall "ceaſe, determine, and become abſolutely void to all intents "and purpoſes whatſoever."

Provided, § 5. "That no perſon or perſons ſhall be authoriſed "by virtue of any letters patent from his Majeſty, his heirs, ſuc-

"ceſſors,

" ceſſors, or predeceſſors, or by the licence of the Lord Chamber-
" lain of his Majeſty's Houſehold for the time being, to act, re-
" preſent, or perform for hire, gain or reward, any interlude,
" tragedy, comedy, opera, play, farce, or other entertainment
" of the ſtage, or any part or parts therein, in any part of *Great*
" *Britain*, except in the city of *Weſtminſter*, and within the liber-
" ties thereof, and in ſuch places where his Majeſty, his heirs or
" ſucceſſors, ſhall in their royal perſons reſide, and during ſuch
" reſidence only."

And it is further enacted by § 6. " That all the pecuniary
" penalties inflicted by this act, for offences committed within
" that part of *Great Britain* called *England*, *Wales*, and town of
" *Berwick* called *Tweed*, ſhall be recovered by bill, plaint, or in-
" formation in any of his Majeſty's courts of record at *Weſtminſter*,
" in which no eſſoin, protection, or wager of law ſhall be allowed:
" and for offences committed in that part of *Great Britain* called
" *Scotland*, by action or ſummary complaint before the court of
" ſeſſions or juſticiary there; or for offences committed in any
" part of *Great Britain*, in a ſummary way, before two juſtices of
" the peace for any county, ſtewarty, riding, diviſion, or liberty,
" where any ſuch offence ſhall be committed, by the oath or oaths
" of one or more credible witneſs or witneſſes, or by the confeſſion
" of the offender, the ſame to be levied by diſtreſs and ſale of the
" offender's goods and chattels, rendering the overplus to ſuch
" offender, if any there be, above the penalty and charge of
" diſtreſs; and for want of ſufficient diſtreſs, the offender ſhall
" be committed to any houſe of correction in any ſuch county,
" ſtewarty, riding, or liberty, for any time not exceeding ſix
" months, there to be kept to hard labour, or to the common
" gaol of any ſuch county, ſtewarty, riding, or liberty, for any
" time not exceeding ſix months, there to remain without bail or
" mainpriſe; and if any perſon or perſons ſhall think him, her, or
" themſelves aggrieved by the order or orders of ſuch juſtices of
" the peace, it ſhall and may be lawful for ſuch perſon or perſons
" to appeal therefrom to the next general quarter ſeſſions, to be
" held for the ſaid county, ſtewarty, riding, or liberty, whoſe
" order therein ſhall be final and concluſive; and the ſaid penal-
" ties againſt this act ſhall belong one moiety thereof to the in-
" former, or perſon ſuing or proſecuting for the ſame, the other
" moiety to the poor of the pariſh where ſuch offence ſhall be
" committed."

And it is further enacted by § 7. " That if any interlude,
" tragedy, comedy, opera, play, farce, or other entertainment
" of the ſtage, or any act, ſcene, or part thereof, ſhall be acted,
" repreſented, or performed, in any houſe or place where wine,
" ale, beer, or other liquors ſhall be ſold or retailed, the ſame
" ſhall be deemed to be acted, repreſented, and performed for
" gain, hire, and reward.

" Provided that every proſecution, for any offence within this
" act, ſhall be commenced within ſix kalendar months after the
" offence is committed."

Rex v. Handy, 6 Term Rep. 286.

[Tumbling is not an entertainment of the ſtage within the meaning of the above act.]

2 Roll. Abr. 138. Poph. 148. Cro. Jac. 382. Godb. 259. Cro. Eliz. 548. Roll. Rep. 136. 200. 2 Roll. Rep. 3, 4. 34. 5 Co. 104. Moor, 238.

It was formerly held, that the erecting of a dovehouſe on a man's own frank-tenement was a nuiſance, becauſe the pigeons* and doves were to be accounted tame animals, inaſmuch as they had *animum revertendi;* and that therefore whoever erected ſuch houſes, were anſwerable for the damages done by them; and becauſe they were not liable to every man's action, to avoid multiplicity of ſuits, it was thought a matter indictable in the leet. But the contrary opinion has prevailed; becauſe it was allowed the lord of the manor might erect, or permit by his licence any perſon to erect a dovehouſe; which he could not do, if it were a nuiſance, every nuiſance being *malum in ſe.* Beſides, theſe animals are rather to be accounted *feræ naturæ;* and by conſequence, the only remedy any perſon had, for the damage ſuſtained by the birds feeding on his ground, was to kill them and take them to himſelf, which was the proper relief according to the common law; inaſmuch as the birds were accounted no man's property. But it is ſaid, that a dovecote newly erected in a manor, without the lord's licence, is a good ground for an action on the caſe, at the ſuit of the lord.

* As to pigeons ſee 1 Jac. 1. c. 27. amended by 2 G. 2. c. 29.

*Vide* tit. Highways, letter (E). Jon. 221. Cro. Car. 104. Bulſt. 203. 2 Roll. Abr. 137.

It is clearly agreed to be a nuiſance to dig a ditch, or make a hedge overthwart a highway, or to erect a new gate, or to lay logs of timber in it; or generally to do any other act which will render it leſs commodious: But it ſeems that a gate, which has continued time out of mind, is no nuiſance; but that the ſame may be juſtified by preſcription, being at firſt intended to have been ſet up by conſent, on a compoſition with the owner of the land, on the laying out the road; in which caſe, the people had never any right to a freer paſſage than what they ſtill enjoy.

Noy, 103. 3 Keb. 640. 759.

And as navigable rivers are deemed highways, it is a nuiſance to divert part of the river, whereby the current of it is weakened, and made unable to carry veſſels of the ſame burden as it could before. Alſo, the laying of timber in a common river, though the ſoil belong to the party, is equally a nuiſance, as if the ſoil was not his, if thereby the paſſage of boats, *&c.* is obſtructed. And hence alſo it ſeems to follow, that private ſtairs from thoſe houſes that ſtand by the *Thames* into it, are common nuiſances. But it ſeems, that where there are cuts made in the banks, that are not annoyances to the river, the timber lying there is no nuiſance.

2 Roll. Abr. 139. pl. 3.

It hath been holden to be a common nuiſance, to divide a houſe in a town for poor people to inhabit in; by reaſon whereof it will be more dangerous in the time of infection of the plague.

6 Mod. 145. The Queen v. Leich.

Bringing a great ſhip of 300 tons into *Billingsgate-dock*, though a common dock, yet being only ſo for ſmall ſhips coming with proviſion to the markets of *London*, is a nuiſance, in the ſame manner, as a man uſing with his cart a common pack and horſe way, ſo as to plough it up, and thereby render it leſs convenient to riders, is a nuiſance indictable.

It

It ſeems the better opinion, that a brew-houſe, glaſs-houſe, chandler's ſhop, ſty for ſwine, ſet up in ſuch inconvenient parts of a town, that they cannot but greatly incommode the neighbourhood, are common nuiſances. 2 Roll. Abr. 139. Cro. Car. 510. Hut. 136. Palm. 536. Vent. 26. Keb. 500. 2 Salk. 458. pl. 3. 460. pl. 7. 2 Ld. Raym. 1163.

[Buildings for making acid ſpirit of ſulphur, whereby the air was impregnated with noiſome and offenſive ſtinks in a pariſh, near the king's highway, and near ſeveral dwelling-houſes, were declared a nuiſance. 1 Bur. 333. &c., in the caſe of the late Doctor Ward's erections at Twickenham.

It is enacted by 9 & 10 *W.* 3. *c.* 7. "That it ſhall not be lawful for any perſon to make or cauſe to be made, or to ſell or utter, or offer or expoſe to ſale, any fire-works, or any caſes, moulds, or implements, for making the ſame, on pain of 5*l.* on conviction before one magiſtrate on the oath of two witneſſes: or, for any perſon to permit fire-works to be caſt, thrown, or fired from, out of, or in his houſe, lodging, or habitation, or from, out of, or in any part or place thereto belonging or adjoining, into any publick ſtreet, highway, road, or paſſage, on pain of 20*s.* on conviction as aforeſaid: or for any perſon to caſt, throw, or fire, or to be aiding or aſſiſting therein, on pain of 20*s.* and that every ſuch offence is and ſhall be adjudged a common nuiſance."

By 10 & 11 *W.* 3. *c.* 17. all miſchievous games, called lotteries, and all other lotteries, are declared to be publick and common nuiſances. See too 17 G. 2. c. 5. 27 G. 3. c. 1.

By 6 *G.* 1. *c.* 18. § 19. "All undertakings, attempts, and projects by publick ſubſcriptions, for adventuring on certain ſchemes of commerce, tending to the common grievance of his Majeſty's ſubjects or a great number of them, and the receiving and paying of any money upon ſuch ſubſcriptions, *&c.* and more particularly the preſuming to act as a body corporate, or to raiſe transferable funds, or pretending to act under any charter formerly granted from the crown for any particular or ſpecial purpoſe therein expreſſed, by perſons making, or endeavouring to make uſe of ſuch charter, for any ſuch other purpoſe not thereby intended, and alſo acting, or pretending to act under any ſuch obſolete charter, *&c.* ſhall be deemed a publick nuiſance."]

## (B) How far the Indictment muſt charge it to be an Annoyance to all the King's Subjects.

EVERY nuiſance, puniſhable by a publick proſecution, muſt be charged to be *ad commune nocumentum*, or to the general annoyance of all the king's ſubjects; for if they are only injuries to particular perſons, they are left to be redreſſed by the private actions of the parties aggrieved by them. 2 Roll. Abr. 83. Hawk. P. C. c. 75. § 3.

And therefore an indictment for ſurcharging ſuch a common, or incloſing ſuch a piece of ground, or diſturbing ſuch a watercourſe, or doing any other act, not apparently of a publick nature, to the nuiſance of the inhabitants of ſuch a town, or of *J. S.* and his tenants, is not good. Hawk. P. C. *ubi ſupra*, and ſeveral authorities there cited.

Vent. 26. 2 Keb. 500. So, an indictment in a court-leet for keeping a glaſs-houſe *ad maximum nocumentum* was quaſhed, becauſe it was not a nuiſance, unleſs it had been *ad commune nocumentum.*

Mod. 107. 3 Keb. 284. So, an indictment for ſtopping a watercourſe was quaſhed, being only laid *ad nocumentum omnium prope inhabitantium*, without ſaying *& tranſeuntium.*

2 Leon. 183, 184. 9 Co. 113. Vent. 208. 3 Keb. 28. But it hath been held, that an indictment, for not repairing a bridge, *per quod ligei domini regis tranſire non poſſunt*, &c. *ad nocumentum eorundem*, is ſufficient; for by the king's liege people ſhall be underſtood all his liege people.

2 Roll. Abr. 83, 84. Hawk. P.C. c. 75. § 4. Alſo, an indictment for doing a thing which plainly appears immediately to tend to the prejudice of religion, or of the king; as for breaking the walls of a church, or embezzling the king's treaſure, *&c.* is good, without expreſsly laying it as a common grievance.

6 Mod. 11. 178. 213. 239. 311. 2 Str. 999. 1246. Hawk. P.C. c. 75. § 5. Moor, 847. 2 Keb. 410. Keb. 161. Roll. Rep. 201. So, an indictment of a common ſcold, by the words *communis rixatrix*, hath been held good, though it concluded *ad commune nocumentum diverſorum* inſtead of *omnium;* becauſe, ſays *Hawkins*, from the nature of the thing, it cannot but be a common nuiſance. And for the ſame reaſon, ſays he, an indictment with ſuch a concluſion, for a nuiſance to a river, plainly appearing to be a publick and navigable river, or to a way, plainly appearing to be a highway, is ſufficient. And perhaps, ſays he, the (*a*) authorities, which ſeem to contradict this opinion, might go upon this reaſon, that in the body of the indictment it did not appear, with ſufficient certainty, whether the way wherein the nuiſance was alleged, were a highway, or only a private way; and therefore it ſhall be intended from the concluſion of the indictment, that it was a private way.

(*a*) *Viz.* Cro. Eliz. 148. 2 Keb. 461. 2 Roll. Abr. 83.

## (C) How a Nuiſance is to be removed or abated.

Hawk. P.C. c. 75. § 12. for which are cited 2 Roll. Abr. 144-5. Cro. Car. 184. Jon. 221. Yelv. 142. 5 Co. 101. 9 Co. 54. Salk. 458. pl. 3. HEREIN it is laid down by *Hawkins*, that any one may pull down or otherwiſe deſtroy a common nuiſance; as, a new gate, or even a new houſe erected in a highway, *&c.* for if one whoſe eſtate is or may be prejudiced by a private nuiſance actually erected, as, a houſe hanging over his ground, or ſtopping his lights, *&c.* may juſtify the entering into another's ground, and pulling down and deſtroying ſuch a nuiſance, whether it were erected before or ſince he came to the eſtate; ſurely, it cannot but follow *à fortiori*, that any one may lawfully deſtroy a common nuiſance. And as the law is now holden, it ſeems, that in a plea, juſtifying the removal of a nuiſance, the party need not ſhew that he did as little damage as need be.

3 Aſſ. 10. 2 Roll. Abr. 137. Hawk. P.C. c. 75. § 13. ſaid to have been adjudged. If a river be ſtopped to the nuiſance of the country, and none appear bound by preſcription to clear it, thoſe who have the piſcary, and the neighbouring towns, who have a common paſſage and eaſement therein, may be compelled to do it.

(*b*) A writ to prohibit a bowling- It ſeems to be the better opinion, that the court of King's Bench may, by a (*b*) mandatory writ, prohibit a nuiſance, and order

der that the ſame ſhall be abated; and that if the party diſobeys the writ, he ſubjects an attachment. But upon ſuch attachment, for proceeding after the writ of prohibition, there ought to be a declaration, ſetting forth the nature of the offence, and that the ſame is a nuiſance, and that, notwithſtanding the writ of prohibition, the defendant proceeded in or continued it; to which, if the defendant can in pleading ſet forth a ſufficient juſtification, his proceeding *poſt prohibitionem regiam* will be good in law, and himſelf diſcharged of all contempt and coſts againſt the complainant. alley erected near St. Dunſtan's church, ſaid by Hale to have been granted 8 Car. 1. on Noy's motion. Mod. 76. —So, a prohibition reſtraining Jacob Hall, a rope-dancer, who had erected a ſtage at Charing-croſs. Vent. 169. 2 Keb. 846. Mod. 76. & *vide* Skin. 625. pl. 21. 5 Mod. 142.

## (D) How the Offence is puniſhable.

ALL common nuiſances to the publick are regularly puniſhable by fine and impriſonment, at the diſcretion of the judges; but in ſome caſes, corporal puniſhment may be inflicted; as, in the caſe of a common ſcold, who is ſaid to be properly puniſhable by being put into the ducking-ſtool. Alſo the offence of keeping a bawdy-houſe is puniſhable, not only with fine and impriſonment, but alſo with ſuch infamous puniſhment, as to the court in diſcretion ſhall ſeem proper. 2 Roll. Abr. 84. Hawk. P. C. c. 75. § 14. 6 Mod. 11. 178. 213. Salk. 382. pl. 31.

Alſo a perſon convicted of a nuiſance done to the king's highway, may be commanded by the judgment to remove the nuiſance at his own coſts; and *per Hawkins*, it is but reaſonable that thoſe, who are convicted of any other common nuiſance, ſhould alſo have the like judgment. 2 Roll. Abr. 84. Hawk. P. C. *ubi ſupra*.

But it is clearly agreed, that common nuiſances againſt the publick are only puniſhable by a publick proſecution; and that no action on the caſe will lie at the ſuit of the party injured; as this would create a multiplicity of actions, one man being as well entitled to bring an action as another; and therefore, in thoſe caſes, the remedy muſt be by indictment at the ſuit of the king. Co. Lit. 56. a. Roll. Abr. 88. 110. 2 Roll. Abr. 140, 141. Moor, 180. 4 Co. 18. 9 Co. 113. 2 Brownl. 147. Vaugh. 341. Cro. Eliz. 664. 3 Mod. 294. Carth. 191. Salk. 15. pl. 7.

But, if by ſuch a nuiſance the party ſuffer a (*a*) particular damage, as, if by ſtopping up a highway with logs, &c. his horſe throws him, by which he is wounded or hurt, an action lies (*b*). Co. Lit. 56. Cro. Jac. 446. Keb. 847. 1 Jon. 157. Salk. 15. pl. 15. (*a*) But if a highway is ſtopped, that a man is delayed in his journey a little while, and by reaſon thereof he is damnified, or ſome important affair neglected; this is not ſuch a ſpecial damage, for which an action on the caſe will lie; but a particular damage, to maintain this action, ought to be direct, and not conſequential; as for inſtance, the loſs of his horſe, or ſome corporal hurt, in falling into a trench in the highway, &c. Carth. 194. [(*b*) But this does not extend to entitle one, who has received detriment by a county bridge being out of repair, to bring an action againſt the inhabitants of that county, there being no ground to conſider them, for this purpoſe, as a corporation, and in that capacity liable to be ſued. 2 Term Rep. 667.]

Alſo an action lies for continuing a nuiſance; as, where, for erecting a nuiſance 2 *die Febr.*, the defendant pleaded a prior action, brought for erecting a nuiſance 20 *die Martii*, and a recovery thereupon, and averred theſe to be the ſame nuiſance and erection; and on demurrer the plaintiff had judgment; for though he cannot have a new action for the ſame erection, yet he may for the continuing the ſame nuiſance. Salk. 10. pl. 3. Carth. 455. Ld. Raym. 370.

# Obligations.

(A) Of the Nature of the Security, called a Bond or Obligation.

(B) What Words create ſuch a Security.

(C) Of the Ceremonies requiſite to a Bond or Obligation: And herein of Signing, Sealing, Date, and Delivery.

(D) Of the Parties to the Obligation: And herein,

1. Who may bind themſelves, or be Obligors.
2. Who may take ſuch Security, or be Obligees.
3. Who ſhall be ſaid the Obligee; and herein of making ſeveral Obligees.
4. Where there are ſeveral Co-obligors or Sureties; and herein, where they ſhall be ſaid to be jointly and ſeverally bound, and of the Obligee's Remedy againſt all or any of them.
5. Of their Remedies againſt each other.

(E) Of the Condition and Conſideration of the Obligation.

(F) How the Breach of the Condition muſt be aſſigned and ſet forth, and the Manner of pleading Performance, and in Bar.

## (A) Of the Nature of the Security, called a Bond or Obligation.

Co. Lit. 172. a. OBLIGATION, ſays my Lord *Coke*, is a word in its own nature of a large extent, but is uſually taken in the common law for a bond, containing a penalty with condition for payment of money, or to do or ſuffer ſome act or thing, *&c.*; and a bill, ſays he, is moſt commonly taken for a ſingle bond without condition.

This

This ſecurity is alſo called a ſpecialty; the debt being therein particularly ſpecified in (*a*) writing. And the party's ſeal, acknowledging the debt or duty, and confirming the contract, renders it a ſecurity of a (*b*) higher nature than thoſe entered into without the ſolemnity of a ſeal; and therefore bonds or ſpecialties ſhall be (*c*) preferred to ſimple contracts, in a courſe of adminiſtration. And from its being a higher ſecurity, it is held, that for a breach or non-performance an action of debt (*d*) only will lie.

(*a*) An obligation may be made upon parchment or paper, and in looſe parchment or paper, or in a piece of parchment or paper ſewed in a book, and, either way, it is good; but if it be made on a tally, piece of wood, or any other thing but paper or parchment, (although it be ſealed and delivered,) it is void. Bro. Oblig. 30. 61.—Becauſe theſe are leaſt ſubject to alteration or corruption. Co. Lit. 229. a.—May be in a letter, or other writing, ſo it be ſealed. Comb. 87. 3 Mod. 154.—But note, That by the late ſtatutes it muſt be on ſtamped paper or parchment. (*b*) Therefore if a man accepts an obligation for a debt due by ſimple contract, this extinguiſhes the ſimple contract debt. Roll. Abr. 604. 2 Leon. 110.—So, if a man accepts a bond for a legacy, he cannot after ſue for his legacy in the ſpiritual court; for by the deed the legacy is extinct, and it is become a mere duty at common law. Yelv. 38. [But the bond of a ſurety will not extinguiſh the ſimple contract debt of the principal. White v. Cuyler, 6 Term Rep. 176.]—Alſo, from its being of a higher nature than a ſimple contract, the defendant cannot plead *nil debet*, but muſt plead *ſolvit ad diem*, or *non eſt factum*; for the ſeal of the party continuing, it muſt be diſſolved *eodem modo quo ligatur*. 2 Inſt. 651. Hard. 218. (*c*) For this *vide* head of Executors and Adminiſtrators. (*d*) And therefore it is held, that if the obligor in a bond, without any new conſideration, as forbearance, &c. promiſes to pay the money, an *aſſumpſit* will not lie, but the obligee muſt ſtill purſue his remedy by action of debt. Roll. Abr. 8. Hut. 34. Cro. Eliz. 240.

A bond or obligation is a debt or duty which adheres to the obligor or debtor, let it be contracted where it will, and let the debtor fly to what place he pleaſes; and being chargeable every where, it need not be dated from any particular place; and therefore uſually begins with *Noverint univerſi*: but yet the plaintiff in his declaration muſt lay a place where it was made, that it may receive trial, if it be denied.

Cro. Eliz. 773. Salk. 141. 3 Lev. 348. 6 Mod. 228. [If the bond be dated at a certain place, the declaration ſhould ſet it out as made at the true place, and introduce the place of trial under a *videlicet*, 1 Str. 612. Therefore, where the plaintiff declared, "that the defendant by his bond *apud London conceſſit*, &c." and on oyer, the bond appeared to be dated at Port St. David in the Eaſt Indies, which was not mentioned in the declaration, the variance was pronounced to be fatal. Roberts v. Harnage, 2 Salk. 659.]

A bond is (*e*) a *choſe in action*, which cannot be aſſigned over, ſo as to enable the aſſignee to ſue in his (*f*) own name; yet he has by the aſſignment ſuch a title to the paper and wax, that he may keep or cancel it.

Co. Lit. 232. (*e*) That being given to a feme ſole, who afterwards marries, and the huſband dies, it ſhall ſurvive to her, being a *choſe in action*, which the huſband might have reduced into poſſeſſion.—So, if the wife, who is the obligee, dies, her huſband is no otherwiſe entitled to it than as adminiſtrator to his wife. Noy, 149. Style, 205. For this *vide* tit. Baron and Feme. (*f*) And by the modern practice, he may ſue for it in the name of the obligee, as his attorney; but *quære*, Whether this can be done without an expreſs authority? *Vide ſupra*, vol. i. 249.

Alſo, in equity, a bond is aſſignable for a valuable (*g*) conſideration paid, and the aſſignee alone becomes entitled to the money; ſo that if the obligor, after notice of the aſſignment, pays the money to the obligee, he will be compelled to pay it over again.

2 Vern. 595. Abr. Eq. 44. there muſt be a conſideration paid. 3 Chan. Rep. 90. (*g*) 2 Vern. 540. But payment to the obligee, without notice of the aſſignment, is good. Chan. Ca. 232.

The aſſignee muſt take it, ſubject to the ſame equity that it was in the hands of the obligee; as if, on a marriage-treaty, the

2 Vern. 428. 652. 764.

the intended huſband enters into a marriage-brokage bond, which is afterwards aſſigned to creditors, yet it ſtill remains liable to the ſame equity, and is not to be carried into execution againſt the obligor.

Yelv. 192. 2 Mod. 201. Sand. 66.

Bonds are to be conſidered as ſecurities for the performance of contracts, and are uſually entered into with (*a*) penalties, which are to be conſidered as (*b*) compenſations for the breach of the contract; as, that a man ſhall pay 200*l.* if he omits to pay 100*l.* within ſuch a time, that he ſhall pay ſo much if he does not perform ſuch and ſuch covenants, do or omit ſuch and ſuch acts; and in thoſe he may *cedere ſuo jure*, provided the thing be not unlawful in itſelf, or injurious to the publick, &c.

(*a*) That the reſervation of a greater ſum than is allowed by the ſtatute for intereſt, for the non-payment of the principal at the end of the year, is not uſurious within the ſtatute, becauſe it is in the power of the borrower to avoid the payment of the money ſo reſerved, by paying the principal at the day appointed. 5 Co. 69. Cro. Jac. 509. (*b*) A contract or covenant to give bond for the payment of a certain ſum of money, without ſhewing of what ſum the obligation ſhall be, is good, and ſhall be intended of double the ſum. 5 Co. 77. b. 78. a. Lev. 88.—So, where there was an agreement to enter into certain covenants, and to enter into a bond for the performance of the covenants; and upon an action, breach was laid that he did not enter into bond, &c., and a verdict for the plaintiff; in arreſt of judgment it was moved, that this part of the agreement was uncertain and void, becauſe it was not expreſſed of what ſum the bond ſhould be, and here was no certainty to guide it, as in the above caſe: but *per* Windham, J. the ſum in the bond muſt be to the value of the agreement; *& per cur.* you ſhould have entered into bond, though the ſum were never ſo ſmall, and why did you not tender ſuch a one? Sid. 270. Keb. 776.

Cro. Car. 490. Vent. 354. 3 Lev. 368.

If a man enter into a bond of ſuch a ſum, on condition to be void on payment of a leſs ſum; or, if a man bind himſelf in the penalty of 100*l.* that he will pay 50*l.* by ſuch a day; after the day of payment is paſt, the penalty or ſum of 100*l.* is the legal debt; and for ſo much it hath been (*c*) reſolved, that an executor of an obligor of ſuch forfeited bond, may cover the aſſets of his teſtator.

(*c*) Hil. 9 G. 2. in B. R. The Bank of England v. Morris.

2 Stra. 1028. 2 Barnard. K. B. 183. S. C. Caſ. temp. Hardw. 219. S. C. 4 Br. P. C. 287. S. C. [It is more correct to plead the ſum really due; and indeed if the bond be not forfeited, ſuch ſum only can be pleaded. 5 Term Rep. 309. However, if the penalty be pleaded, the plaintiff may reply the ſum really due for principal and intereſt, which he may aver the obligee is ready to receive, and that the bond is kept on foot by fraud.]

Show. Par. Ca. 15. Abr. Eq. 91, 92. Salk. 154. Vern. 342. 350. 2 Vern. 509.

And as the penalty, by the bond's being forfeited, becomes the legal debt; ſo there was no remedy againſt ſuch penalty, but by application to a court of equity, which relieves in thoſe caſes, on payment of principal, intereſt, and coſts. Alſo, though at law (*d*) there can be no remedy beyond the penalty, becauſe in that the obligee ſeems to have taken up his ſecurity; yet, as it is on the foundation of doing equal juſtice to both parties that equity proceeds, it will, on any application for a favour from the obligor, compel him to pay the principal, intereſt, and coſts, though exceeding the penalty (*e*).

[(*d*) It hath been holden in ſome caſes, that in an action *at law* on a bond, damages may be recovered beyond the amount of the penalty. Lord Lonſdale v. Church, 2 Term Rep 388. *Sed vide* Wilde v. Clarkſon, 6 Term Rep. 303. *contr.* (*e*) In general, however, the rule of equity is not to compute any thing beyond the penalty of the bond. Tew v. Earl of Winterton, 3 Br. Ch. Rep. 492. Thus, where there was a deviſe for payment of debts, it was holden, that ſimple contract debts, even for ſeventy years ſtanding, were renewed by it, and were ordered to be paid with full intereſt; but the bond debts were only allowed intereſt to the amount of the penalty. Ketilby v. Ketilby, before Lord Bathurſt, cited in 2 Anſtr. 527. So, though the principal and intereſt on a mortgage bond exceed the penalty, yet the obligee, on a bill to redeem, can claim only to the extent of the penalty. Lloyd v. Hatchett, *Id.* 525.]

And

And this rule of compelling the party to do equity who ſeeks equity, ſeems to be the reaſon why an obligee ſhall have intereſt after he has entered up judgment; for though in ſtrictneſs it may be accounted his own fault why he did not take out execution, and therefore he is not entitled to intereſt; yet, as by the judgment he is entitled to the penalty, it does not ſeem reaſonable that he ſhould be deprived of it, but upon paying him principal, and the intereſt, which incurred as well before as after the entering up of the judgment. Abr. Eq. 92. 288.

Alſo, by the 4 & 5 *Ann. c.* 16. it is enacted, "That where "any action of debt ſhall be brought on any ſingle bill, or where "an action of debt, or *ſcire facias*, ſhall be brought upon any "judgment, if the defendant hath paid the money due on ſuch "bill or judgment, ſuch payment ſhall and may be pleaded in "bar of ſuch action or ſuit; and where an action of debt is "brought upon any bond, which hath a condition or defeazance "to make void the ſame, upon payment of a leſs ſum at a day or "place certain; if the obligor, his heirs, executors, or adminiſtra-"tors have, before the action brought, paid to the obligee, his "executors or adminiſtrators, the principal and intereſt due by "the defeazance or condition of ſuch bond, though ſuch pay-"ment was not ſtrictly made according to the condition or de-"feazance; yet it ſhall and may be pleaded in bar of ſuch action, "and ſhall be as effectual a bar thereof, as if the money had been "paid at the day and place according to the condition or defea-"zance, and had been ſo pleaded."

And it is further enacted by the ſaid ſtatute, § 14. "That if at "any time pending an action upon any ſuch bond with a penalty, "the defendant ſhall bring into court, where the action is (*a*) de-"pending, all principal money and intereſt due on ſuch bond, "and alſo all ſuch coſts as have been expended in any ſuit "or ſuits in law or equity upon ſuch bond; the ſaid money ſo "brought in ſhall be deemed and taken to be in full ſatisfaction "and diſcharge of the ſaid bond; and the court ſhall and may "give judgment to diſcharge every ſuch defendant of and from "the ſame accordingly*.

(*a*) One cannot move to ſtay proceedings upon a bond upon payment of principal, intereſt, and coſts, till bail be put in; for till then the parties are not in court. 6 Mod. 11.——* Stealing a bond made felony, by 2 G. 2. c. 25. § 3.

## (B) What Words create ſuch a Security.

HEREIN we muſt obſerve, that the law does not ſeem to require any particular ſet form of words, as eſſentially neceſſary to create an obligation, but that any words, which declare the intention of the party, and denote his being bound, will be ſufficient; becauſe ſuch obligation is only in nature of a contract, or a ſecurity for the performance of a contract, which ought to be conſtrued according to the intention of the parties. Yelv. 193. 2 Roll. Abr. 146-7.

Therefore, if a man uſeth this form of words, *viz. This bill witneſſeth, that I* A. B. *have borrowed* 10 l. *of* C. D.; or this form, *Memorandum, quod talis debet to* B. *ten pounds*; or thus, *Memorandum,* Dyer, 22. b.

*dum, all things reckoned and accounted between* A. *and* B. A. *cognovit se debere to* B. *ten pounds;* all these forms are good, and shall as effectually bind the party and his executors, as if the most formal words were made use of, provided the writing be sealed and delivered.

Leon. 25. So, a writing in this form, *Memorandum, I* A. B. *have agreed to pay* J. S. 20*l.* though this be in the preterfect tense, yet if it hath all other ceremonies essential, it shall amount to an obligation.

Cro. Eliz. 729. So, in this form, *This bill witnesseth, that I* R. S. *have received of* T. B. 40*l. to the use of* R. *and* J. S. *children of,* &c. *equally to be divided between them; which sum I confess to have received to the uses aforesaid, and the same to repay at such time as shall be thought best for the profits of the said* R. *and* J. S.; this was resolved to be a good obligation.

Cro. Eliz. 561. *& vide* Cro. Eliz. 758. So, a writing in this form, *Memorandum, that I bind myself to* J. M. *to pay him as much money as my brother owes him;* and in the end of the bill is written the sum of 40*l.* which is said to be the debt due from the brother: this is a good obligation.

Cro. Eliz. 886. *Memorandum, that I owe and promise to pay to* A. 10*l. at any time after the Feast,* &c. *when thereto required, for the payment whereof I bind myself to* J. H. *by these presents:* this is a good bill to *A.* by the first words, and the latter being surplusage are void, and to be rejected.

Moor, 537. Parry v. Woodward, adjudged. And that the words together with 6*l.* which I owe by bills, &c., are only an explanation of the precedent debt. It is held in *Moor* and *Cro. Eliz.* that a bill in this form, *Be it known,* &c. *that I owe to* B. 14*l. to be paid at the Feasts,* &c. *together with* 6*l. which I owe him upon bills and reckonings subscribed with my hand,* amounts only to a bill for 14*l.*; but (*a*) *Dyer* holds it a good obligation for the whole debt of 20*l.*

Cro. Eliz. 537. S. C. adjudged, and that that which comes after the *solvendum* is void, as that which comes after an *habendum*.

(*a*) Dyer, 22. b. in margin.

Vent. 238. Watson v. Sneed. In debt for 20*l.* the plaintiff declared, that the defendant *concessit se teneri per scriptum suum obligatorium,* &c. and the words of the deed were, *I do acknowledge to* Edward Watson *by me twenty pounds upon demand, for doing the work in my garden;* and upon demurrer to the declaration, it was adjudged a good bond.

3 Leon. 119. 2 Roll. Abr. 146. S. P. These words, *I am content to give to* W. 10*l. at* Mich. *and* 10*l. at our* Lady-day, amount to an obligation, and an express engagement to pay, *&c.*

But for this *vide* 10 Co. 133. a. Yelv. 96. 193. 206. Hob. 119. Cro. Jac. 290. 309. 355. 603. 607. Cro. Car. 147. Brownl. 62. It hath been held in variety of cases, that a seeming *Latin* word, not properly expressing the quantity of the sum in which the party intended to be bound, should, notwithstanding, be so construed, as to answer the intention of the parties, rather than that the obligation should be void; as *quinquagessimis libris,* for *quinquaginta libris,* has been held good; so, *trigintate* for *triginta, sexingenta* for *sexaginta*; and it is said in general, that in most cases where the *gent* or *gint,* or the *sex* or *sept* are right, the obligation has been held well.

2 Roll. Abr. 146. 5 Mod. 154. 2 Jon. 58. Comb. 60. 86. 187. 477. Ld. Raym. 335. 5 Mod. 287. 2 Salk. 462. pl. 2. [By statute 4 Geo. 2. c. 26. bonds must be in the English language, and not in Latin or French, or any other language whatsoever.]

A bond

A bond *in viginti nobilis* has been held a good bond for 6 *l.* 8 *s.*; for though *nobilis* be not a *Latin* word, yet it being a term ſignifying 6 *s.* and 8 *d.* it may properly be made uſe of. Cro. Jac. 203. 2 Roll. Abr. 146. Burchin v. Vaughan.

Debt brought upon a bond for 60 *l.* the bond was in *Italian*, and the ſum therein expreſſed was in theſe words, *viz. in ceſſanti libris*, and adjudged to be good. Cro. Jac. 208. Parker v. Rennaday.

In debt upon a bill obligatory, demanding thirty-two pounds four ſhillings and ſeven pence; the defendant demanded oyer of the bill, and it was threty-two ponds four ſhillings and ſeven pence, ſo threty for thirty, and ponds for pounds; and on demurrer for this cauſe, it was adjudged for the plaintiff. Cro. Jac. 607. Hulbert v. Long.

So a bill, in which the party bound himſelf in the ſum of *ſewtne pounds*, has been held a good obligation for 17 *l.* in order to anſwer the intention of the parties. 10 Co. 133. a. in Oſborn's caſe. 2 Roll. Abr. 147. S. P. cited.

## (C) Of the Ceremonies requiſite to a Bond or Obligation: And herein of Signing, Sealing, Date, and Delivery.

IT is ſaid, that there are only three things eſſentially neceſſary to the making a good obligation, *viz.* writing in paper or parchment, ſealing, and delivery; but it hath been (*a*) adjudged not to be neceſſary, that the obligor ſhould ſign or ſubſcribe his name; and that therefore if in the obligation the obligor be named *Erlin*, and he ſigns his name *Erlwin*, that this variation is not material, becauſe ſubſcribing is no eſſential part of the deed, ſealing being ſufficient. 2 Co. 5. a. Goddard's caſe. Noy, 21. 85. Moor, 28. Styl. 97. (*a*) 2 Salk. 462. pl. 2. Ld. Raym. 335. 5 Mod. 281. *Vide* tit. Miſnomer and Addition.

And though the ſeal be neceſſary, and the uſual way of declaring on a bond is, that the defendant *per ſcriptum ſuum obligatorium ſigillo ſuo ſigillatum* acknowledged, &c. yet, if the word *ſigillat.* be wanting, it is cured by verdict and pleading over; for when he ſaith *per ſcriptum ſuum obligatorium*, &c. all neceſſary circumſtances ſhall be intended; and if it were not ſealed, it could not be his deed or obligation. Dyer, 19. a. Cro. Eliz. 571. 737. Cro. Jac. 420. 2 Co. 5. Vent. 70. 3 Lev. 348.

Alſo, though ſealing and delivery be eſſential to an obligation, yet there is no occaſion in the bond to mention that it was (*b*) ſealed and delivered; becauſe, as my Lord *Coke* ſays, theſe are things which are done afterwards. 2 Co. 5. a. (*b*) So, an obligation is good, though it want *in cujus rei teſtimonium*. Moor, 3. Leon. 25. 2 Co. 5. a.

An obligation is good though it wants a date, or hath a falſe or impoſſible date; for the date, as hath been obſerved, is not of the ſubſtance of the deed. But herein we muſt take notice, that the day of the delivery of a deed or obligation is the day of the date, though there is no day ſet forth; and if a deed bear date one day, and be delivered at another, it was really dated when delivered, though the clauſe of (*c*) *gerens dat.* be otherwiſe. 2 Co. 5. Goddard's caſe. Noy, 21. 85, 86. Hob. 249. Styl. 97. Cro. Jac. 136. 264. Yelv. 103. Salk. 76.

(*c*) A difference has been taken between *gerens dat.* and *cujus dat.*, that the firſt refers to the expreſs date, but that *cujus dat.* is always intended of the real date, which is the delivery. 5 Mod. 285. Comb. 477. 2 Salk. 463. Ld. Raym. 335.

If

Cro. Eliz. 773. 3 Lev. 348. Salk. 141. pl. 7.

If a man declare on a bond, bearing date ſuch a day, but do not ſay when delivered, this is good; for every deed is ſuppoſed to be delivered and made on the day it bears date; and if the plaintiff declare on a date, he cannot afterwards reply, that it was *primo deliberat.* at another day; for this would be a departure.

Brownl. 104. Lev. 196.

But, if a bond bear date ſuch a day, but was really delivered at a day after, the obligee may declare on a bond of ſuch a date, but *primo deliberat.* at a day after; and if the obligee declare on a bond of ſuch a date generally, the obligor may plead it was *primo deliberat.* on ſuch a day after; but then he muſt traverſe that it was delivered on the day of the date.

2 Co. 4. 6. 3 Keb. 332.

If the bond was delivered before the date, on iſſue, *non eſt factum*, joined on ſuch a deed, the jury are not eſtopped to find the truth, *viz.* that it was delivered before the date, and it is a good deed from the delivery.

Vent. 9. 110. Salk. 274. pl. 1. 2 Ld. Raym. 803.

In debt on an obligation, the defendant pleads that he delivered it as an eſcrow, *& hoc paratus eſt verificare:* this is ill, for he ought to ſhew to whom he delivered it, and conclude *iſſint nient ſon fait; & de hoc ponit ſe*, &c.

Hob. 246. Vent. 9.

So, pleading that he delivered it to the obligee as an eſcrow, to be his deed on certain conditions, is ill; for by the delivery of it to the obligee, it is become his deed abſolutely.

Co. Lit. 36. a. Cro. Eliz. 835. [That circumſtances may amount to delivery, ſee Goodright v. Strahan, Cowp. 204.]

A bond or deed may be delivered by words, without any act of delivery; as, where the obligor ſays to the obligee, go and take the ſaid writing, or take it as my deed, *&c.* ſo an actual tradition, without ſpeaking any words, is ſufficient; otherwiſe, a man that is mute could not deliver a deed. But (*a*), where on an iſſue of *non eſt factum*, the jury found that the defendant ſigned and ſealed the obligation, and laid it on a table, and that the plaintiff came and took it up, this was held not to be the defendant's deed, without other (*b*) circumſtances found by the jury.

(*a*) Leon. 193. Cro. Eliz. 122.

(*b*) On an iſſue *non eſt factum*, the evidence was, that the obligation was written in a book, and that in the ſame leaf the defendant put his hand and ſeal thereto; and this was held to be ſufficient evidence for the jury to find it his deed, which they having accordingly done, it was held good without queſtion. Cro. Eliz. 613. Fox v. Wright.

5 Co. 119. b.

If an obligation be delivered to another to the uſe of the obligee, and the ſame be tendered, and he refuſe, the delivery has loſt its force.

Lord Lovelace's caſe, Sir Wm. Jones, 268. Ball v. Dunſterville, 4 Term Rep. 313.

[If *A.* and *B.* enter into a bond, and ſet but one ſeal to it, and *A.* execute it for himſelf and *B.* with the authority and in the preſence of *B.*, it is obligatory on both.]

## (D) Of the Parties to the Obligation: And herein,

### 1. Who may bind themſelves, or be Obligors.

5 Co. 119. 4 Co. 124. Roll Abr. 340.

ALL perſons who are enabled to contract, and whom the law ſuppoſes to have ſufficient freedom and underſtanding for that purpoſe, may bind themſelves in bonds and obligations.

But,

But, if a perſon is illegally reſtrained of his liberty, by being confined in a common gaol or elſewhere, and during ſuch reſtraint, enters into a bond to the perſon who cauſes the reſtraint, the ſame may be avoided for dureſs of impriſonment. Co. Lit. 253. 2 Inſt. 482. *Vide* tit. Dureſs.

[If a man menace me unleſs I make him a bond for 40 *l.* and I tell him, I will not do it, but will give him a bond for 20 *l.* the court will not expound this bond to be a voluntary one; for *non videtur conſenſum retinuiſſe, qui ex præſcripto minantis aliquid mutavit.*] Bac. Rej. 22.

So, in reſpect of that power and authority which a huſband has over his wife, the bond of a feme covert is *ipſo facto* void, and ſhall neither bind her nor her huſband. *Vide* tit. Baron and Feme (M). Vol. I. 507.

So, though an infant ſhall be liable for his neceſſaries, ſuch as meat, drink, clothes, phyſick, ſchooling, &c. yet, if he bind himſelf in an obligation, with a (*a*) penalty for payment of any of theſe, the obligation is void. Doctor and Student, 113. Co. Lit. 172. Cro. Jac. 494. 560. Sid. 112.

(*a*) For this incapacity of an infant ariſes from his being incapable of contracting for any thing but for his benefit; but it can never be for his benefit to enter into a penalty. Cro. Eliz. 920. *Vide* head of Infancy and Age.

Alſo, though a perſon *non compos mentis* ſhall not be allowed to avoid his bond, by reaſon of infanity and diſtraction, becauſe no man can be allowed to ſtultify himſelf, becauſe of the ill conſequences that might attend counterfeit madneſs; yet, may a privy in blood, as the heir; and privies in repreſentation, as the executor and adminiſtrator, avoid ſuch bonds. Alſo, if a lunatick, after office found, enters into a bond, it is merely void. 4 Co. 124. Beverly's caſe. *Vide* head of Idiots and Lunaticks. [Modern caſes conſider the bond of a lunatick as abſolutely void; and the obligee himſelf may, on *non eſt factum*, give lunacy in evidence. Yates v. Boen, 2 Str. 1104. A bond may be avoided in like manner by reaſon of exceſſive drunkenneſs at the time of executing it. Cole v. Robbins, Bull. N. P. 172.]

But, if an infant, feme covert, monk, &c. who are diſabled by law to contract and to bind themſelves in bonds, enter together with a ſtranger, who is under none of theſe diſabilities, into an obligation, it ſhall bind the ſtranger, though it be void as to the infant, &c. Roll. Rep. 41.

If a ſervant make a bill in this form, *Memorandum, that I have received of* Ed. Talbot, *to the uſe of my maſter Serjeant* Gaudy, *the ſum of* 40 l. *to be paid at* Michaelmas *following*, and thereto ſet his ſeal, this is a good obligation to bind himſelf; for though in the beginning of the deed the receipt is ſaid to be to the uſe of his maſter, yet the repayment is general, and muſt neceſſarily bind him who ſealed; and the rather, becauſe otherwiſe the obligee would loſe his debt, he having no remedy againſt Serjeant Gaudy. Yelv. 137. Talbot v. Godbolt.

## 2. Who may take ſuch Security, or be Obligees.

Infants, idiots, as alſo a feme covert, may be obligees. And as to this the huſband is ſuppoſed to aſſent, being for his advantage: but if he diſagrees, the obligation has loſt its force; ſo that after 5 Co. 119. b. Co. Lit. 3. a.

the obligor may plead *non eſt factum*. But if he neither agrees nor diſagrees, the bond is good, for his conduct ſhall be eſteemed a tacit conſent, ſince it is a turn to his advantage.

But for this *vide* tit. Baron and Feme, Letter (E). But a feme covert can neither be obligor nor obligee to her huſband, nor *vice verſa*, being but one perſon in law. Alſo, by the better opinion, a bond entered into, to a feme ſole, by the perſon whom ſhe afterwards marries, is, by the marriage, at law (*a*) extinguiſhed.

[(*a*) A bond given by the huſband to the intended wife prior to marriage, conditioned for payment of money to her after the obligor's death, is not extinguiſhed by the coverture; and ſuch a bond may be enforced *at law* againſt the heirs of the huſband. Milbourn v. Ewart, 5 Term Rep. 381. Cage v. Acton, 1 Ld. Raym. 515.]

Co. Lit. 129. b. Moor, 431. Cro. Eliz. 142. 683. Cro. Car. 9. Salk. 46. pl. 1. Ld. Raym. 282. *Vide* head of Alien.

An alien may be an obligee; for ſince he is allowed to trade and traffick with us, it is but reaſonable to give him all that ſecurity which is neceſſary in his contracts, and which will the better enable him to carry on his commerce and dealings amongſt us.

Cro. Eliz. 464. Dyer, 48. a. Co. Lit. 9. a. 46. b. Hob. 64. Roll. Abr. 515. (*b*) As, the Chamberlain of London, whoſe ſucceſſor, by cuſtom, may have execution of a bond or recognizance acknowledged to his predeceſſor for orphanage money. 4 Co. 65. Cro. Eliz. 464. 682.

Sole corporations, ſuch as biſhops, prebendaries, parſons, vicars, *&c.* cannot be obligees, and therefore a bond made to any of theſe ſhall enure to them in their natural capacities; for no ſole body politick can take a chattel in ſucceſſion, unleſs it be by (*b*) cuſtom. But a corporation aggregate may take any chattel, as bonds, leaſes, *&c.* in its political capacity, which ſhall go in ſucceſſion, becauſe it is always in being.

### 3. Who ſhall be ſaid the Obligee; and therein of making ſeveral Obligees.

2 Roll. Abr. 148. Franklin v. Turner. [The *ſolvendum* will ſhew to whom bound, though the obligee's name be omitted in the preceding part of the inſtrument. Langdon v. Goole, 3 Lev. 21. Lambert v. Branthwaite, 2 Str. 945.]

If *A.*, by his bill obligatory, acknowledges himſelf to be indebted to *B.* in the ſum of 10 *l.* to be paid at a day to come, and binds himſelf and his heirs in the ſame bill in 20 *l.*, but does not mention to whom he is bound, yet is the obligation good, and he ſhall be intended to be bound to *B.* to whom he acknowledged before the 10 *l.* to be due.

Dyer, 167. a. Taw's caſe. N. Bendl. 75. Co. Ent. 145. Roll. Abr. 148. and Salk. 301. S. C. cited. (*c*) In 3 Co. 26. b. where my Lord Coke cites this caſe, he ſays, that peradventure in an action brought on the bond, *A.* cannot plead *non eſt factum*, becauſe that it was once his deed.—But in 5 Co. 119. b. he ſays, that in ſuch caſe the obligor may plead *non eſt factum*, in regard the obligation, by the refuſal of the obligee, loſes its force.

If *A.* enters into an obligation to *B.* which he delivers to *C.* to the uſe of *B.*, though this immediately, upon the execution and delivery to *C.* becomes the deed of *A.*, yet, if after it is preſented to *B.* he (as he may) diſagrees to it *in pais*, by ſuch refuſal the obligation (*c*) loſes its force.

Though

Though there may be ſeveral obligees, yet a perſon cannot be (*a*) bound to ſeveral perſons ſeverally; and therefore an obligation of 200 *l.* to two, *ſolvend.* the one hundred pounds to the one, and the other to the other, is a void *ſolvend.* Dyer, 350. a. pl. 20. Hob. 172. 2 Brownl. 207. Yelv. 177. (*a*) But a man may covenant with two ſeverally, for that ſounds only in damages. March, 103.

A bond was worded in the words following: *Be it known, that I A. do acknowledge myſelf to owe and be indebted to* B. *and* C. *in the ſum of* 91 *l.* 12 *s.* 8 *d.*, *for which payment to be made I bind myſelf to* B. *in* 100 *l.*; and whether *B.* alone ſhould bring the action for the 100 *l.*, or both ſhould join in an action for the 91 *l.* 12 *s.* 8 *d.* *dubitatur & adjournatur.* Cro. Jac. 251. Foxall v. Sands.

If an obligation be made to three to pay money to one of them, they muſt all join in the ſuit, for they are but as one obligee; and if he to whom the money is to be paid dies, the others muſt ſue, although they have no intereſt in the ſum contained in the condition. Yelv. 177.

So, if an obligation be made to three, and two bring their action, they ought to ſhew the third is dead. Sid. 238. 420. Vent. 34.

If *A.* bind himſelf in a ſum to *B.*, *ſolvendum* to *C.*, who is a ſtranger, to the uſe of *B.*, a payment to *C.* is a payment to *B.*, and in an action upon it the count muſt be upon a bond *ſolvendum* to *B.* Queen Mother v. Challoner, Sid. 295. 2 Keb. 81. [In this caſe the court only inclined to the opinion here ſtated: there was no determination: the matter was adjourned.—As courts of law now take notice of truſts, the defendant may plead, that the nominal obligee in the bond, is not the real owner of it, but merely a truſtee for another, and ſo entitle himſelf to ſet off a debt due from the *ceſtuy que* truſt to him. Rudge v. Birch, Mich. 25 G. 3. B. R. Bottomley v. Brook, Mich. 22 G. 3. C. B. 1 Term Rep. 621-2.]

In debt the declaration was, that the defendant became bound in a bond of ——— for the payment of ——— to him, his attorney or aſſigns, and on oyer of the bond it appeared, that the *ſolvendum* was to the plaintiff's attorney or aſſigns, without mention of himſelf; and on demurrer for this variance it was held good; and that the declaration muſt not be according to the letter of the obligation, but according to the operation of the law thereupon. 6 Mod. 228. Robert v. Harnage. Ld. Raym. 1043. 2 Salk. 659. pl. 5.

So, if *A.* make a bond to *B.*, *ſolvendum* to ſuch perſon as he ſhall appoint; if *B.* does appoint one, payment to him is a payment to *B.*, and if *B.* appoint none, it ſhall be paid to *B.* himſelf. 6 Mod. 228.

## Where there are ſeveral Co-obligors or Sureties; and herein, where they ſhall be ſaid to be jointly and ſeverally bound, and of the Obligee's Remedy againſt all or any of them.

It is clearly agreed, that two or more may bind themſelves jointly in an obligation, or they may bind themſelves jointly and ſeverally; in which laſt caſe the obligee may ſue them all jointly, or he may ſue any one of them, at his election; but if they are jointly, and not ſeverally bound, the obligee muſt ſue them jointly. 2 Roll. Abr. 148. Dyer, 19. 310. 5 Co. 19. Daliſ. 85. pl. 42. Salk. 393.

pl. 2. Carth. 61. Lutw. 696. jointly. Alſo, in ſuch caſe, if one of them dies (*a*), his executor is totally diſcharged, and the ſurvivor and ſurvivors only chargeable.

(*a*) If two are bound jointly, and one dies, the ſurvivor only is liable in equity; but it is otherwiſe, if they were bound jointly and ſeverally. 2 Vern. 99.

Dyer, 19. b. pl. 114. If three enter into an obligation, and bind themſelves in the words following, *Obligamus nos & utrumque noſtrum per ſe pro toto & in ſolido*; theſe make the obligation joint and ſeveral.

Cro. Jac. 322. Hawkinſon v. Sandilans. So, where two bound themſelves, *or any of them, their heirs, executors, or either of their heirs*, &c. and the obligation was ſealed and delivered by both of them jointly; this was held to be a joint and ſeveral, and not a joint bond only; and that the word *vel* ſhould be underſtood the ſame as *et*; and that therefore the joint delivery and acceptance could not make that joint only, which by the words was joint or ſeveral, at the election of the obligee.

8 H. 6. 31. 2 Roll. Abr. 149. If two jointly and ſeverally bind themſelves in an obligation, which they ſeverally deliver at different times and places, yet is the obligation joint or ſeveral, at the election of the obligee.

Moor, 260. pl. 407. 3 Leon. 206. Wigmore v. Wells. [Spencer v. Durant, 1 Show. 8. S. P. If three are bound in a bond by theſe words, *Obligamus nos & quemlibet noſtrum conjunctim*; this is a joint obligation, and one of them alone cannot be ſued (*b*); for the word *conjunctim* makes the obligation joint, which the word *quemlibet* cannot make ſeveral; being inſerted for no other purpoſe, but to expreſs more ſtrongly that they ſhould be all bound, not that they were to be ſeverally bound.

(*b*) But if one is ſued, he muſt take advantage of it by pleading in abatement; for if he demands oyer, and demurs, the plaintiff ſhall have judgment; for the court will preſume, that the other never ſealed it. Gilbert v. Bath, 1 Str. 503. They will preſume the like, unleſs the plea ſtate that the other actually did ſeal it. Hollingworth v. Aſcue, Cro. El. 355.]

2 Roll. Abr. 149. adjudged by three judges againſt Rolle, who held it to be joint and ſeveral; and of that opinion he ſays were divers of the judges and ſerjeants, at the table in Serjeants-Inn in Fleet-ſtreet, on its being propoſed to them. If by indenture between three on the one part, and two of the other, the two covenant jointly and ſeverally to perform a certain act, and the three likewiſe covenant jointly and ſeverally with the ſaid two, that, after the performance of the ſaid act, they will pay the ſaid two a certain ſum of money, &c., and then follow theſe words, viz. *Pro vera & reali performatione omnium articulorum & agreamentorum prædictorum alternatim una partium prædictarum obligavit ſe hæredes, executores, adminiſtratores & aſſignatos ſuos, in & ſubter penalitatem ſexaginta librarum ſterlingarum*; an action of debt for the 60 *l.* on this laſt clauſe, cannot be brought againſt one of the three only, being only joint, and not joint and ſeveral, like the precedent covenant.

10 H. 7. 16. Yelv. 26. Sid. 238. Although two or more may bind themſelves jointly, or jointly and ſeverally, in which caſe the obligee may ſue them all jointly or ſeverally, at his election; yet, if three or more bind themſelves jointly and ſeverally, the obligee cannot ſue two of them (*c*) only jointly.

(*c*) Unleſs it appear to the court that the other perſons are dead. Hard. 198. Cro. Eliz. 494. Sand. 291. Sid. 238. 420. Allen, 21. 4[illegible] Lutw. 696. Cro. Jac. 152. Keb. 840. 936.

Alſo,

Alſo, if two be bound in a bond jointly, and one be ſued alone, though he may plead this matter in abatement of the writ, yet he cannot plead *non eſt factum*; for it is his deed, though not his ſole deed. Co. Lit. 283. a. 5 Co. 119. Whelpdale's caſe, Doct. Pl. 198. Cro. Jac. 152. Vent. 34. Poph. 161. 9 Co. 110.

And therefore in debt againſt one, on an obligation wherein two are jointly bound, after imparlance and oyer, the defendant cannot plead that the other ſealed and delivered; for as that muſt come on the defendant's ſide, and it is too late to plead it after imparlance, it ſhall be taken, that the other did not ſeal, *&c.* nor will the oyer help it, for it does not appear by it, without ſpecial averment. But of (*a*) records oyer is ſufficient, without averment. Vent. 76. 135. 2 Keb. 795.

(*a*) And therefore in a *ſcire facias* brought againſt three bailees or ſureties, upon a recognizance acknowledged by them and the principal jointly and ſeverally; on demurrer the writ abated, becauſe, this being founded upon a record, the plaintiff ought to ſet forth the cauſe of the variance from the record; as, that one was dead. But, if an action be brought upon bond in the like caſe, there, the defendants ought to ſhew that it was made by them and others in full life not named in the writ; becauſe the court ſhall not intend that the bond was ſealed and delivered by all that are named in it; and therefore the defendants cannot demur upon it, though it be entered *in hæc verba*. Allen, 21. Blackwell v. Aſhton.

So, in debt againſt one, on a bond wherein two are jointly bound, after oyer the defendant demurred, and the plaintiff had judgment; for though another be named in the bond, yet it does not appear, without averment, that he ſealed, and then the bond is ſingle; but it ought to have been pleaded in abatement. Saund. 291. Sid 420. Cabel v. Vaughan.

Alſo, if two or more be jointly bound, though, regularly, one of them alone cannot be ſued, yet, if proceſs be taken out againſt all, and one of them only appear, but the other ſtand out to an outlawry, he who appeared ſhall be charged with the whole debt. 9 Co. 119 a. in Whelpdale's caſe.

If two are jointly bound, and there is judgment againſt both, execution likewiſe muſt be taken out againſt both, and muſt be of the ſame nature: alſo, if two are jointly and ſeverally bound, and there is judgment in a joint action againſt both, the execution muſt be joint againſt both, and of the ſame nature; ſo that you cannot take out a *capias* againſt one, and an *elegit*, *&c.* againſt the other; for though the plaintiff might have ſued them ſeverally, yet by ſuing them jointly he has made his election, and the execution muſt enſue the nature of the judgment; and though they be ſeveral perſons, yet they make but one debtor, when *J. S.* ſues them jointly. But if the obligee ſues them ſeverally, he may ſever them in their kinds of execution; for though the obligation be but one, yet the originals, ſuits, pleadings, judgments, and executions are as different as if they were upon ſeveral obligations. Hob. 59. Cro. Eliz. 648. 2 Sid. 12. Mod. 2. Roll. Abr. 888-9.

But, if there be a joint judgment againſt two, and one die, a *ſcire facias* lies againſt the other alone, reciting the death; and he cannot plead, that the heir of him that is dead has aſſets by deſcent, and demand judgment, if he ought to be charged alone; for at (*b*) common law, the charge upon a judgment being (*c*) perſonal ſurvived; and the ſtatute of *Weſtm.* 2. 13 *Ed. ſtat.* 1. *c.* 45. that gives the *elegit*, does not take away the remedy of the plaintiff at the common law, and therefore the party may take out his Raym. 26. Lev. 30. Keb. 92. 123. S. C. Edſat v. Smart.

(*b*) So adjudged 1 E 3. 15. pl. 41. 3 E. 3.

pl. 37. & *vide* 29 Aſſ. pl. 37. 29 E. 3. 29.

execution which way he pleaſes; for the words of the ſtatute are, *Sit in electione*. But, if he ſhould, after the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by (*d*) ſuggeſtion, or by *audita querela*.

(*c*) For the difference between a real and perſonal execution, and that a perſonal execution will ſurvive, though a real will not, *vide* 3 Co. 14. Yelv. 202. Raym. 153. 3 Keb. 3. 331. 4 Mod. 315. 3 Keb. 295. Salk. 319. pl. 3. Ld. Raym. 44. Comb. 441. 5 Mod. 338. Carth. 320. 404. Show. 402. (*d*) For this *vide* F. N. B. 166. 44 E. 3. 10.

Hob. 2. Cro. Jac. 338. 2 Bulſt. 97. &c. Godb. 257. Roll. Rep. 8, 9. S. C. adjudged between Crawley and Lidgeat.

If two are bound in an obligation jointly and ſeverally, and judgment given againſt each in two ſeveral actions, one *in Banco*, the other *in Banco Regis*, and after one is taken in execution *in Banco Regis*, and after an execution is taken *in Banco* againſt the other by *elegit*, and lands and goods (*e*) delivered in execution thereupon; he, that is in execution by his body *in Banco Regis*, ſhall be delivered upon an *audita querela*, becauſe the execution upon an *elegit* is a ſatisfaction.

(*e*) But if, after execution by *elegit*, the judgment *in Banco* is reverſed, perhaps the other ſhall not have an *audita querela*; *per* Croke, *contra* Doddridge. 2 Bulſt. 100.—And my Lord Coke ſays, that if upon an *audita querela* the other be once diſcharged, although afterwards the judgment *in Banco* be reverſed, yet he ſhall not be taken in execution again. Roll. Rep. 10. 2 Bulſt. 101.

5 Co. 86. Cro. Eliz. 478, 479. 555. Co. Ent. 85. *vide* tit. Eſcape.

If *A.* and *B.* are bound in an obligation jointly and ſeverally, and judgment given againſt each upon ſeveral actions brought, and both taken in execution, and after *A.* eſcapes; yet *B.* ſhall not be delivered upon an *audita querela;* for though the obligee may have an action againſt the ſheriff for the eſcape, yet, till he is actually ſatisfied, the other ſhall not have an *audita querela*, nor the obligee be compelled, whether he will or no, to take his remedy againſt the ſheriff, who may die or be inſolvent.

8 Co. 136. Salk. 300. & *vide* Jon. 345.

If ſeveral obligors are bound jointly and ſeverally, and the obligee make one of them his executor, it is (*f*) a releaſe of the debt, and the executor cannot ſue the other obligor.

(*f*) But though it be a releaſe in law, in regard it is the proper act of the obligee, yet the debt by this is not abſolutely diſcharged, but it remains aſſets in his hands, to pay both debts and legacies. Cro. Car. 373. Yelv. 160. & *vide* tit. Evidence, letter (G).

Hamond & ux. v. Bendiſh, Paſch. 26 Car. 2. Rot. 712.

*A.* and *B.* were jointly bound to *J. S.*, who made the wife of *A.* executrix, and died; *A.* and his wife brought debt againſt *B.*, who pleaded this matter in abatement: it was argued by Serjeant *Turner*, for the defendant, that by making the wife of one of the obligors executrix, the other obligor is diſcharged. *Hob.* 10. *Fryer* v. *Gildridge*, 21 *E.* 4. 81 *b. Bro. Exec.* 118. And that it would be ſo, if they were bound jointly and ſeverally. *Plow.* 38. *a. Platt*'s caſe. *Keilw.* 63. 8 *Ed.* 4. 3 *Bro. Debt.* 156. The reaſon is, becauſe a debt, or perſonal thing, once ſuſpended is gone for ever; and here the plaintiff, one of the obligors, is diſcharged, for he and his wife cannot ſue himſelf; and of that the other ſhall take advantage. *Dyer* 140. *Co. Lit.* 264. *b.* It is a releaſe in law, of which his companion ſhall take advantage, notwithſtanding the opinion 21 *H.* 7. 37. But if it was but ſuſpended for the time of the executorſhip, yet it is for the defendant, having pleaded in abatement. 11 *H.* 7. 4. *b.* 1 *Roll. Abr.* tit. *Extinguiſhment*,

*tinguiſhment*, 940. *Moor*, 855. *pl.* 1174. 1 *Cro. Dorcheſter* v. *Webb*, 272. *Yelv.* 160. *Flud* v. *Ramſey*, 8 *Co.* 136. *Per cur.*—The plea being pleaded in abatement, it is for the defendant; for during the coverture and executorſhip there is a ſuſpenſion of the debt. But it was agreed, that this debt due by the baron was aſſets in his hands, and liable to the creditors, though it ſhould be adjudged an extinguiſhment; for as *North* ſaid, this is a releaſe, but it is but by will; and therefore in nature of a legacy, which ſhall not be preferred to a debt. But it was doubted, if it had been pleaded in bar, if it ſhould be for the defendant; and *North*, *Ellis*, and *Windham* thought not; but that, after the death of the baron, it might be ſued for; for the ſuſpenſion is but during the coverture, and the baron is executor only in right of his wife: but of this *Atkyns* doubted. But in the principal caſe there was judgment for the defendant.

If a feme ſole obligee take one of the obligors to huſband, this is ſaid to be a releaſe in law of the debt, being her own act. 8 Co. 136. a. March, 128.

If one obligor makes the executor of the obligee his executor, and leaves aſſets, the debt is deemed ſatisfied; for he has power, by way of retainer, to ſatisfy the debt; and neither he nor the adminiſtrator *de bonis non*, &c. of the obligee can ever ſue the ſurviving obligor. Hob. 10.

But, if two are bound jointly and ſeverally to *A.*, and the executor of one of them makes the obligee his executor, yet the obligee may ſue the other obligor. 2 Lev. 73.

If two are jointly and ſeverally bound in an obligation, and the obligee releaſes to one of them, both are diſcharged. Co. Lit. 232. a. [26 H. 6.

T. Barre, 37. Obligee made an acquittance to one obligor, which was dated before the obligation, but was delivered afterwards: the other obligor pleads this in bar, and it was adjudged a good plea in bar. *Nota*, each was bound in the entierty, therefore it was joint and ſeveral. 34 H. 6. So, in the caſe of the king, if he releaſes to one of the obligors, the other ſhall take advantage. 5 Rep. 56. *contra.*—And as a releaſe in deed to one obligor diſcharges the other, ſo of a releaſe in law, as 8 Rep. 136. Needham's caſe. A woman obligee marries the obligor, that is another ſort of diſcharge. But in 17 Car. 2. B. R. two were bound jointly and ſeverally. The plaintiff ſued both, and afterwards entered a retraxit againſt one: whether that diſcharged the other was the queſtion? Berkley ſaid it was, for it amounts to a releaſe in law, as the plaintiff confeſſes thereby that he had not cauſe of action, and therefore he cannot have judgment, as in Hickmot's caſe, 9 Rep. and retraxit is a bar to an action; and the plaintiff by his own act has altered the deed from joint to ſeveral, and therefore the other ſhall have advantage of it. Co. Inſt. *contra*; for a retraxit is only in nature of an eſtoppel, and therefore the other ſhall not have advantage; neither is it a releaſe, though it be in the nature of a releaſe; and if the obligee ſues both, and then covenants with one not to ſue farther, that is in the nature of a releaſe, but the other ſhall not take advantage of it; and in 21 H. 6. it is ſaid, that there muſt be an actual releaſe to one obligor to diſcharge the other. See March's Rep. 165.——Paſch. 18 Car. Hannam v. Roll. The obligee releaſes to one obligor; the other, in conſideration of the forbearance, undertakes to pay, and in an action on the caſe the matter was found ſpecially; and Rolle argued, that the debt was not abſolutely diſcharged, but only *ſub modo*, viz. if the other can have the releaſe to plead, and becauſe the forbearance was a good conſideration. But the court was of opinion, that the debt was abſolutely diſcharged, and therefore the conſideration was inſufficient.——See Hob. 70. Parker v. Sir John Lawrence. In treſpaſs againſt three, they divided on the pleading. Judgment againſt one. Then he entered a *noli proſequi* againſt the two others; it was held to be no diſcharge to him againſt whom judgment was had; for as to him, the action was determined by the judgment, and the others are divided from him, and not ſubject to the damages recovered againſt him; but a *noli proſequi*, or nonſuit before judgment againſt one, would diſcharge all. Lord Nott. MS. Co. Lit. 232. a. note (i). laſt edit.]

Three were bound jointly and ſeverally in an obligation, and an action was brought againſt one of them, who pleads, that the ſeal of one of the others was torn off, and the obligation cancelled, and therefore void againſt all. Upon demurrer it was adjudged, 2 Lev. 220. Seaton v. Henſon. 2 Show. 28. pl. 20. S. C. ad-

judged *nisi*. (a) Where several merchants covenanted *separatim*, and the seal of one of them was torn off, it was held, that this should avoid the covenant, as to him whose seal was torn off only, but not as to the others. 5 Co. 23. Matthewson's case. March, 126. S. C. cited, and a difference there taken between a bond and a covenant.

judged, that the obligation, by the tearing off the seal of one of the obligors, became void against all, notwithstanding the obligors were (a) severally bound.

March, 125. Bayly v. Garford. 2 Show. 29. S. C. cited, as adjudged to have been void.

So, where three were bound in a bond jointly and severally, and the seals of two were eaten by the rats, the court inclined, that the bond was void against all.

Owen, 8. Michael's case. Dyer, 59. pl. 12, 13. S. C. and S. P. where the jury were directed to try, whether it was his bond at the time of the plea pleaded.

But, where two were bound jointly and severally, and it was found by special verdict, that after issue joined, and before the *nisi prius*, the seal of one of the obligors was taken off the bond; it was held, that this being after issue joined, the bond was good.

Abr. Eq. 93. Sheffield v. Lord Castleton. (b) Especially, if the money was lent principally upon the surety's credit. Chan. Ca. 77. & *vide* 2 Chan. Ca. 22. Vern. 196.

If *A.* be bound in a bond for payment of money, and *B.* be bound with him, as his surety only, and the bond happen to be lost; equity will set up the bond, as well against the (b) surety as against the principal, because the bond was once a legal charge against both.

Abr. Eq. 93. Maure v. Harrison.

In equity, a bond creditor shall have the benefit of all counter-bonds or collateral securities given by the principal to the surety; as, if *A.* owes *B.* money, and he and *C.* are bound for it, and *A.* gives *C.* a mortgage or bond to indemnify him, *B.* shall have the benefit of it to recover his debt.

And. 121. Moor, 752. pl. 1035. Cro. Jac. 32, 33. Yelv. 47.

A bond made to secure a just debt, payable with lawful interest, shall not be avoided by reason of usury, or any corrupt agreement between the obligors, to which the obligee was no way privy; as, where *A.* being indebted to *B.* in 100 *l.*, agrees to give him 30 *l.* for the forbearance of that 100 *l.* for a year, and gives him a bond of 60 *l.* for payment of the 30 *l.*, and for the payment of the 100 *l.* enters into a bond of 200 *l.* together with *B.* for the payment of a true debt of 100 *l.* due from *B.* to *C.*

## 5. Of their Remedies against each other.

(c) Or perhaps he may have remedy by writ *De plegiis acquietandis*. Lev. 72. [*Qu.* Whether not in an action for money paid to the other's use?]

If one of the sureties pays all the bond, yet the obligee is not compellable by law to assign the bond to him, but the surety's remedy must be in (c) Chancery.

Sid. 89. Lev. 71. Scot and Stevens, Roll. Rep. 27. S. P. *per* Croke.

And on this foundation, that there is a remedy in equity, it hath been adjudged, that if *A.* together with *B.* is bound to *C.* for the proper debt of *B.*, &c. and *A.* pays the money, and *B.* dies, and makes *D.* his executor, and *D.* in consideration that *A.* will forbear to sue him till such a time, assumes and promises to re-

pay

pay him; this conſideration is good, though *D.* was liable in equity only *.

* Why was not *D.* liable at law as executor, for money paid by plaintiff, for the uſe of teſtator?

Alſo, it is held clearly in equity, that one ſurety may compel another to contribute towards payment of a debt, for which they were jointly bound. Chan. Ca. 246. Chan. Rep. 34. 120. 150.

Therefore it hath been held, that if the obligee ſue in Chancery the executor of one obligor to diſcover aſſets, he muſt make all the obligors parties, that the charge may be equal. But it is made a *quære*, whether he may not ſue the principal, and leave out them which are bound only as ſureties. 2 Vent. 348.

But it is held, that if a judgment be had at law againſt one obligor, you may ſue the executor of him alone, to diſcover aſſets, becauſe the bond is drowned in the judgment. 2 Vent. 348.

If the principal in a bond, being arreſted, gives bail, and judgment is had againſt the bail, and the ſureties are afterwards ſued on the original bond, and are obliged to pay the money; the ſureties ſhall have the judgment againſt the bail aſſigned to them, in order to reimburſe them what they had paid, with intereſt and coſts; and the ſureties in the original bond are not to be contributory, for the bail ſtands in the place of the principal. 2 Vern. 608. Parſon v. Priddock.

## (E) Of the Condition and Conſideration of the Obligation.

[For the law on the ſubject of conditions of bonds, ſee tit. *Conditions*, K, L, &c.]

## (F) How the Breach of the Condition muſt be aſſigned and ſet forth, and the Manner of pleading Performance, and in Bar.

THE uſual way of declaring and ſetting forth the breach on a bond is, that the defendant *per ſcriptum ſuum obligatorium ſigillo ſuo ſigillatum* acknowledged, &c. and therein to lay a place where it was made, that it may receive trial, in caſe it be denied. Alſo, it is uſual to ſay, that the bond was ſealed and delivered; but this has been held not to be of neceſſity, and to be cured by pleading over, the calling it *ſcriptum ſuum obligatorium* implying ſo much. But it hath been held, not to be ſufficient for the plaintiff to declare *quod reddat ei* ſo much, without adding *quas ei debet & injuſte detinet*. Cro. Jac. 420. Cro. Eliz. 773. 3 Lev. 348. 6 Mod. 306. Ld. Raym. 336. 763. 2 Ld. Raym. 1043.

[The bond being the ſole foundation of the action, the court muſt ſee that it is properly executed; and therefore it is matter of ſubſtance, that *profert* be made of it. And the defendant being entitled to it by law, the court can in no caſe diſpenſe with it. Soreſby v. Sparrow, 2 Str. 1186. 1 Wilſ. 16. S. C.

But

Read v. Brookman, 3 Term Rep. 151. Totty v. Nesbitt, *Id.* 153. n. 1 Cr. Pr. 141.

But where a bond is loſt, it is now holden, that the plaintiff may declare ſpecially, "that it is loſt by time and accident," and without a *profert*. And where he has made a *profert*, and the deed is loſt, he may move, that the production of a copy ſhall be oyer, or if he have no copy, to amend his declaration, and plead as above.]

Matiſon v. Atkinſon, 3 Term Rep. 153. n. And ſee Whitfield v. Fauſſet, 1 Vez. 392.

(*a*) Cro. Jac. 409. Cro. Car. 436. Allen, 57. 2 Vern. 129. (*b*) 3 Bulſt. 244. Roll. Rep. 423. [(*c*) However, in ſuch caſe, the plaintiff has his election to which bond to apply the money. Bloſs v. Cutting, 2 Str. 1194.]

(*a*) In an action of debt for part of a debt upon contract or obligation, the plaintiff muſt acknowledge ſatisfaction of the reſidue; for there muſt be no variance from the ſpecialty. But (*b*) in debt upon two bonds, the plaintiff in his declaration may acknowledge the payment of 10 *l.* in part, without ſhewing upon which bond it was paid; for it is immaterial, and can no way prejudice the defendant. Beſides, the money might have been paid generally, without any application to either bond (*c*).

Lev. 88. Salk. 326. [(*d*) Not if the condition be illegal upon the face of it, for in that caſe the demurrer is proper. 2 Bl. Rep. 1103. 11 Co. 26.]

In debt on a bond with condition, the plaintiff may declare generally, and it is on the defendant's part to ſhew the condition, which goes by way of defeaſance; and if he demand oyer, and demur, the plaintiff ſhall have judgment (*d*).

Cro. Jac. 315. Kirby v. Hanſaker. Mod. 204. S. C. cited, and allowed to be law; and ſo in 3 Mod. 135. Vent. 84. 2 Lev. 37. but 3 Lev. 325. Mod. 66. ſeems *contra*; and there ſaid by Jones, that, ſince this caſe, the ſtatutes 21 Jac. 1. c. 13. and 16 & 17 Car. 2. c. 8. have greatly ſtrengthened verdicts. (*e*) That in debt upon a bond to perform covenants, the replication muſt ſhew a certain breach; but in covenant, it is ſufficient to aſſign a general breach. Salk. 139. pl. 5. Ld. Raym. 478.

Error upon a judgment in debt, upon an obligation of 600 *l.*, the error aſſigned was, that there was not a ſufficient breach alleged; for the condition being that he ſhould enjoy ſuch lands without eviction, the breach was aſſigned in the recovery by verdict in ejectment, upon a leaſe made by one *E.*, and does not ſhew what title *E.* had to make the leaſe, but avers, that *E.* had a good title; and it might have been, that he had title from the plaintiff himſelf after the obligation made; and therefore he ought to have ſhewed a good and *eigne* title before the leaſe made: *Et per cur.*—The replication is ill; for it ought to (*e*) comprehend a full and manifeſt breach, otherwiſe it is not good.

Salk. 140. pl. 6. Ld. Raym. 620.

If the condition of an obligation be to deliver, before the 5th of *Jan.*, twenty quarters of corn out of a ſhip into a barge, to be brought by the plaintiff to receive the ſaid corn; and the plaintiff aſſign for breach, that the defendant did not deliver it 5 *Jan.*; it is good; for when one is obliged to deliver, and the other to accept, it ſhall be preſumed, that the plaintiff was there before the time, ready to accept the corn with his barge.

Sid. 307. Champion v. Shipweth; but the reporter ſays, that if the obligation be for payment of money, and the money become payable pending the action, this makes the action good;

If the breach be aſſigned after the action brought, it is ill; as, where in debt on an obligation for non-performance of covenants, the plaintiff replied and aſſigned a breach in non-payment of rent the 20th of *June*, 17 *Car.* 2., and the bill was filed *Trin.* 17 *Car.* 2. which term ended the 14th of *June*; this was held ill.

good; *secùs*, where the condition is for performance of covenants; *vide* Cro. Eliz. 325. 4 Leon. 98. Keb. 106.

It is said, that in an obligation for performance of covenants, the breach ought to be more precise and particular than in actions of covenant; but that yet if what is material, and the substance, is alleged, it is sufficient; as, where the condition of an obligation was, that the defendant, a bailiff, should not let at large any prisoner arrested, without licence of the plaintiff an under-gaoler; and the breach assigned was, that the defendant had let at large such a one, whom he had arrested at *Westminster*, without licence, *&c.* this was held sufficient, though the particular time and place were not set forth, the escape being the material part of the covenant or condition. Sid. 30. Jenkins v. Hancock, Cro. Eliz. 132.

If the replication be repugnant to the declaration, it makes the declaration ill, because the subsequent pleading falsifies the declaration; as, if a man declares on a bond made 1 *Martii*, if the plaintiff replies, that the bond was delivered 30 *Martii*, this falsifies the declaration; because it could not be made the first: so, if the rejoinder falsifies the bar, the bar is vitious. Cro. Jac. 264. Saund. 116. 226.

In debt on a bond, with condition for performance of several things, the defendant pleads *quod conditio ejusdem facti nunquam infracta fuit per se ipsum*, &c. and held an ill plea; because, for saving the bond it is necessary for the defendant to shew how he hath performed the condition; and this sort of pleading was never admitted. 2 Vent. 156.

So, if he had pleaded *performavit omnia*, it had been ill; for the particulars being expressed in the condition, he ought to plead to each particularly. But, if the condition were for performance of covenants in an indenture, performance generally will be a good plea, if they are all in the affirmative. 1 Lev. 303. 1 Sid. 215. Defendant cannot plead conditions performed, to a bond for performance of covenants, without oyer of the deed, which contains the covenants. R. 1 Sid. 50. 97. 425. 1 Vent. 37. R. Al. 72.—And he must make a *profert in cur.* of the deed, otherwise it will be bad on a special demurrer. R. 1 Saund. 9.

Debt on a bond conditioned to deliver goods on such a day; the defendant pleads, that he delivered them according to the form of the condition; the plaintiff demurred, because he ought to have pleaded expressly, according to the words of the condition, that he delivered them on the day; and the court inclined to that opinion.——(*a*) So, in debt on a bond conditioned to pay a sum of money at *D.* such a day, the defendant pleads payment at the day *secundum effectum conditionis*; the plaintiff demurred specially, because he does not say where he paid it: and it was held to be form at least; and the plaintiff having demurred specially had judgment. (*b*) And generally, where performance is pleaded, it ought to be pleaded in the words of the condition. Lev. 145. Nels. Lutw. 268. (*a*) 3 Lev. 245. (*b*) 2 Salk. 520. pl. 22. 2 Ld. Raym. 1138. Salk. 208. pl. 8. 6 Mod. 157. 197.

[But, where the condition of a bond was, "that the defendant "should from time to time *render a just and true account* of all "monies received by him as treasurer of the parish of *B.*" &c. and the breach assigned was, that on the last account furnished by the defendant, there appeared to be due by him a large sum of money, which he had not *paid over*; the defendant demurred, because Bache v. Proctor, Doug. 382.

cauſe the breach was not within the condition, which was only to *account*; but *per curiam*, the intention of the parties, and fair conſtruction of the condition is, that the money ſhould be paid; for to conſtrue it a condition to enforce the making out a paper of items and figures is idle and nugatory.

African Company v. Maſon, Gilb. Rep. 238. cited 2 Burr. 773. and 1 Str. 227.

Where the defendant, being appointed agent to the plaintiffs, gave a bond, conditioned for the payment of all ſums of money by him received to the uſe of the Company; and the breach aſſigned was, "that the defendant had received from *J. S.* and ſe-"veral other perſons divers ſums of money, which he had not "paid to the Company;" it was holden, that the aſſigning of the breach in the receipt of *divers ſums* from *ſeveral perſons*, was too general and uncertain, and therefore bad.

Cornwallis v. Savery, 2 Burr. 772.

But where in debt on a bond as ſecurity for a perſon appointed agent to a regiment, the breach aſſigned was, "that the defend-"ant had received ſeveral ſums of money from the paymaſter-"general, for the uſe of the regiment, which he had not paid "over to the officers according to their reſpective proportions:" this breach was, on demurrer, holden to be well aſſigned; for the money was received from one perſon, (not from many, as in the laſt caſe,) and for one purpoſe, to pay the regiment; and the defendant's omitting to pay any part of it was a breach of the bond.

Jones v. Williams, Doug. 214.

In debt on a bond given as a ſecurity for the faithful ſervice of a clerk, the breach aſſigned was, "that a large ſum of money, "*viz.* 13*l.* came to the clerk's hands on account of the plaintiff, "which he (the clerk) had ſpent and embezzled." This breach is ill aſſigned, inaſmuch as it does not ſhew how and from whom the money ſo embezzled had been received.

Stibbs v. Clough, 1 Str. 227.

The condition of a bond was, "that the plaintiff ſhould fur-"niſh the defendant with ale and beer, to be uſed in his houſe, "at ſuch prices, and that he ſhould take it of nobody elſe; but "might take his other liquors from whom he pleaſed, malt li-"quors only excepted." The breach aſſigned was, "that ſuch a "quantity of *liquors* was drawn and unpaid for." On demurrer, it was holden, that the breach was improperly aſſigned, for it did not appear, that the liquors unpaid for were *malt liquors*, which only the defendant was bound to take from the plaintiff.

Box v. Day, 1 Wilſ. 59.

The defendant's wife, when ſole, gave a bond to the plaintiff in the penal ſum of 1200*l.* if ſhe married *any other perſon* than the plaintiff, *or* refuſed to marry him within one month after her father's death. She married the defendant in her father's lifetime, upon which the plaintiff brought debt on the bond, and aſſigned her marriage as a breach: and it was holden to be good, (though it was inſiſted, that ſhe might ſtill perform one part of the condition by marrying the plaintiff after her father's death, as he might ſurvive her huſband); for that by the breach of one of the conditions the bond became abſolute.

Hallett v. Hodges, Say. Rep. 29.

A bond was for the payment of a ſum of money by inſtalments; the condition was for the payment of theſe inſtalments, without the words *or any of them*. It was nevertheleſs reſolved, that

that the obligee might, on default of payment of any of the inſtalments, bring his action on the bond.]

In debt on an obligation for payment of money, &c. the defendant pleads, that at the time and place *paratus fuit* to pay the money, but that nobody was there to receive it; and held ill, on a general demurrer, for want of an *obtulit ſolvere;* for the tender only is traverſable, not the *paratus.* 3 Lev. 104.

In debt on an obligation by a maſter of a ſhip againſt a merchant, for the performing of agreements in a charter-party; the declaration was, & *ad performationem conventionum ex parte dicti mercatoris obligaſſet ſe dicto magiſtro,* &c. Adjudged inſufficient, for want of the word *ipſe,* or *ipſe prædict. mercator obligaſſet,* &c. Vent. 196. Cro. Eliz. 913. Salk. 26. pl. 13. & *vide* tit. Amendment and Jeoffails.

In debt on a bond with condition, the defendant pleaded a collateral plea, which was inſufficient; the plaintiff demurred, and had judgment without aſſigning a breach; for the defendant by pleading a defective plea, by which he would excuſe his non-performance of the condition, ſaves the plaintiff the trouble of aſſigning a breach, and gives him advantage of putting himſelf on the judgment of the court, whether the plea be good or not. But, if the plaintiff had admitted the plea, and made a replication which ſhewed no cauſe of action, it had been otherwiſe. But, if the replication were idle, and the defendant demurred, yet the plaintiff ſhould have judgment, without aſſigning a breach. Lev. 55. 84. 3 Lev. 17. 24. Tryon v. Carter, 2 Burr. 944. S. P.

And in all caſes of debt on an obligation with condition, (that of a bond to perform an award only excepted,) if the defendant pleads a ſpecial matter, that admits and excuſes a non-performance, the plaintiff need only anſwer, and falſify the ſpecial matter alleged; for he that excuſes a non-performance admits it, and the plaintiff need not ſhew that which the defendant hath ſuppoſed and admitted. Salk. 138. pl. 2. *vide* tit. Arbitrament.

But, if the defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff in his replication muſt ſhew a breach; for then he has no cauſe of action, unleſs he ſhew it; and this difference will give the true reaſon, and reconcile the caſes in the (*a*) margin. Salk. 138. pl. 2. Tryon v. Carter, 2 Burr. 944. (*a*) Lev. 55. 84. 226. Saund. 102. 159. 317. 3 Lev. 17. 24. Vent. 114. Cro. Eliz. 320. Yelv. 78.

In debt on an obligation to pay for what goods an apprentice ſhall waſte; the plaintiff in pleading need not ſhew what the goods were, for he is to recover the penalty of the bond: otherwiſe, in covenant. Lev. 194. [Qu. the paſſage in Levintz. The reference is faulty.]

Pleading the breach of a condition of a bond, *eo quod* it was not paid, &c. is a good affirmation; as in avowry, & *quia* the rent was arrear, is good: ſo, in all *aſſumpſits* on collateral promiſes to pay on requeſt, *licet* ſuch a day and place he requeſted, is an affirmation, and traverſable. Saund. 116. 2 Vent. 278. Lev. 194.

Pleading a bond by a *teſtatum exiſtit* is not good, though it be with a *hic in curia prolat.* 2 Lev. 175. Saund. 275.

Debt

Hudſon v. Spier, 3 Lev. 50.

Debt on an obligation conditioned to perform articles; the defendant demands oyer, and then pleads the articles and performance; the plaintiff prays they may be entered *in hæc verba*, and then demurs; becauſe the defendant in pleading the articles omitted part; and the plaintiff had judgment; for perhaps he might have aſſigned the breach in thoſe omitted, of which advantage he is by this means deprived.

Smith v. Yeomans, 1 Saund. 316.

[Debt on bond for performance of covenants in certain indentures: the defendant demands oyer; and then pleads, that there are not any covenants in the indenture on his part to be performed: the plaintiff prays oyer of the indenture by the defendant brought into court, which is entered at large *in hæc verba*; and it appears, that there are ſeveral covenants in the indenture on the defendant's part, upon which the plaintiff demurs. It was inſiſted by the defendant's counſel, that the plaintiff had demurred too haſtily, for he ought to have ſhewn a breach of one of his covenants to maintain his action; as, in debt on a bond to perform an award, if the defendant pleads no award made, it is not ſufficient for the plaintiff to reply, and ſhew an award made, but he ought likewiſe to ſhew a breach thereof: ſo, here, when the defendant pleads, there are no covenants in the indenture, the plaintiff ought not only to ſhew the covenants, but likewiſe to aſſign a breach on them. *Sed non allocatur*—and judgment was given for the plaintiff without any difficulty. And the reaſon ſeems to be, that when the defendant brings the indenture into court, and ſaith, that there are no covenants therein, on oyer thereof, the indenture is made part of the (*a*) plea; and it thereby judicially appears to the court, that he hath pleaded a falſe plea, and hath taken an averment againſt the truth of that which appears to the court by the very indenture which he himſelf hath brought into court; and ſo the plaintiff need not ſhew any matter of fact in a replication to maintain his action, as in the caſe of an award, but a demurrer was more proper. *Quod nota*, ſaith the Reporter.]

(*a*) Jeffery v. White, Dougl. 476. acc.

Salk. 172. pl. 4.

In debt on a bond, with condition to exhibit an inventory to the eccleſiaſtical court before ſuch a day, it is not enough for the defendant to plead, that there was no court held, but he muſt plead alſo that he was there ready; for he muſt ſhew that he has done all that could be on his ſide toward a performance. So, if the condition were to levy a fine *in Oct. Hil.* by which the obligee is to ſue out the writ of covenant; it is not enough for the defendant to plead, that no writ of covenant was ſued out, but he muſt plead, that he was there ready at the day, and no writ of covenant was ſued out. So, if the condition were to pay money to *J. S.* at a certain time and place, it is not enough for the defendant to ſay, that the obligee came not, without ſaying that he was there ready and offered, *&c.*

Baldee v. Eler, 5 Term Rep. 250.

[To debt on bond conditioned for the payment of a certain ſum on a certain day, the defendant pleaded, that by articles of agreement between the plaintiff, her ſiſter, and the defendant, the intereſt

tereſt of the money was to be paid to one of the ſiſters upon an event which had happened: but, as the plea did not allege the payment of the intereſt accordingly, it was holden bad.]

In debt on a bond, the defendant may have ſeveral pleas in bar; as, if the plaintiff ſue as executor, the defendant may plead the releaſe of the teſtator for part, and for the reſidue the releaſe of the plaintiff; ſo, he may plead payment as to part, and as to the reſt an acquittance. Salk. 180. [Bonds are within the act of 4 & 5 Ann. c. 16. which allows the defendant to plead double: therefore, where the condition was to marry on requeſt, *non eſt factum*, and never requeſted, were allowed to be pleaded together. Dunn v. Vacher, 2 Str. 908. So, *non eſt factum*, and a diſcharge by bankruptcy. Atkinſon v. Atkinſon, *Id.* 871. But not, *non eſt factum*, and *ſolvit ad diem*, Arnold v. Baas, 2 Bl. Rep. 993.; or *ſolvit poſt diem*, Fox v. Chandler, *Id.* 905.; or *non eſt factum*, and a tender as to part. Jenkins v. Edwards, 5 Term Rep. 97.]

In debt on an obligation, if not guilty be pleaded, and there be a verdict for the plaintiff, it is aided by the 16 & 17 *Car.* 2. *c.* 8. becauſe being an ill plea, and a falſe one, the plaintiff ought to have his judgment, both becauſe of the badneſs of the plea, and for its falſehood. But, had the verdict been for the defendant, yet the plaintiff ſhould have judgment, becauſe the declaration is not anſwered by the plea. Noy, 56. Cro. Eliz. 773. 2 Jon. 184.

In debt on a bond conditioned for the payment of 105 *l.* the defendant pleads payment of 100 *l. ſecundum formam effectum conditionis*; the plaintiff replies, *non ſolvit prædict.* 105 *l.*: this is an immaterial iſſue not aided by the ſtatute; for the plaintiff has not traverſed the ſame payment that is in the defendant's plea. Cro. Jac. 585. Cro. Car. 593.

In debt on an obligation, the defendant pleads payment of 50 *l.* 14 *Junii* 11 *Jac.* according to the condition; the plaintiff replies, *quod non ſolvit* 50 *l. prædict.* 14 *Aug. anno* 11 *ſupradict.*, *quas ad eundem diem ſolviſſe debuiſſet, & hoc*, &c. the verdict found, *quod non ſolvit prædict.* 14 *Junii*, *prout* the defendant had alleged. The objection here was, that no iſſue was joined; becauſe they do not meet in the time the money was paid. But the word *Auguſt* was adjudged to be plainly ſurpluſage; for when he ſaid *quod non ſolvit prædict.* 14 *die*, it is a ſufficient traverſe, without the word *Auguſt*; and *Auguſt* is plainly repugnant to the word *prædict.*, for *prædict.* refers to *June*; and ſuch ſurpluſage, being a repugnancy to what was before material, was idle and void. Cro. Jac. 549. Sand. 282. 286.

If one declared on a bond made 1 *Martii*, if the plaintiff reply, that the bond was delivered 30 *Martii*, this falſifies the declaration, becauſe it could not be made the firſt, and is therefore vitious. Cro. Jac. 264. Saund. 116. 226.

In debt on an (*a*) obligation the defendant cannot plead *nihil debet*, but muſt deny the deed by pleading *non eſt factum*; for the ſeal of the party continuing, it muſt be diſſolved *eo ligamine quo ligatur*. Hard. 332. Hob. 218. [(*a*) So held on a general demurrer. Anonymous, 2 Will. 10.] But, if the debt be due by ſimple contract, then he may plead *nil debet*; for it does not appear, that there is any debt continuing. 2 Inſt. 651. Hob. 218.

[On the plea of *non eſt factum*, only queſtions of fact can ariſe. Where therefore the condition is void in law, the defendant ſhould pray Colton v. Goodridge, 2 Bl. Rep. 1108.

Pigot's caſe, 11 Co. 26. Thompſon v. Leach, 2 Salk. 675.

pray over, and demur, if the illegal condition appears upon the face of it; if not, plead the ſpecial matter to avoid it.

Colborne v. Stockdale, 1 Str. 493. Hinton v. Roffey, 3 Mod. 35.

Hence, if a bond be given for a gaming debt, the ſtatute ſhould be pleaded. And in ſuch plea, the defendant ſhould ſet out the game played at, and conclude *contra form. ſtat.* that the court may ſee, that it was within the ſtatute. So, in pleading ſimony or uſury, the ſimoniacal or uſurious contract muſt be ſhewn.

Winch v. Pardon, Mich. 1 G. 1. Bull. N. P. 174.

If the defendant has paid the money before the day, he may, to debt on bond conditioned to pay *at a day certain*, plead *ſolvit ad diem*, and give in evidence payment *before* the day, as he could not plead it: for if the defendant were to plead payment before the day, the iſſue would be immaterial, as it would ſtill leave the preſumption open that there might be payment at the day. And therefore a difference is to be obſerved between pleading where the condition of a bond is to pay *at a day certain*, and where *at or before* ſuch a day: for to the firſt, the defendant may only plead *payment at the day*, for the reaſon now given; beſides, that the performance of a condition ought to follow the terms of it: but to a bond payable *at or before ſuch a day*, the defendant may plead payment *before the day*, for it is within the condition. And therefore where it was ſo pleaded, and the defendant demurred to it as an immaterial iſſue, the court over-ruled the demurrer, and laid down the rule to be, "That where the defendant pleads performance of "the condition, the plaintiff muſt aſſign an abſolute breach, though "it is not neceſſary where he pleads a collateral matter, as, a "releaſe; and that, therefore, where the defendant had pleaded "payment before the day, the plaintiff ſhould have replied, that "the money was not paid at the day mentioned in the plea, *nor* "*at any time before, on*, or after that day."

Tryon v. Carter, 2 Str. 994. Fletcher v. Henning-ton, 2 Burr. 944. 1 Bl. Rep. 210. S. C.

Underhill v. Matthews, P. 1 G. 1. C. B. Bull. N. P. 171.

But a tender and refuſal of principal and intereſt at a ſubſequent day cannot be pleaded in bar under the ſtatute, as not being within the equity of it; for ſuch conſtruction would be prejudicial, as it would empower the obligor at any time to compel the obligee to take his money without notice.

Sturdy v. Arnaud, 3 Term Rep. 599.

*A.* gave *B.* a bond to ſecure an annuity, and, before any payment became due, *A.* lent *B.* a ſum of money, on which it was agreed, that *B.* ſhould retain the payments of the annuity, as they became due, till that ſum was diſcharged; then *B.* became a bankrupt. The agreement to retain was holden to be a good plea to an action on the bond by *B.*'s aſſignees for the payments accruing after the bankruptcy; ſuch agreement and retainer being equivalent to a plea of *ſolvit ad diem*.

1 Burr. 434. Cowp. 109. Oſwald v. Legh, 1 Term Rep. 270.

If no intereſt has been paid on a bond for twenty years, it ſhall be in law preſumed to be ſatisfied; and in ſuch caſe the defendant may plead *ſolvit ad diem*, and rely on the preſumption. Lord *Raymond* indeed left it to the jury on ſixteen years, where there were circumſtances to fortify the preſumption. But without any circumſtances a period of nineteen years and a half has been holden inſufficient.

To

To a bond of thirty years ſtanding the defendant pleaded *ſolvit ad diem*, and relied on the preſumption: the plaintiff in anſwer could only prove payment two years after the time mentioned in the condition, but gave no evidence of any receipt or demand for twenty-eight years paſt. The Chief Juſtice was of opinion, that this plea of payment at the day was to be taken as ſtrictly in this caſe, which went only upon the preſumption, as in any other caſe; and the plaintiff having falſified the plea by ſhewing a payment of intereſt two years after, it was not ſufficient to ſay the other twenty-eight years were enough to let in the preſumption; becauſe, to take advantage of that, the defendant ſhould have pleaded upon the act for the amendment of the law, that he paid the money *after the day*, in which caſe it would have been with him upon the evidence. Moreland v. Bennett, Str. 652.

To debt on a bond, the defendant pleaded *ſolvit ad diem*, and relied on the preſumption of non-payment of intereſt for twenty years: the plaintiff offered in evidence an indorſement on the back of the bond, being a receipt for intereſt on it ten years before the preſumption accrued. This evidence was refuſed by the Chief Juſtice, on the ground, that it was the act of the obligee himſelf, and ſo inadmiſſible. But the court granted a new trial, for it was proper evidence to be left to a jury, whether the indorſement of the receipt of the money had not been made with the privity of the obligor, it being the conſtant practice for the obligee to indorſe the payment of intereſt, and that for the ſake of the obligor, who is ſafer by taking ſuch an indorſement, than by taking a looſe receipt. On a new trial the evidence was admitted, and the plaintiff recovered. Searle v. Lord Barrington, 2 Str. 826. 2 Ld. Raym. 1370. S. C.

But in *Turner* v. *Criſp*, *B. R. Hil.* 14 *G.* 2. the Chief Juſtice refuſed to let the indorſement of a receipt of part of the bond, made after the preſumption had taken place, be given in evidence; for that it differed from the above caſe, where the indorſement appeared to be made before it could be thought neceſſary to be made uſe of to encounter the preſumption. 2 Str. 827. In Barnes v. Ranſom, 1 Barnard. B. R. 432. a ſimilar indorſement ſeems to have been admitted, though made after the preſumption had taken place. But in Glyn v. Bank of England, 2 Vez. 43. Lord Hardwicke took the ſame diſtinction as was done in the preſent caſe. In a copy of *Select Caſes of Evid.* 152. (where this caſe is alſo reported), formerly in the poſſeſſion of the late Mr. J. Wilſon, but now in that of Mr. Nolan, the editor of Strange's Reports, it is ſtated, that "at the "Sittings after Michaelmas term at Weſtminſter, 6 Geo. 3., Lord Camden ſaid, he was never much "pleaſed with the determination of Searle v. Lord Barrington; however, he ſaid, it was law."

[Where the plaintiff ſhewed two writs of *teſtatum capias* ſued out by him before the twenty years run, but not ſerved, becauſe defendant could not be found; Lord *Mansfield* ſaid, there was no ground for the preſumption.] Moyle v. Lord Roberts, cited in 1 Term Rep. 271.

If the condition of an obligation be, that the defendant ſhall diſcharge or acquit, or free the plaintiff of or from ſuch a bond, or rent, or action, or from any other particular thing aſcertained in the condition, there, the negative plea, *non damnificatus*, is not good, becauſe the defendant hath undertaken to do an act in diſcharge of the plaintiff; but, where the condition is only to free, or to diſcharge or indemnify the plaintiff from any damage, or coſt, or trouble which ſhall or may happen by reaſon of ſuch Carth. 375.

bond, rent, or action, or other particular thing therein mentioned; in such case, the negative plea is sufficient, because it doth not appear that any damage hath happened to the plaintiff; and if no damages have happened, then it is impossible that the defendant should shew in the affirmative the manner how he had freed or discharged the plaintiff; therefore it lies on the part of the plaintiff, by way of reply, to shew wherein he was damnified.

Hulland v. Malken, 2 Wilf. 126.

[To debt on bond to save harmless, the defendant can only plead, either that he has saved the plaintiff harmless, or, that if he has received any injury, it was through his own default.

White v. Cleaver, 2 Str. 681.

Where the defendant pleads that he has saved the plaintiff harmless, he should shew *how he has done so*. But as the saving harmless is the substance; and *how* matter of form, the plaintiff must take advantage of this defect in the plea by special demurrer.

See further tit. *Covenant*, Vol. II. 83. and tit. *Set-off, infra.*]

---

# Offices and Officers.

(A) Of the Nature of an Office, and the several Kinds of Offices.

(B) Offices, by what Authority created.

(C) Who hath a Right of granting or assigning an Office: And herein of one Office being incident to another.

(D) Of the Grant of Offices by Ecclesiastical Persons.

(E) Of the Ceremony requisite to a complete Creation or Grant, and of the Oaths required by Statute.

(F) Of the Offence of Buying and Selling an Office, and what Offices are prohibited to be thus disposed of.

(G) What Remedies a Person having a Right to an Office must pursue, to be let into the Enjoyment of it, and how a Disturbance is punishable.

(H) Of the Nature of Offices as to their Duration and Continuance: And herein of their being grantable in Fee, for Life, Years, at Will, and Reverſion.

(I) Offices by whom to be executed, and who are incapable thereof.

(K) Of the Manner of executing them: And herein of Offices that are incompatible, and where an Office may be executed by two or more Perſons.

(L) Of the Execution of an Office by Deputy: And herein of Superiors being anſwerable for their Deputies.

(M) Of the Forfeitures of an Office.

(N) Where for Corruption and oppreſſive Proceedings Officers are puniſhable: And herein of Bribery and Extortion.

---

## (A) Of the Nature of an Office, and the ſeveral Kinds of Offices.

IT is ſaid, that the word *officium* principally implies a duty, and in the next place the (*a*) charge of ſuch duty; and that it is a rule, that where one man hath to do with another's affairs againſt his will, and without his leave, that this is an office, and he who is in it is an officer. Carth. 478.

(*a*) Signifies a place of truſt, and therefore the ſtatute 3 Jac. 1. c. 5. enacts, that no popiſh recuſant ſhall exerciſe any office or charge. 5 Mod. 431.

There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination of offices; ſuch as an agreement to make hay, plough land, herd a flock, *&c.* which differ widely from that of ſteward of a manor, *&c.* 2 Sid. 142.

By the ancient common law, officers ought to be honeſt men, legal and ſage, *& qui melius ſciant & poſſint officio illi intendere;* and this, ſays my Lord *Coke*, was the policy of prudent antiquity, that officers did ever give grace to the place, and not the place only to grace the officer. 2 Inſt. 32. 456.

Officers are diſtinguiſhed into civil and military, according to the nature of their ſeveral truſts. Carth. 479.

Carth. 479. Offices are distinguished into those which are of a publick, and those which are of a private nature. And herein it is said, that every man is a publick officer, who hath any duty concerning the publick; and he is not the less a publick officer, where his authority is confined to narrow limits; because it is the duty of his office, and the nature of that duty, which makes him a publick officer, and not the extent of his authority.

Sid. 94. 152. Lev. 75. Keb. 349. Raym. 94. Hurst's case. It hath been held, that the commissioners for purging corporations could not take notice of or remove an attorney of a court, it not being a publick office in which the government was concerned.

5 Mod. 431. Carth. 478. The King v. Dr. Burrel. It hath been doubted whether the Censor of the College of Physicians, be such an officer as is compellable to take the oaths prescribed by the statute 25 *Car.* 2. *c.* 2. it being urged, that the oversight and inspection of medicines was of a private nature; and that no offices were within the intent of that statute, but such as relate to the revenue, or to the conservation of the peace; and that particular powers created for particular purposes were not within that statute.

9 Co. 97. Cro. Eliz. 636. 2 Roll. Abr. 182. Cro. Car. 513. 2 Co. 16. Show. 436. Also, offices are distinguished into ancient offices, and those which are of (*a*) new creation. And herein it is observable, that constant usage hath not only sanctified the first establishment of such ancient offices as have existed time out of mind, but also hath prescribed and settled the manner in which they have and are to continue to exist, in what manner to be exercised, how to be disposed of, *&c.*

(*a*) No officer, that is constituted by act of parliament, hath more authority than the act that creates him, or some subsequent act of parliament doth give him; for he cannot prescribe as an officer at common law may do. 4 Inst. 267.

Jon. 109. Dav. 35. 9 Co. 97. There is also another distinction of offices into such as are judicial, and such as are ministerial offices only; the first, relating to the administration of justice, or the actual exercise thereof, must be executed by persons of sufficient capacity, and by the persons themselves to whom they are granted; and herein also ancient usage and custom must govern.

## (B) Offices, by what Authority created.

12 Co. 116. Roll. Rep. 206. Carth. 478. THE king is the universal officer and disposer of justice within this realm, from whom all others are said to be (*b*) derived; but yet he cannot create any new office inconsistent with our constitution, or prejudicial to the subject.

(*b*) Offices are said to be in the King, or execute, where the king may grant or nominate to the office, but hath not the office in him to use. Co. Lit. 3. b. 2 Vent. 270. [1 H. 7. 29. Plowd. 381. 2 Bulst. 4. 8 Co. 55. b.]

2 Inst. 540. There are three things, says my Lord *Coke*, which have fair pretences, yet are mischievous; 1*st*, New courts; 2*d*, New offices; 3*d*, New corporations for trade. And as to new offices, either in courts or out of them, these, he says, cannot be erected without act of parliament; for that under the pretence of the common good,

good, they are exerciſed to the intolerable grievance of the ſubject.

An office granted by letters patent for the ſole making of all bills, informations, and letters miſſive in the council of *York*, was held unreaſonable and void. Jon. 231. Mounſon v. Lyſter.

One *Chute* petitioned the king to erect a new office for regiſtering all ſtrangers within the realm, except merchant ſtrangers, and to grant the ſaid office to the petitioner with or (*a*) without a fee; and it was reſolved by all the Judges at *Serjeants-Inn*, that the erection of ſuch new offices, for the benefit of a private man, was againſt all law of what nature ſoever. Co. 116. and ſeveral caſes there cited to this purpoſe.

(*a*) It hath been held clearly, that in the conſtitution of a new office or officer, it is not neceſſary that an annual or caſual fee ſhould at firſt be annexed to ſuch office. Moor, 809.

King *E.* 4. by his letters patent bearing date 10 *Oct. anno* 15. of his reign, reciting, that whereas there was no office of the Chancellour of the Garter, that there ſhould be ſuch an office of the Chancellour of the Garter, and that none ſhould have it but the Biſhop of *Saliſbury* for the time being, willed and ordained, that *Richard Beauchamp*, then Biſhop of *Saliſbury*, ſhould have it for his life, and, after his deceaſe, that his ſucceſſors ſhould have it for ever. And amongſt divers other points it was reſolved unanimouſly, that this grant was void (*b*); for that a new office was erected, and it was not defined what juriſdiction or authority the officer ſhould have, and therefore for the uncertainty it was void. 4 Inſt. 200. Paſch. 6 Jac. 1. Biſhop of Saliſbury's caſe. Moor, 808. S. C. [The queſtion, according to Moor, was, Whether the Biſhop of Saliſbury had, under

See Hale's Prepar. Notes &c. 241.

this grant, *by ſucceſſion*, ſuch a title to the office, that he ought to be admitted to it? It appeared, that Beauchamp accepted the office, executed it, and died biſhop of Saliſbury in the 22d year of Ed. 4th.: but there was no proof extant of any ſucceeding biſhop of Saliſbury being admitted to the office, but the kings of England, one after another, had appointed chancellours at their pleaſure. The three judges to whom the matter was referred, viz. the Chief Juſtices Flemming and Coke, and the Chief Baron Tanfield, agreed in opinion, and ſo reported to the king, that the biſhop by *ſucceſſion* had no title to the office, for two reaſons: 1ſt, Becauſe the patent originally was void as to the appointment of any ſucceeding biſhop to the office, for Beauchamp took the eſtate for his life in the office in his natural capacity, not in his politick capacity; ſince if it had happened, that he had been removed from the biſhoprick of Saliſbury, yet, in reſpect of the expreſs limitation to him for his life, he muſt have continued in the office, and his ſucceſſor in the ſee could not have taken it: then the conſequence is, that he did not take an inheritance of ſucceſſion in the office; and he could not take in his natural capacity for life, and alſo in his politick capacity; nor could the grant enure by ſuch a fraction. Wherefore they all thought the grant void as to the ſucceſſion. The other reaſon was, becauſe there had been no uſe or exerciſe of this office by any ſucceeding biſhop of Saliſbury.—But this ſtate of facts, from which the above judgment was formed, does not ſeem to be correct; for in truth, this office was enjoyed and executed by biſhops of Saliſbury from the time of the above grant to Richard Beauchamp to the reign of Edward 6th. Upon the Reformation of the order by that king, his ſtatutes wholly leave out the eccleſiaſticks, and appoint that the office ſhall be executed by one of the knights companions, and from that time till the reign of C. 2. it remained in the hands of laymen. It appearing, however, that there were ſeveral charters granted to the ſee of Saliſbury, particularly one in the 4th of Elizabeth, which confirmed charters of Queen Mary, King Henry 8th, and Henry 7th, and alſo another in the 4th of Car. 1., in which laſt the letters patent of E. 4. are recited *totidem verbis*, and expreſsly confirmed, the pretenſions of the ſee of Saliſbury to the office were revived in the laſt-mentioned reign, and the claim was agitated in a chapter of the order, but the troubles which ſhortly afterwards followed, prevented a deciſion. The claim, however, was renewed ſoon after the Reſtoration, and at a chapter of the order in 21 Car. 2. was allowed on the ground of the above grant. It was declared, that the Biſhop of Sarum, and his ſucceſſors for ever ſhould have and execute the office of Chancellour of the moſt noble order of the Garter, and receive and enjoy all the rights, privileges, and advantages thereunto belonging, immediately upon the firſt vacancy. Aſhmole's Inſtitution, &c. of the Garter, c. 8. § 2.] (*b*) So, if the king grants an office by the name of an office *cum feodis inde ſpectantibus*, and it appears to the court to be new, the grant is void, 4 E. 4. 10. 2 Sid. 141.

Hob. 63. The king cannot grant to any perſon to hold a court of equity (*a*), though he may grant *tenere placita*; for the diſpenſation of equity is a ſpecial truſt committed to the king, and not by him to be intruſted with any other, except his Chancellour.

[(*a*) But it is ſaid, that courts of equity may be holden by preſcription, 4 Inſt. 87., which implies a legal inconſiſtency, (unleſs we believe the royal authority to have varied in this reſpect at different periods), ſince preſcription, as a title to any franchiſe, pre-ſuppoſes a royal grant. It is alſo aſſerted, 4 Inſt. 204. marg. Dav. 60. b., that counties palatine (to which courts of equity are thought incident, Hob. 63.) may be erected by the king without parliament. Cheſter, Durham, Lancaſter, are ſaid to be counties palatine by preſcription. 4 Inſt. 204. However, the doctrine in the text is ſupported by the reſolution of many of the judges, amongſt whom was Sir E. Coke, that the king cannot grant a commiſſion to determine any matter of equity, but it ought to be determined in the court of Chancery, which hath had juriſdiction in ſuch caſe immemorially, and had always ſuch allowance by the law; but ſuch commiſſioners, or new courts of equity, ſhall never have ſuch allowance, but have been adjudged to be againſt law. 12 Co. 113. See 1 Wooddeſ. 188.]

## (C) Who hath a Right of granting or aſſigning an Office: And herein of one Office being incident to another.

4 Co. 32. Mitton's caſe. (*b*) If a houſe or land belong to an office, by the grant of the office by deed the houſe or land paſſeth, as belonging thereunto. Co. Lit. 49. a. Vaugh. 178. cited.

WHerever one office is (*b*) incident to another, ſuch incident office is regularly grantable by him who hath the principal office. On this foundation it hath been held, that the king's grant of the office of county-clerk was void, it being inſeparably incident to the office of ſheriff, and could not by any law or contrivance be taken away from him.

2 Salk. 439. pl. 3. *Per* Holt, C. J. Leon. 320, 321. Like point.

So, the office of Chamberlain of the King's Bench Priſon is inſeparably incident to the office of Marſhal; and therefore a grant of the office of Marſhal with a reſervation of the office of Chamberlain, is void.

Dyer, 175. a. pl. 25. And. 152. *& vide* Show. Par. Ca. Sir Rowland Holt's caſe.

So, it hath been reſolved, that the office of Exigenter of *London* and other counties in *England*, is incident to the office of Ch. Juſt. of *C. B.* and that therefore a grant thereof by the king, though in the vacancy of a Chief Juſtice, is null and void.

2 Inſt. 425. 4 Mod. 173. cited.

My Lord *Coke* ſays, that the juſtices of courts did ever appoint their clerks, ſome of which after by preſcription grew to be officers in their courts; and this right which they had of conſtituting their own officers, is further confirmed to them by *Weſtm.* 2. 13 *Ed.* 1. *c.* 30. the reaſons whereof are twofold. 1*ſt*, For that the law doth ever appoint thoſe who have the greateſt knowledge and ſkill, to perform that which is to be done. 2*dly*, The officers and clerks are but to enter, enrol, or effect that which the juſtices do adjudge, award, or order; the inſufficient doing whereof maketh the proceedings of the juſtices erroneous, than the which nothing can be more diſhonourable and grievous to the juſtices, and prejudicial to the party.

## (D) Of the Grant of Offices by Eccleſiaſtical Perſons.

HERE it will be proper to take notice how far biſhops, and other eccleſiaſtical perſons, may grant offices to bind their ſucceſſors, and how far not: wherein the rule is, that ſuch offices as are ancient, and of neceſſity to be exerciſed by ſome other perſon, they may grant, together with the ancient fee for exerciſing thereof; and as theſe offices are not within 32 *H.* 8. *c.* 28. to be granted by the biſhops or other eccleſiaſtical perſons ſolely; ſo neither are they conſtrued to be within the reſtraint of 1 *Eliz. c.* 19. & 13 *Eliz. c.* 10. and therefore remain perfectly at the common law, and, by conſequence, to bind the ſucceſſors, muſt be confirmed in the ſame manner as all other grants or alienations of eccleſiaſtical perſons at common law muſt have been. Theſe grants appear generally to have been made for the life of the grantees; for it were too ſevere and rigid a conſtruction, to confine them to be made determinable on the death, tranſlation, or other promotion of the biſhop, dean, &c. who made them; and would diſcourage men of ability and capacity to undertake the exerciſe thereof; and to grant ſuch offices for twenty-one years, or any other term of years, would introduce many inconveniencies, by letting in executors, ſtrangers, and other unqualified perſons to the exerciſe thereof; and therefore any grant of ſuch offices for years, ſeems againſt the policy of the common law and the benefit of the ſucceſſors, which thoſe ſtatutes intended to provide for, and, by conſequence, will not bind them.

Co. Lit. 44. a. Co. 58. 61. Biſhop of Sarum's caſe. Cro. Car. 49. Ley, 71. 79. [Notwithſtanding what is ſaid here and in ſeveral other caſes concerning the *neceſſity* of the office, yet that point is not at all material. For it hath been determined upon ſolemn hearing, that an office and fee which exiſted before the firſt of Elizabeth are not within the reſtraint of that ſtatute, but that they may be granted as before the ſtatute; and that the utility or neceſſity of the office is not more material ſince, than it was before the ſtatute. Sir John Trelawney v. the Biſhop of Wincheſter, 1 Burr. 219.]

But, if ſuch offices have been anciently granted to one for life, this induces no neceſſity of their being granted to two for their lives; and therefore ſuch grant to two for their lives, will not bind the ſucceſſor, though one of the grantees ſhould die in the life of the grantor, ſo as there were but one life in being againſt the ſucceſſor: becauſe by ſuch grant to two, the grant was faulty in its foundation, and therefore ſhall not be helped by any accident after. So, if the office hath been anciently granted to one with an ancient fee, and after a grant is made to another in reverſion, after the death of the firſt grantee; this ſhall not bind the ſucceſſor, for there can be no neceſſity urged to juſtify this; beſides that, the grantee in reverſion, by ſickneſs or other accident, may become incapable to exerciſe ſuch office before it comes into poſſeſſion; and if the biſhop, or other ſpiritual perſon, might grant ſuch offices to two, or grant them in reverſion, they might abuſe that power, and grant them to twenty, or for twenty lives in reverſion one after another, which as they cannot be juſtified from any neceſſity, ſo they would be inconvenient, by tying up the ſucceſſor's hands from chooſing ſuch officers as he thought neceſſary and proper for the diſcharge of ſuch offices; and therefore no confirmation will make good ſuch grants againſt the ſucceſſor.

10 Co. 61. Cro. Car. 49. 11 Co. 4.

Cro. Eliz. 636. Scambler v. Watts. 10 Co. 61. Cro. Car. 50. Ley, 74. Dyer, 80. b. in margine.

The Biſhop of *Norwich* having the office of high ſteward of his courts, to which a fee of 10 *l. per annum* appertained, and alſo the office of under ſteward of the ſame courts, to which a fee of 4 *l. per annum* appertained, granted the office of under ſteward to three for their lives, whereof one was within age, and the other two being dead, the infant grants over the office to the defendant, and then the biſhop grants both theſe offices to the plaintiff, with the fees. By the books, both theſe grants ſeem to be void; the firſt, becauſe it was granted to three, where the cuſtom warranted a grant thereof only to one; and alſo, becauſe the ſurviving grantee was an infant, and ſo not capable of a judicial office, as the ſteward of a court is. The 2*d*, becauſe both were granted to one perſon, where they had uſually been granted to two ſeverally, with diſtinct fees, and therefore, the grant of both to one perſon neither neceſſary nor convenient, and, by conſequence, not binding againſt the ſucceſſor. Alſo, ſuch grant of either the ſaid offices in reverſion would not bind the ſucceſſor, for the reaſons before given.

10 Co. 61 b. Cro. Car. 48. 2 Brownl. 137. Biſhop of Ely's caſe. Ley, 78, 80.

But, although the biſhoprick, deanery, *&c.* were founded but of late times, yet the grant of ſuch offices as are neceſſary, and cannot be exerciſed by the biſhop, dean, *&c.* in perſon, may be allowed, together with a reaſonable fee for the exerciſe thereof; (the reaſonableneſs whereof the court where the cauſe depends is to be judge); for theſe cannot be ſaid to tend to the impoveriſhment of the ſucceſſor, but rather for his benefit, by providing officers fit and qualified to take care of the revenues; and therefore ſuch grants are not within the reſtraint of 1 *Eliz. c.* 19. & 13 *Eliz. c.* 10.; but not being warranted by 32 *H.* 8. *c.* 28. they muſt be confirmed by all perſons intereſted therein; becauſe they remain at common law, untouched by any of the ſtatutes.

2 Lev. 136. 3 Keb. 472. 506. Ridley v. Pawnal.

In an action upon the caſe, for diſturbing the plantiff in his office of regiſtrar to the Biſhop of *Briſtol*, which was a new biſhoprick taken out of the biſhoprick of *Sarum*, and founded in the time of *H.* 8., and which had been granted *ſeparalibus temporibus* after the foundation to one, and his aſſigns for three lives, *&c.* theſe differences were taken and agreed to by the court. 1*ſt*, That the biſhop of a new biſhoprick may grant offices of neceſſity for life. 2*dly*, If an office hath been uſually granted by the biſhop of a new biſhoprick, for three lives, with the conſent or confirmation of the dean and chapter (*a*), before 1 *Eliz. c.* 19. it may be now granted accordingly. 3*dly*, Be the biſhoprick new or old, if it was not ſo granted, but granted always before 1 *Eliz. c.* 19. for one or two lives, it cannot be granted by the biſhop after 1 *Eliz. c.* 19. for three lives. 4*thly*, If it was granted before 1 *Eliz. c.* 19. for three lives, and after the ſtatute but for one life, yet this ſhall not abridge the power of the biſhop, but he may grant it for three lives, *&c.* And in the principal caſe, the verdict finding that it had been granted *ſeparalibus temporibus* after the foundation to one and his aſſigns for three lives, was held defective, becauſe it might be ſo granted after the foundation, and yet be after 1 *Eliz. c.* 19. and therefore a *venire facias de novo*, was awarded to ſupply that defect.

(*a*) Cro. Car. 258. 279. Jon. 311. March, 38. *accord.*, that ſuch grant before 1 Eliz. is a badge of their having been anciently ſo granted.

The

The Biſhop of *Chicheſter* was ſeiſed in fee of a park in right of his biſhoprick, and had the office of park-keeper, which he by deed 44 *Eliz.* granted to the defendant for his life; *& ulterius conceſſit pro executione officii prædict.* five marks, with a clauſe of diſtreſs, *una cum a livery*, or 13 *s.* 4 *d. per annum, nec non paſturam pro duobus equis* in the ſaid park yearly, *una cum* the windfalls, with clauſe of diſtreſs for the ſaid rent, or annuity of five marks, and livery, or 13 *s.* 4 *d.*; and this grant was confirmed by the dean and chapter; and for non-payment of the five marks the defendant diſtrains, and avers the office and fee of five marks to be anciently granted, but makes no averment for the reſidue. The plaintiff, in bar of the avowry, pleads the ſtatute 1 *Eliz. c.* 19. and ſays, that the paſturage was never granted before, and derives a title to himſelf under the preſent biſhop, ſucceſſor to the grantor. In this caſe it ſeems to be agreed by all, that if the new additional fees had been in another clauſe, diſtinct from the grant of the office and five marks; or had been granted for another conſideration; or, if the biſhop had granted the office and five marks for him and his ſucceſſors, and had granted the paſturage, and other additional fees, during his own life only; that in theſe caſes the grant had been good, for the ancient office and fee, to bind the ſucceſſor, but not for the additional fees: or, if the grant of the office had been with a fee of 5 *l.*, where the ancient fee was but five marks; there, the grant being entire would have been void *in toto* againſt the ſucceſſor: but whether theſe grants were diſtinct or entire ſeemed the only diſpute in the caſe; wherein the court was divided; two judges holding that they were ſeveral and diſtinct, and two, that they were entire and depending on each other, and therefore void in the whole againſt the ſucceſſor. But a variation in the days of payment of the ancient fee, as if it were formerly payable at one day, and be now reſerved payable at two, will not vitiate the grant.

Bridg. 30. 32. Cro. Car. 47. Ley, 71. Biſhop of Chicheſter v. Freeland. Cro. Car. 16. Cook v. Younger. Ley, 75.

In replevin, defendant avows upon a grant to him by the dean and chapter of, *&c.* of the office of caterſhip of the church for life, with an annuity of 6 *l. per annum*, for the exerciſing thereof, and a clauſe of diſtreſs; and avows for the annuity, and avers, that it was an ancient office pertaining to the dean and chapter, *&c.*, but does not aver that the annuity was an ancient annuity: the defendant pleads 13 *Eliz. c.* 10. *&c.* and ſhews the death of the dean grantor, and the election of another, *&c.*, and upon demurrer adjudged, that the grant was void.

Brownl. 182. Humphrey v. Parſel.

The biſhop of *Landaff*, in 1672, granted the office of Chancellour of his dioceſe to *A.* and *B.* and the ſurvivor of them for life, and this was confirmed by the dean and chapter; and now *A.* being dead, it became a queſtion, Whether this grant to two were good againſt the ſucceſſor? And the court held, that if it had been anciently ſo granted, it would bind the ſucceſſor; and to prove it anciently ſo granted, four grants were produced, three of which were made in the time of one biſhop, and the laſt in the year 1620, from which time to this preſent grant in 1672 no ſuch grant to two had been made; and the firſt of theſe grants was about

4 Mod. 16, 17, 18. Jones v. Bean. Show. 288. 12 Mod. 10. 2 Salk. 465. pl. 1. Carth. 213.

about 50 years after 1 *Eliz. c.* 19., yet the court held this sufficient evidence to prove this office anciently grantable to two, before the statute 1 *Eliz. c.* 19. (as the prescription must be to warrant it;) and one *Ridley*'s case was mentioned of the office of registrar of *Bristol*, wherein my Lord *Hale* was of opinion, that if it could be shewn, that such grants were made some time after the first *Eliz. c.* 19. it would be an evidence that such were also made before the statute; and upon a special verdict finding this matter, the court gave judgment accordingly, that the grant was sufficiently warranted by ancient usage, and had no great regard to the objection of its being a judicial office, which cannot by law be granted to two, being supported by such usage, and no diminution of the successor's revenue, which those statutes were made to secure.

*Supra*, 2 Lev. 136.

10 Co. 58, 9. But *quære*; for others hold, that the avowant ought to make averment for all, because he is in the nature of a plaintiff,

Some hold, that when such ancient office and ancient fee are granted together, with some new additional fees, yet, if the distress and avowry be only for the ancient fee, that the avowant need only make averment, for that fee for which he distrains, that it was ancient; and the plaintiff, if the other fees were new, ought to shew it in avoidance of the grant; for the avowry, being only for the ancient fee, needs meddle with no more, that being only in question,

and is to make a title. *Vide* Cro. Car. 48-9, 50. Ley, 73. 77.

Cro. Car. 258. Jon. 263. Walker v. Sir John Lamb.

In an action upon the case, for disturbing him in the exercise of the office of commissary of the Bishop of *Lincoln*, and of official to the Archdeacon of *Leicester*, upon not guilty pleaded, it was found, that these were ancient offices of judicature, always granted to one person for life, the one by the bishop, and the other by the archdeacon, till 1609, when they were granted by the bishop and archdeacon severally to *A.* and *B.* for their two lives: and after 1614, were likewise granted to *B.* and *C.*, with confirmation of the bishop's grant, by the dean and chapter, and of the archdeacon's grant by the bishop, dean and chapter; and that after the death of that bishop and archdeacon, their successors severally granted both the said offices to the plaintiff; who, being disturbed by *C.*, brought this action and had judgment; for all the court held these offices parcel of the possessions of the bishoprick and archdeaconry, and expressly within the word *Hereditaments* in the 1 *Eliz. c.* 19. & 13 *Eliz. c.* 10., and therefore being usually granted in possession, the grant thereof in reversion is without warrant, and no necessity can be urged for so doing; and the acceptance by *B.* of the second grant, where *C.* was joined, was no surrender of the first, and, by consequence, the respective successors were not bound by these grants, but might lawfully, as they have done, grant both these offices to the plaintiff for his life; and therefore he had judgment.

Cro. Car. 279. 555. Jon. 310. 2 Roll. Abr. 153. Young v. Stowel. March, 38.

But, where the office of registrar of a bishop hath been usually granted as well in reversion as in possession, there, a grant to one of such office for life, where by the death or surrender of the present officer it shall become void, is good, and shall bind the successor, and is not within the restraint of either of the said statutes; because,

becauſe, being uſually ſo granted, it might proceed at firſt from a reaſon of convenience and neceſſity, that the office might always be kept full, and a perſon always ready to execute it, for the benefit of the king's ſubjects; for though there is no reverſion of an office, unleſs it be an office of inheritance, yet it may well be granted in reverſion, *habend.* after the death of the preſent officer; which is no more than a proviſion of a perſon to ſupply it, when it becomes void; and if ſuch proviſion has been uſually made, the cuſtom and uſage gives ſanction to it. But then ſuch grant muſt be confirmed, as is ſaid before; and therefore, where ſome books hold ſuch grant of offices in reverſion not good, it muſt be taken with this diverſity, that they have not uſually been ſo granted, but only in poſſeſſion, and then to grant them in reverſion is not warranted by the cuſtom, nor ſhall bind the ſucceſſor. 3 Leon. 31. 4 Mod. 279.

But in the laſt caſe, where the office of regiſtrar was granted by the biſhop to an infant, then about eleven years of age, *habend.* after the death or ſurrender of the preſent officer, *exercend. per ſe vel ſuffic. deput. ſuum cum vadiis*, &c. and when the tenant for life died, the grantee in reverſion was then thirty years of age; all the court held his infancy, at the time of the grant, no cauſe to avoid it; becauſe, at the time it fell into poſſeſſion, he was of ſufficient age to execute it; and though it had fallen vacant during his minority, yet, as this caſe is, the grant would have been good, becauſe it is to be exerciſed *per ſe vel per ſuffic. deputat.*, &c. and therefore though he were not capable of exerciſing it himſelf, (as writing and a little *Latin* would ſufficiently qualify him for, it being only to write and regiſter acts done in court,) yet he might have put in a ſufficient deputy; and therefore they denied the opinion *Co. Lit.* 3. *b.* that the grant of the office of ſteward of the court of a manor, either in poſſeſſion or reverſion, to an infant was void, as incapable, and wanting knowledge to exerciſe it, unleſs it were to be underſtood that there was no clauſe of exerciſing it, *per ſe vel ſuffic. deputat.*, and that the infant himſelf was of ſuch tender age, that by no intendment he was capable of exerciſing it himſelf. But they held, that (*a*) if there were ſuch clauſe, then it would be good, and he might appoint a ſufficient deputy; and if he did not, it would be a forfeiture of his office, notwithſtanding his infancy; and of the ſufficiency of the deputy the lord of the manor, or judge of the court, were to be judges; and if the deputy ſhould miſdemean himſelf, or prove unſkilful in his office, it would be a forfeiture at the infant's peril; and this ſeems to be the diverſity taken in the books. Beſides, if the caſe in *Co. Lit.* be meant of the office of ſteward of a court-leet, it may be good law, becauſe that is a judicial office, which perhaps cannot be executed by deputy; but, if it be meant of a court-baron, then, the general opinion of the (*b*) books is againſt it, which hold, that the ſteward of a court-baron may make a deputy, though there were no expreſs power given him for that purpoſe; for that it is an office purely miniſterial, (for the ſuitors are judges in the court-baron,) and conſiſts in entering plaints, ſurrenders, admittances, &c. in the nature of a regiſtrar; and though

Cro. Car. 279. 555. 557. Jon. 310. 2 Roll. Abr. 123.

(*a*) *Vide* Cro. Jac. 18. Hob. 148. 11 Co. 87. 8 Co. 44.

(*b*) *Vide* 9 Co. 48, 49. 2 Lev. 245. 2 Jon. 126. Hob. 148. 11 Co. 87. Cro. Jac. 18.

though an infant ſhould have the ſtewardſhip of both courts, viz. the court-leet and court-baron together, and that he ſhould be incapable to exerciſe that of the court-leet, and therefore the grant thereof to him ſhould be void; yet for the court-baron the grant would continue good, and he might either exerciſe it in perſon, or by a ſufficient deputy. And perhaps upon this diverſity the books may be reconciled; for they agree, that if an office of judicature or learning be given to a man utterly incapable of it, no clauſe of exerciſing it by deputy, or otherwiſe, will mend the caſe, or make the grant good; for it muſt radically veſt in the grantee before it can go in title of procuration, or deputation, to another.

Noy, 153. Prebend of Hatcherley's caſe. But where the dean of *Windſor*, having ordinary juriſdiction, by deed made ſuch a one his commiſſary, which was confirmed by the dean and chapter, yet, after his death, it was held the ſucceſſor was not bound thereby, becauſe this was a judicial office and authority; which, though it may be exerciſed by a ſubſtitute, yet it is in law in the ordinary himſelf; and though excommunication, probate of teſtaments, and ſuch like, may be tranſacted by the commiſſary, yet it muſt be in the name of the ordinary, and if the ſubſtitute offends, the ordinary ſhall be puniſhed. And therefore this grant can continue no longer than the ordinary himſelf who grants it; for if it ſhould bind the ſucceſſor, then he could not remove him, though he were anſwerable for his acts and offences; which would be hard; therefore this grant determines with the death or remotion of the ordinary, and then no confirmation can make it good after; and the archbiſhops, in their ſeveral provinces, have the ordinary juriſdiction *ſede vacante*; and
17 E. 3. 23. the archbiſhop, dean and chapter, cannot grant the juriſdiction of guardian of the ſpiritualties after the death of the biſhop; which is a ſtronger caſe.

## (E) Of the Ceremony requiſite to a complete Creation or Grant, and of the Oaths required by Statute.

Roll. Abr. 152. Co. 121. 2 Sid. 137. Dyer, 200. b. pl. 62. Hard. 351. WHerever the right of granting and erecting new offices is veſted in the king as the head and fountain of juſtice, he muſt uſe proper words for that purpoſe; as, in the erection of a new office the words *erigimus*, *conſtituimus*, &c. muſt be made uſe of; and it hath been adjudged, that the word *conceſſimus* is not ſufficient, unleſs there be an office already in being, and then a grant by the word *conceſſimus* is good.

Mod. 123. If an officer be created by letters patent, he is a complete officer before he is ſworn, and before any inveſtiture.

Leon. 248. Mod. 123. *Cont.* Roll. Abr. 154. But if a perſon be created herald at arms, inveſtiture is neceſſary before he is a complete officer.

Leon. 219. 3 Mod. 147. 5 Mod. 388. An office, being a thing which lies in grant, cannot regularly be granted or transferred from one to another, but by deed duly executed,

executed, which is an inſtrument the law hath appointed inſtead of livery.

But it is ſaid, that one may retain (*a*) a ſteward to keep his court-baron and court-leet without deed, and that ſuch retainer ſhall continue until he be diſcharged. Co. Lit. 61. b. [Some have thought, that ſtewards without deed cannot take ſurrenders out of court. Godb. 142. and 1 Ld. Raym. 159. But this hath been frequently denied, and indeed ſeems unſupported by any good reaſon. Cro. Jac. 526. Com. Rep. 83. Hargr. Co. Lit. 59. a. n. 6. (*a*) That a corporation may make a bailiff without deed, tit. Corporations, Letter (E). [But a patent is neceſſary to the making of ſtewards of the king's manors. Co. Comp. Cop. 56. § 45.]

Alſo it hath been adjudged, that a parol appointment of clerk of the peace by the *cuſtos rotulorum*, by the words following, ſpoken in open court, is good, *I do nominate the ſaid* Philip Owen *to be clerk of the peace, according to the act of parliament.* But in *B. R.*, though the parol appointment was held good, yet that court reverſed the judgment, becauſe the form of the words uſed in the nomination were inſufficient; for he did not name any certain county of which he ſhould be clerk of the peace, nor diſtinguiſh which ſtatute he intends; for there are two ſtatutes which concern this matter, *viz.* 37 *H.* 8. *c.* 1. § 3. and 1 *W. & M. ſtat.* 1. *c.* 21. § 5. and moreover by his adding this word, *viz.* ſaid *Philip Owen*, it is altogether inſenſible. But the judgment of *B. R.* was reverſed in the Houſe of Lords. Carth. 426. 2 Salk. 467. pl. 4. 5 Mod. 386. Sanders v. Owen. 12 Mod. 200. S. C. Lill. Entr. 278. S. C.

By the 13 *Car.* 2. *ſtat.* 2. *c.* 1. it is enacted, "That no perſon ſhall be placed, elected, or choſen to any office or place of mayor, alderman, recorder, bailiff, town-clerk, common councilman, or other office of magiſtracy, place of truſt, or other employment relating to the government of any city, corporation, borough, cinque-port, or other port-town, who ſhall not have received the ſacrament according to the rites of the church of *England*, within one year next before ſuch election; and that every perſon ſo placed or elected ſhall take the oaths of allegiance and ſupremacy at the ſame time when the oath for the due execution of the ſaid office, &c. ſhall be adminiſtered; and that the ſaid oaths ſhall be adminiſtered and (*b*) tendered by thoſe who adminiſter the oath of office; and in default of ſuch, by two (*c*) juſtices of peace of the corporation; and that in default hereof every ſuch election, placing, and choice ſhall be void."

(*b*) It hath been adjudged, that it is no excuſe that the oaths were not tendered. 5 Mod. 316. 2 Jon. 121. Salk. 428.

(*c*) Which makes it neceſſary in a return to a *mandamus*, ſetting forth that the party did not take the oaths before the mayor, &c. to add, that he did not take them before two juſtices of peace. 5 Mod. 317. 2 Salk. 428. pl. 3.

[But now by ſtat. 5 *G.* 1. *c.* 6. for quieting and eſtabliſhing corporations, it is enacted, "That all perſons in the actual poſſeſſion of any office that were required by the above act to take the ſacrament within one year next before their election into ſuch office ſhall be confirmed in their ſeveral offices, and ſhall be indemnified and diſcharged from all incapacities and penalties ariſing from ſuch omiſſion; and that none of their acts ſhall be queſtioned by reaſon of ſuch omiſſion; nor ſhall any perſons who ſhall be hereafter placed or elected in or to any of the offices aforeſaid, be removed by the corporation, or otherwiſe

" proſecuted

(a) If neither of these events have happened within the time limited, the election becomes absolute and unavoidable; for the statute operates rather as a protection to the possession, than as a bar to the remedy. 1 Bl. Rep. 229. 2 Burr. 1013. Cowp. 539.

" prosecuted for or by reason of such omission; nor shall any in-
" capacity, disability, forfeiture, or penalty, be incurred by reason
" of the same, unless such person be so removed, or such prosecu-
" tion be commenced (a) within six months after his election."

However, by 1 *G.* 1. *stat.* 2. *c.* 13. amended by 2 *G.* 2. *c.* 31. & 9 *G.* 2. *c.* 26. all persons who bear any office civil or military, &c. shall take the oaths of allegiance and supremacy (b), and the oath of abjuration. And all persons who were before, shall still continue, obliged to receive the sacrament; and shall subscribe the doctrine against transubstantiation. And by 11 *G.* 1. *c.* 4. § 4. mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths by law required at the time of their admission into such office, *before* such officer as shall preside at such election.]

(b) As recited in 6 G. 3. c. 53.

[The acts which are annually passed to indemnify persons in office who have omitted to qualify themselves, have the effect of repealing this salutary statute.]

By the 25 *Car.* 2. *c.* 2. (commonly called the Test Act) it is enacted, " That all officers civil and military, (except those of in-
" heritance appointing sufficient deputies,) and all who have any
" fee, &c. by patent from the king, (except such as shall be
" granted for valuable consideration for life or years, and not re-
" late to any office or place of trust,) and also all who have any
" place of trust or employment in the king's household, shall take
" the oaths of allegiance and supremacy, and test, the next term,
" (in the King's Bench or Chancery, or quarter sessions,) and re-
" ceive the sacrament within three months, and give in a certifi-
" cate thereof, proved by two witnesses, to the court wherein
" they take the said oaths; and in case of neglect, shall be dis-
" abled to hold the said offices, &c. and (c) forfeit five hundred
" pounds, except feme coverts, &c."

(c) It hath been adjudged, that the persons so disabled lose only their right to the profits of their offices from the time of such disability, but that they lose nothing vested in them before. Lutw. 910.

(d) It hath been made a *quære*, Whether it extends to the Censor of the College of Physicians? 5 Mod. 431.

But it is provided by the last-mentioned statute, " That the
" said act shall not extend to constables or churchwardens, or
" (d) such like inferior civil officers, or to a bailiff of a manor or
" lands, or such like private officers."

2 Jon. 81. 137. 2 Lev. 184. 242. 2 Mod. 193. 3 Keb. 606. 665. 682. 721. Hawk. P.C. c. 8. 10 Mod. 185. Ld. Raym. 299.

Though the words of the above act of 13 *Car.* 2. are so very strong, as to make such election, &c. void, and those of the 25 *Car.* 2. to make such persons disabled in law to all intents and purposes whatsoever, to have, occupy, or enjoy the said offices; yet it hath been strongly holden, that the acts of one under such a disability, being instated in such an office, and executing the same without any objection to his authority, may be valid as to strangers; for otherwise, not only those who no way infringe this law, but even those whose benefit is intended to be advanced by it, might be sufferers for another's fault, to which they are no way privy; and one chasm in a corporation, happening through the default of one head officer, would perpetually vacate the acts of

of all others, whoſe authority in reſpect of their admiſſion into their offices, or otherwiſe, may depend on his.

[The deſign of the ſtatute of 13 *Car.* 2. was to exclude men, who were not of the church of *England*, from all offices which concern the government: and is to be conſidered as prohibitory upon the electors *quoad* ſuch perſons. A diſſenter therefore being ineligible to ſuch office, cannot of courſe be fined for refuſing to accept it. Upon this ſimple point, however, there hath heretofore been ſome difference of opinion (*a*). And it became neceſſary to appeal to the court of ſovereign juriſdiction, in order to ſettle the law upon it. That was done in the caſe of *Harriſon* v. *Evans* (*b*), which caſe was as follows:—In 1748, the corporation of *London*, by a bye-law, impoſed a fine of ſix hundred pounds upon every perſon, who, being elected, ſhould refuſe to ſerve the office of ſheriff. The plaintiff, the Chamberlain of *London*, levied debt, in the ſheriff's court, againſt the defendant for the penalty. The defendant pleaded the 13 *Car.* 2. averring, that he was a Proteſtant diſſenter within the toleration act 1 & 2 *W.* & *M.* *c.* 18. of ſcrupulous conſcience; and therefore had not received the ſacrament. The plaintiff replied the 5 *G.* 1. which confirms members of corporations in their reſpective offices, although they have not received the ſacrament according to the directions of 13 *Car.* 2. To this replication the defendant demurred, and judgment was given upon it in favour of the city. The defendant appealed to the court of Huſtings, where the judgment was affirmed. A ſpecial commiſſion was ſued out, directed to *Willes*, C. J., *Parker* C. B., and *Foſter*, *Bathurſt*, and *Wilmot*, J., by whom the judgments in the courts below were unanimouſly reverſed. The plaintiff brought a writ of error in parliament; and on the 4th of *February* 1767, Lord *Mansfield* with five other judges, againſt *Parrot* B., were of opinion, that upon the facts admitted by the pleadings in this cauſe, the defendant ſhould be allowed to object to the validity of his election to the office of ſheriff, in bar to the action, by reaſon that he had not taken the ſacrament within the time limited.]

(*a*) Larwood's caſe, 1 Ld. Raym. 29. 4 Mod. 269. Guildford Town v. Clarke, 2 Vent. 247. Rex v. Groſvenor, 2 Str. 1193; 1 Wilſ. 18.

(*b*) 2 Burn's E. L. 8vo. edit. 185. 6 Br. P. C. 181.

## (F) Of the Offence of Buying and Selling an Office, and what Offices are prohibited to be thus diſpoſed of.

THE taking or giving of a reward for offices of a publick nature is ſaid to be bribery. And ſurely, ſays *Hawkins*, nothing can be more palpably prejudicial to the good of the publick, than to have places of the higheſt concernment, on the due execution whereof the happineſs of both king and people doth depend, diſpoſed of, not to thoſe who are moſt able to execute them, but to thoſe who are moſt able to pay for them; nor can any thing be a greater diſcouragement to induſtry and virtue, than to ſee thoſe places of truſt and honour, which ought to be the rewards of thoſe who

3 Inſt. 184. Hawk. P.C. c. 67. It is ſaid to be *malum in ſe*, and indictable at common law. Noy, 102. Moor, 781.

who by their induſtry and diligence have qualified themſelves for them, conferred on thoſe who have no other recommendation, but that of being the higheſt bidders; neither can any thing be a greater temptation to officers to abuſe their power by bribery and extortion, and other acts of injuſtice, than the conſideration of the great expence they were at in gaining their places, and the neceſſity of ſometimes ſtraining a point to make their bargain anſwer their expectations.

For the expoſition hereof, *vide* the Earl of Macclesfield's trial. [State Trials, 6 vol. 477.]

For which reaſons, among many others, it is expreſsly enacted by 12 *Rich.* 2. *c.* 2. "That the chancellour, treaſurer, keeper "of the privy ſeal, ſteward of the king's houſe, the king's cham- "berlain, clerk of the rolls, the juſtices of the one bench and of "the other, barons of the exchequer, and all other that ſhall be "called to ordain, name or make juſtices of the peace, ſheriffs, "eſcheators, cuſtomers, comptrollers, or any other office or mi- "niſter of the king, ſhall be firmly ſworn that they ſhall not or- "dain, name, or make any of the above-mentioned officers for any "gift or brokage, favour or affection; nor that none that ſueth "by himſelf, or by others, privily or openly, to be in any man- "ner of office, ſhall be put in the ſame office, or in any other, "but that they make all ſuch officers and miniſters of the beſt "and moſt lawful men, and ſufficient, to their eſtimation and "knowledge."

And by the 4 *H.* 4. *c.* 5. it is enacted, "That no ſheriff ſhall "let his bailiwick to farm to any man for the time that he occu- "pieth ſuch office."

But the principal ſtatute relating to this matter is the 5 & 6 *E.* 6. *c.* 16. which is *verbatim* as follows, §. 1. "For avoid- "ing of corruption which may hereafter happen to be in the "officers and miniſters in thoſe courts, places, or rooms, wherein "there is requiſite to be had the true adminiſtration of juſtice, or "ſervices of truſt, and to the intent that perſons worthy and "meet to be advanced to the place where juſtice is to be mini- "ſtered, or any ſervice of truſt executed, ſhall hereafter be pre- "ferred to the ſame, and no other:"

§ 2. "Be it therefore enacted, That if any perſon or perſons "at any time hereafter bargain or ſell any office or offices, or de- "putation of any office or offices, or any part or parcel of any of "them, or receive, have, or take any money, fee, reward, or any "other profit, directly or indirectly, or take any promiſe, agree- "ment, covenant, bond, or any aſſurance to receive or have any "money, fee, reward, or other profit, directly or indirectly, for "any office or offices, or for the deputation of any office or "offices, or any part of any of them; or to the intent that any "perſon ſhould have, exerciſe or enjoy any office or offices, or the "deputation of any office or offices, or any part of any of them, "which office or offices, or any part or parcel of them, ſhall in "anywiſe touch or concern the adminiſtration or execution of "juſtice, or the receipt, controlment, or payment of any of the "king's highneſs's treaſure, money, rent, revenue, account, aul- "neage, auditorſhip, or ſurveying of any of the king's majeſty's

"honours,

" honors, caſtles, manors, lands, tenements, woods, or hereditaments, or any the king's majeſty's cuſtoms, or any adminiſtration or neceſſary attendance to be had, done, or executed in any of the king's majeſty's cuſtom-houſe or houſes, or the keeping of any the king's majeſty's towns, caſtles, or fortreſſes, being uſed, occupied, or appointed for a place of ſtrength and defence; or which ſhall concern or touch any clerkſhip to be occupied in any manner of court of record wherein juſtice is to be miniſtered; that then all and every ſuch perſon and perſons, that ſhall ſo bargain or ſell any of the ſaid office or offices, deputation or deputations, or that ſhall take any money, fee, reward, or profit, for any of the ſaid office or offices, deputation or deputations, of any of the ſaid offices, or any part of any of them, or that ſhall take any promiſe, covenant, bond, or aſſurance for any money, reward, or profit, to be given for any of the ſaid office or offices, deputation or deputations of any of the ſaid office or offices, or any part of any of them, ſhall not only loſe and forfeit all his and their right, intereſt, and eſtate, which ſuch perſon or perſons ſhall then have of, in, or to any of the ſaid office or offices, deputation or deputations, or any part of any of them, or of, in, or to the gift or nomination of any the ſaid office or offices, deputation or deputations, for the which office or offices, or for the deputation or deputations of which office or offices, or for any part of any of them, any ſuch perſon or perſons ſhall ſo make any bargain or ſale, or take or receive any ſum of money, fee, reward, or profit, or any promiſe, covenant, bond, or aſſurance to have or receive any reward, money, or profit; but alſo that all and every ſuch perſon or perſons that ſhall give or pay any ſum of money, reward, or fee, or ſhall make any promiſe, agreement, bond, or aſſurance for any of the ſaid offices, or for the deputation or deputations of any the ſaid office or offices, or any part of any of them, ſhall immediately, by and upon the ſame fee, money, or reward given or paid, or upon any ſuch promiſe, covenant, bond, or agreement had or made for any fee, ſum of money, or reward, to be paid as is aforeſaid, be adjudged a diſabled perſon in the law to all intents and purpoſes to have, occupy, or enjoy the ſaid office or offices, deputation or deputations, or any part of any of them, for the which ſuch perſon or perſons ſhall ſo give or pay any ſum of money, fee, or reward, or make any promiſe, covenant, bond, or other aſſurance to give or pay any ſum of money, fee, or reward."

§ 3. " It is further enacted, That all and every ſuch bargains, ſales, promiſes, bonds, agreements, covenants, and aſſurances, as be before ſpecified, ſhall be void to and againſt him and them by whom any ſuch bargain, ſale, bond, promiſe, covenant, or aſſurance ſhall be had or made."

§ 4. " Provided always, that this act, or any thing therein contained, ſhall not in anywiſe extend to any office or offices whereof any perſon or perſons is, are, or ſhall be ſeiſed of any eſtate of inheritance; nor to any office of parkerſhip, or of the

" keeping of any park-house, manor, garden, chase, or forest, or to " any of them; any thing in this act heretofore mentioned to " the contrary thereof in anywise notwithstanding."

§ 5. " Provided also, that if any person or persons do hereafter " offend in any thing contrary to the tenor and effect of this act, " yet that notwithstanding, all judgments given, and all other act " or acts, executed or done, by any such person or persons so of- " fending by authority or colour of the office or deputation, " which ought to be forfeited, or not occupied, or not enjoyed, " by the person so offending, as is aforesaid, after the said offence " so by such person so committed or done, and before such per- " son so offending for the same offence be removed from the ex- " ercise, administration, and occupation of the said office or de- " putation, shall be and remain good and sufficient in law to all " intents, constructions, and purposes, in such like manner and " form as the same should or ought to have remained and been, if " this act had never been had or made.

" Provided also, that this act shall not extend to be prejudicial " or hurtful to any of the Chief Justices of the king's courts, " commonly called the King's Bench or Common Pleas, or to any " of the Justices of assise that now be, or hereafter shall be; but " that they and every of them may do in every behalf, touching " or concerning any office or offices to be given or granted by " them or any of them, as they or any of them might have done " before the making of this act; any thing above mentioned to " the contrary in anywise notwithstanding."

In the construction of the last-mentioned statute the following opinions have been holden:

Cro. Jac. 269. 3 Inst. 148. 12 Co. 78. Salk. 468. pl. 6. 3 Lev. 289. 2 Vent. 187. 267.

1. That the offices of Chancellour, Registrar, and Commissary in ecclesiastical courts are within the meaning of the statute, inasmuch as those courts do not only determine matters which are brought before them *pro salute animæ*, but also have the decision of disputes concerning the lawfulness of matrimony, and legitimation of children, which touch the inheritance of the subject; and also hold plea of legacies and tithes, *&c.* in which respects they are courts of justice.

2 Lev. 151. Ellis v. Ruddle.

2. It hath been adjudged, that offices in fee are out of the statute: so, if the king be seised in fee of a bailiwick, and he demise the same to *A.* who demises to *B.* rendering rent, the demise to *B.* is not within the statute; for offices in fee being excepted out of the statute, under-leases of such offices are also excepted inclusively.

2 Vent. 91. Sir Arthur Ingram's case. Co. Lit. 234.

3. It hath been resolved, that the place of cofferer is within this statute, and a person having once purchased this place is for ever disabled to enjoy the same; and that the king is bound by this statute.

S. C. and there said, that the king could not dispense with this statute by any *non obstante*. Cro. Jac. 385. S. C. cited.

4 Leon. 33. Godbolt's case. 4 Mod 223. S. C. cited.

4. It hath been agreed, that the sale of a bailiwick of a hundred is not within the statute, for such an office doth not concern the administration of justice, nor is it an office of trust.

5. If

5. If *A.* being ſurveyor of the cuſtoms, agrees with *B.* that *B.* ſhall be his deputy, and that in conſideration thereof *B.* ſhall pay *A.* 600*l.* and 100*l.* annually, and it is further agreed, that *A.* will ſurrender his patent, and procure a new one in the name of *A.* and *B.*, which is done accordingly, and *B.* gives *A.* a bond for performance of the whole agreement; the bond is void, as being within this ſtatute; for though part of the condition, ſuch as procuring a new patent, *&c.*, may not be void within the ſtatute, yet being joined with that which is ſo, it makes the whole void. 2 And. 55. 107. Smith v. Cotleſhill.

6. It hath been adjudged, that a ſeat in the Six-Clerks Office is not within the ſtatute, being a miniſterial office only; and they are but under-clerks, who have ſo much a ſheet for copying, *&c.* But one judge held it not ſaleable at common law, for the following reaſons; 1*ſt*, Diſcouragement of merit and induſtry. 2*dly*, Its being the occaſion of extortion and exaction of exceſſive fees. 3*dly*, From its being a great charge to ſuits. 4*thly*, It exempts the perſons, who enter by theſe means, in a great meaſure from the due regulations under which they ought to be; for they are not ſo eaſily removed, as if they were at the will of him who hath the diſpoſal of them. Paſch. 26. Car. 2. in C. B. Sparrow v. Reynold.

7. It hath been held, that this ſtatute doth not extend to military officers (*a*); and that the 7 *W.* & *M.* which requires, that every commiſſion officer, before his commiſſion is regiſtered, ſhould take the oath there mentioned, that he had not directly or indirectly given any thing for procuring the commiſſion, but the uſual fees, extends only to horſe, foot, and dragoons, but not to the marines. Ive v. Aſh, Prec. Chan. 199. [(*a*) 1 Vern. 98. Nor to the purſer of a ſhip. 2 Vern. 308. Ca. temp. Talb. 140.

But ſee 1 H. Bl. 326., where it is ſaid by Lord Loughborough, C. J. that this caſe in 2 Vern. is contrary to an evident principle of law. And clearly, if the Lords of the Admiralty were to take money for their warrant to appoint a perſon to be a purſer, it would be criminal in the corrupter and corrupted. Purdy v. Stacey, 5 Burr. 2698.]

8. It hath been adjudged, that the ſale of the deputation of the office of Provoſt Marſhal of *Jamaica*, is not within this ſtatute (*b*); becauſe this ſtatute does not extend to the plantations. 4 Mod. 222. 2 Salk. 411. Blankark v. Galdy.

1 Ld. Raym. 1245. S. C. cited. (*b*) 2 Mod. 45. S. P. undetermined, and there ſaid *arguendo*, that ſo good a law ſhould have as extenſive a conſtruction as poſſible.

9. In a writ of error on a judgment in *Ireland*, it was held clearly, that the office of clerk of the crown, and clerk of the peace, was within the ſtatute; but that this law did not extend to *Ireland*, not being enacted there. Trin. 9 G. 2. in B. R. Maccarty v. Wickford.

10. It hath been held, that one who makes a contract for an office, contrary to the purport of this ſtatute, is ſo far diſabled to hold the ſame, that he cannot at any time during his life be reſtored to a capacity of holding it by any grant or diſpenſation whatſoever. Hob. 75. Co. Lit. 234. Cro. Car. 361. Cro. Jac. 386. Ca. temp. Talb. 107.

11. It is held, that where an office is within the ſtatute, and the ſalary is certain, if the principal make a deputation, reſerving a leſs ſum out of the ſalary, it is good: ſo, if the profits be uncertain ariſing from fees, if the principal make a deputation, reſerving 2 Salk. 468. 6 Mod. 224. Godolphin v. Tudor. Comb. 356. S. P.

ſerving a certain ſum out of the fees and profits of the office, it is good: for in theſe caſes the deputy is not to pay, unleſs the profits ariſe to ſo much; and though a deputy by his conſtitution is in place of his principal, yet he has no right to his fees, they ſtill continue to be the principal's; ſo that, as to him, it is only reſerving a part of his own, and giving away the reſt to another. But where the reſervation or agreement is not to pay out of the profits, but to pay generally a certain ſum, it muſt be paid at all events; and a bond for performance of ſuch agreement is void by the ſtatute.

Bellamy v. Burrow; Ca. temp. Talb. 97; (a) Fordyce v. Willis,

[12. It hath been adjudged, that a truſt may be created of an office clearly within this ſtatute. But ſubſequent determinations (*a*) have made this doctrine exceedingly queſtionable, if not entirely over-ruled it.]

3 Br. Ch. Rep. 579. Parſons v. Thompſon, 1 H. Bl. 322. Garforth v. Fearn, *Id.* 327. Theſe two laſt caſes have determined, that if an action for money had and received be brought upon the foot of an agreement, to allow the plaintiff a certain proportion of the profits of the office, in conſideration of his having procured, or been aiding to the defendant's appointment to it, the plaintiff cannot recover.

Trin 9 G. 2. in B. R. Maccarty v. Wickford. (*b*) Hornby v. Comford, Fitzg. 45.

13. It hath been holden, that this being a publick law, the judges *ex officio* are to take notice of it; yet it ſeems the more regular and ſafe way to plead it (*b*). But it hath been reſolved, that a perſon in pleading this ſtatute need not allege, that the party againſt whom it is pleaded is not within any of the proviſos or exceptions in the ſtatute; but that if he be, it muſt come on his ſide to ſhew it.

[As the proviſions of this ſtatute do not extend to all caſes within the miſchief which it was intended to prevent, it has become neceſſary for courts of equity, in many caſes, to interpoſe; for though it be true, that penal laws are not to be extended as to penalties and puniſhments, yet, if there be a publick miſchief, and a court of equity ſee private contracts made to elude laws enacted for the publick good, it ought to interpoſe, and that, upon the publick policy of the law, though the office be not within the ſtatute of *E.* 6. For it is a rule of equity, "that if a man ſells "his intereſt, to procure a perſon an office of truſt or ſervice "under the government, it is a contract of turpitude. It is acting "againſt the conſtitution, by which the government ought to be "ſerved by fit and able perſons, recommended by the proper "officers of the crown for their abilities, and with purity."

Morris v. M'Cullock, Ambl. 432.

The defendant, who was a linen-draper, entered into a treaty with the plaintiff, who was a livery-ſervant, to procure him a commiſſion in the marines for 200 *l.*, which the defendant effected by means of a lady, who was intimately connected with one of the lords of the Admiralty, and afterwards received the money. The plaintiff, after ſix months, being diſcovered to have worn a livery, was diſcharged, upon which he filed a bill to be repaid the ſum he had advanced to the defendant. Lord *Henley* decreed the money to be repaid with intereſt; for though commiſſions in the army may be ſold, yet that is with the leave of the crown, and the perſon to ſucceed is examined by the Secretary at War, and approved as

as a proper perſon: that that was not the caſe here: but the defendant ſold his intereſt with the lady to procure a commiſſion. The caſe of *Ive* v. *Aſh*, he ſaid, was very different, the commiſſion was ſold by leave of the crown, the defendant ſurrendered, and it was the plaintiff's fault that he did not take it.

The offices of collector and ſupervisor of the exciſe are clearly within the ſtatute; and though a bond given to a perſon to influence a commiſſioner to appoint one to either of thoſe offices, be not directly a ſale within the ſtatute, yet in effect it is ſo, and equity will therefore relieve againſt it. Law v. Law, Ca. temp. Talb. 140. 3 P. Wms. 391. S. C.

The late Lord *Rochford*, being groom of the ſtool to his majeſty, and, in conſequence of that office, recommending pages of the preſence, *&c.*, treated with the plaintiff's teſtator, to recommend him upon a vacancy, on condition that he ſhould grant two annuities, one of 100 *l.* to *St. Ferrol*, the defendant's teſtator, who had been Lord *Rochford*'s travelling tutor, and was then a bond creditor of his Lordſhip for 600 *l.*, and the other of 40 *l.* to another perſon. An action being brought upon the annuity bonds by defendant's teſtator for the arrears of the annuity, the plaintiffs filed their bill for an injunction. The defendants had demurred, and the demurrer had been over-ruled, and upon the motion to continue the injunction upon the merits, the anſwer being put in; it was argued on the part of plaintiffs, that this bond was *pro turpi cauſâ*; that Lord *Rochford* having a confidence placed in him by the king, had abuſed that confidence, by ſelling his recommendation, and that upon the publick policy of the law, ſuch an agreement ought not to ſtand. On the other hand, it was argued, that it was allowed this was not an office within the ſtatute of *E.* 6. that it was merely an office reſpecting the king's private, not his publick character; and that if it was *turpis contractus*, that might have been pleaded at law. Lord *Thurlowe* expreſſed his doubts, whether it might not have been brought upon the record at law by a plea, and made a defence there to the action, but thought that not a ſufficient reaſon to prevent his interpoſition, the court of law never having determined, that it could be ſo brought there as a defence. He then, admitting that it was not within the ſtatute of *E.* 6., but treating it as a matter of publick policy of the law, and ſimilar to marriage brokage bonds, where, though the parties are private perſons, the practice is publickly detrimental, ordered the injunction to be continued till the hearing; and afterwards, upon the hearing, ordered it to be perpetual.] Haneington v. Du-Chatel, 1 Br. Ch. Rep. 124. That the illegality of the conſideration can be pleaded to an action on a bond is denied by the court in Andrews v. Eaton, Fitzg. 73.; but ſee Col ins v. Blantern, 2 Wilſ. 341.

## (G) What Remedies a Perſon having a Right to an Office muſt purſue, to be let into the Enjoyment of it, and how a Diſturbance is puniſhable.

IT was held clearly, that an aſſiſe lay at common law for an office, and that therefore though the ſtatute of *Weſt.* 2. 13 *Ed.* 1. *ſtat.* 1. *c.* 25. ſpeaks only of offices in fee, yet an aſſiſe lies for an 3 Co. 47. 2. John Webb's caſe. 2 Inſt. 412. S. P.

office in tail or for life. But this is to be understood of offices of profit; for of an office of charge and no profit an assise does not lie.

8 Co. 49. b. 2 Inst. 412. But a man shall not have an assise of the whole office, unless he be disseised of the whole; for if a man be disseised of parcel of the profits of an office, he may have an assise of that parcel only.

8 Co. 49. Webb's case. In an assise for an office newly erected and constituted, the demandant in his plaint must shew what fee or profit is granted for the exercise thereof; for this office cannot have a fee or profit appurtenant to it, as an ancient office may, and for an office without fee or profit no assise lies.

8 Co. 49. But in an assise for an ancient office, the demandant in his plaint need not shew what fee or profit is belonging to it, for it shall be intended there is some fee or profit.

Roll. Abr. 270. In an assise for an office, the demandant must shew a seisin; but it hath been held, that the taking of 3 *d.* for a *capias* against *B.*, is a sufficient seisin of the office of filazer *de banco*.

2 Lev. 108. Cragg v. Norfolk, adjudged. So, if one be committed by the House of Commons to *A.*, who before and long after was in possession of the office of *serjeant at arms* to the House, and the prisoner compound with *B.* for his fees, and give him twenty shillings; this is a good seisin of the office by *B.*, for he cannot be disseised thereof, but at his election. It was likewise held, that proving that *B.* being in the *lobby* of the *House of Commons*, took hold of the door of the House, and laid his hand upon the mace, then being in the hands of *A.* to take it, but hindered by *A.*, was good evidence both of a *seisin* and *disseisin*.

Lev. 108. & *vide* Mod. 122. where such recovery is held to be a sufficient seisin. But, where the serjeant of the mace to the *House of Commons*, in an action upon the case for a disturbance, recovered damages; whether this was a sufficient seisin, the damages being recovered in satisfaction of the fees, and he then being out of possession of his office, was doubted; some of the judges inclining one way and some the other; and it was intended to have been found specially, but the plaintiff being unwilling to stand to it was nonsuit.

3 Mod. 273. Savier v. Lenthol; Also, in an assise for an office, the demandant in his plaint must set forth a title.

by which book it appears, that the demandant not being ready to set forth a title, the assise was adjourned till the next day, when he appeared and set forth a title, and process was prayed against the defendant.——But by Salk. 82. S. C. the demandant was nonsuited the second day for not counting; and the court told him, he might bring a new assise. Comb. 173. S. C. and the plaintiff nonsuited; & *vide* Dyer, 114 pl 63. 149. pl. 81. 152. pl. 9. 8 Co. 45. b.

8 Co. 47. 2 Inst. 412. 11 Co. 99. b. Dyer, 152. An assise lies for the office of registrar of the (*a*) Admiralty; for though their proceedings are according to the civil law, yet the (*b*) right of their offices is determinable at common law. So, of the mastership of an hospital, being a lay fee.

(*a*) So, the right of the office of registrar to a bishop is to be determined at common law, and not to be tried in the spiritual court, though the subject-matter is spiritual; because the office itself being matter of freehold, is for that reason of temporal cognizance.——For this *vide* Roll. Abr. 285. 4 Mod. 27, 28. Carth. 169.

(*b*) So, chancellours, registrars, proctors, &c. being officers of temporal profit, are to sue for their fees in the temporal courts.——For this *vide* tit. Fees, letter (D).

A man

A man may bring an action on the caſe (*a*) for the profits of an office, though he never had ſeiſin. Mod. 122. *per* Hale, C. J.

[But if the perquiſites of an office are mere gratuities, not known and accuſtomed fees, neither an aſſiſe, nor an action for money had and received, will lie to recover them. Boyter v. Dodſworth, 6 Term Rep. 681.] (*a*) An action on the caſe for diſturbing a perſon in the exerciſe of the office of pariſh clerk. 2 Salk. 468. pl. 7. But not ſo adviſable as an aſſiſe; becauſe a jury may not well compute the damages in proportion to the loſs of a man's livelihood. Carth. 169.

If the king grant the office of comptroller of the cuſtoms to *A.* and *B. durante beneplacito*, and *A.* die, and afterwards the king grant the ſaid office to *C.*, and yet *B.* under pretence of ſurvivorſhip exerciſe the ſaid office, and receive the profits thereof; *C.* may have an *indebitatus aſſumpſit* for ſo much money had and received to his uſe. 2 Mod. 160. adjudged, upon a ſpecial verdict between Arris v. Stukely. 2 Jon. 126.

2 Lev. 245. S. P. between Haward v. Wood; where the defendant, under pretence of title, received the fees belonging to the plaintiff as ſteward of a court-baron.

[The head of a college hath not ſuch an eſtate in his office as will entitle him to maintain an aſſiſe for it; for he hath no ſole ſeiſin.] *Per* Holt, C. J. in Philips v. Bury, 2 Term Rep. 335.

## (H) Of the Nature of Offices as to their Duration and Continuance: And herein of their being grantable in Fee, for Life, Years, at Will and Reverſion.

OFFICES, in reſpect to their duration and continuance, are diſtinguiſhed into thoſe which are of inheritance, or in fee, or fee-tail, thoſe of freehold or for life, thoſe for years or a limited time, and thoſe which are at will only. And here we muſt again obſerve, that though all offices, in relation to the adminiſtration of juſtice, are originally and inherently lodged in the crown, yet cannot the king himſelf grant theſe in any other manner than warranted by ancient uſage, or ſo as to be injurious or inconvenient to the publick. 9 Co. 97.

But, where no inconvenience can enſue to the publick, there, offices are allowed to deſcend as inheritances; as, the offices of (*b*) earl marſhal of *England*; ſo, of park-keeper, foreſter, gaoler, (*c*) ſheriff, *&c.* Dyer, 285. 7 Co. 33. Plow. 2. 2 Inſt. 382. 2 Roll. Abr. 153.

(*b*) So, the office of ſeneſchal of England formerly belonged to the earldom of Leiceſter, and came afterwards to the Staffords, and dukes of Buckingham, and the laſt who had it in fee was Edward Duke of Buckingham, who was attainted 13 H. 8., but now it is never granted to any ſubject only *pro hâc vice*. 4 Inſt. 58. 127. 7 Mod. 125. cited. (*c*) The mayor and citizens of London have the ſhrievalty of London in fee, and the ſheriffs of London are guardians under them, and removeable from year to year. 2 Inſt. 382.

And if one hath the office of park-keeper, foreſter, gaoler, ſheriff, *&c.* to him and his heirs, he may grant theſe offices to one for life, remainder to another for life, *&c.* for *omne majus continet in ſe minus*; and as they are grantable over in fee, ſo may they be granted in ſucceſſion to one for life, with remainders over. Plow. 379. b. 381. a. 9 Co. 48. 97.

7 Co. 33. Co. Lit. 20. a. Roll. Abr. 838.

So, offices may be entailed; as, the office of earl marſhal of *England*, or the office of ſteward, bailiff, or receiver of a manor, may be entailed; becauſe they are demandable in a *præcipe ut tenementa*, and being exerciſable within the manor, are therefore looked upon as members or branches of it.

Perk. § 342. Co. Lit. 32. Roll. Abr. 676. Plow. 379. b. F. N. B. 149.

So, a woman may be endowed of an office; as, of the office of the *Marſhalſea* to have the third part of the profits, and in ſuch caſe ſhe ſhall be contributory to a third part of the charge. So, ſhe may be endowed *de tertiâ parte exituum provenient. de cuſtodiâ gaolæ abbathiæ Weſtm.*, or of the third part of the profits of courts, fines, heriots, *&c.*

4 Mod. 167. Show. 428. ſaid *arguendo*.

It is ſaid, that, at common law, all officers of juſtice had eſtates in their reſpective offices during life, and could not be removed but for miſdemeanors: ſo, was the office of clerk of the crown in *B. R.* and in Chancery: ſo, are the clerks in the Exchequer, and the filazers in *C. B.* And in this reſpect the wiſdom and policy of the law was very great; becauſe, when men held their offices for life, it was an encouragement to the faithful execution of their duties; it was then alſo they endeavoured to acquire knowledge and experience in their employments, having a durable and fixed eſtate therein, and not liable to be diſplaced at the pleaſure of thoſe who put them in.

Co. Lit. 42. Roll. Abr. 844. Show. Parl. Caſes, 161.

If an office be granted to a man to have and enjoy ſo long as he ſhall behave himſelf well in it; the grantee hath an eſtate of freehold in the office; for ſince nothing but his miſbehaviour can determine his intereſt, no man can prefix a ſhorter time than his life; ſince it muſt be his own act (which the law does not preſume to foreſee) which only can make his eſtate of ſhorter continuance than his life. So, if the office be granted to a man *quamdiu ſe bene geſſerit tantum*, his eſtate will not be leſs for the word *tantum*; for the grant is of equal extent with the former, and his miſbehaviour in each caſe determines his intereſt.

4 Mod. 167. Show. 426 to 536. Harcourt v. Fox, Show. Parl. Caſes, 158. S. C. Ll. Raym. 161. S. C. Comb. 209.

Therefore, where by the ſtatutes (*a*) directing in what manner the *cuſtos rotulorum* ſhall be appointed, *&c.* it is among other things provided, that the *cuſtos* ſhall appoint and nominate the clerk of the peace, when void, who may execute it by himſelf or deputy, for ſo long time only as he ſhall demean himſelf well; in the conſtruction of theſe words it was held, that the clerk had an office for life, and that it did not determine with the *cuſtos*.

12 Mod. 42. S. C. [(*a*) By ſtat. 37 H. 8. c. 1. § 3. the *cuſtos rotulorum* is authoriſed to appoint a fit and able perſon to hold the office of clerk of the peace, during the time that the ſaid *cuſtos rotulorum* ſhall occupy the ſaid office of *cuſtos*, ſo as the ſaid clerk of the peace demean himſelf juſtly and honeſtly. By ſtat. 1 W. & M. c. 21. the *cuſtos* is authoriſed to nominate a clerk of the peace, for ſo long a time only as ſuch clerk of the peace ſhall well demean himſelf in his ſaid office; and if he do not well demean himſelf in his office, the ſeſſions of the county, on application and proof made as the act requires, may remove him.]

4 Inſt. 74. 117.

The Judges of the ſeveral courts at *Weſtminſter* held formerly their places *durante bene placito*, but now by the 12 & 13 *W.* 3. their commiſſions are *quamdiu ſe bene geſſerint*, by which they hold their offices for life; but upon the addreſs of both Houſes of Parliament it may be lawful to remove them.

It

It hath been determined, that at common law the patents of the judges (*a*), ſheriffs, eſcheats, commiſſioners of oyer and terminer, gaol-delivery, and of the peace, and of the attorney and ſolicitor general, are determined by the death of the king, in whoſe name they are made. And. 44. Dyer, 165. Cro. Car. 1, 2. N. Bendl. 79. (*a*) But the office of ſheriff in ſuch places where he is choſen by a corporation, having by its charter the inheritance of the office, does not determine by the demiſe of the king. 7 Co. 30. b.——Nor the authority of a coroner or verderor. Daliſ. 15. Dyer, 165. 2 Inſt. 175. Lev. 120.——Nor does any corporation officer, who by the charter is inveſted with judicial authority, loſe it by ſuch demiſe. 2 Hawk. P. C. 3. & vide the ſtatutes 7 & 8 W. 3. c. 27. and 1 Ann. c. 1. for continuing all patent officers for ſix months after ſuch demiſe, tit. Courts, letter (C).——[And by ſtat. 1 G. 3. c. 23. the offices of the judges do not become vacant on the demiſe of the crown.]

It hath been adjudged in Sir *George Reynold*'s caſe, that the office of the King's Bench Priſon * could not be granted for years, for that being an office of great truſt concerning the adminiſtration of juſtice, in keeping of priſoners till they pay their debts, if it ſhould be granted for years, might be injurious to the publick, in that it would go to the executors or adminiſtrators, or might be in ſuſpenſe till probate of the will, or adminiſtration taken out; and if the officer ſhould die indebted, ſo that none would prove his will, or take out adminiſtration, then there would be no officer at all, and executors or adminiſtrators would be in by act of law, without allowance of the court. Alſo, it might be a queſtion, if ſuch office ſhould not be forfeited by outlawry, or be aſſets in the executor's hands; and many other inconveniencies would follow if ſuch grant for years were allowed. For the ſame reaſons it was held likewiſe, that the offices of *cuſtos brevium*, chirographer, clerk of the pipe of the king's ſilver, or of the crown, remembrancer, or chamberlain of the Exchequer, prothonotaries, and other officers in the ſeveral courts of juſtice, could not be granted for years. 9 Co. 27. Roll. Abr. 847. 2 Roll. Abr. 153. Cro. Car. 587. Jon. 563. Hob. 153. 3 Mod. 145. * The power of appointing the marſhal of the King's Bench priſon, reveſted in the crown, by 27 G. 2. c. 17. which *vide*.

But ſuch offices as do not concern the adminiſtration of juſtice, but only require ſkill and diligence, may be granted for years, becauſe they may be executed by deputy, without any inconvenience to the publick; therefore, where a grant for years was made of the office of garbler of ſpices in *London*, it was adjudged to be a good grant, or at leaſt a good appointment for years, within the intent of the ſtatute of 1 *Jac.* 1. *c.* 19. Hard. 46. 353. Jones v. Clerk.

The office of regiſtrar of policies of aſſurance in *London*, concerning merchants, was granted by the king for years, and adjudged to be a good grant, becauſe it did not concern the adminiſtration of juſtice in any court, but required only the ſkill of writing after a copy. So, the office of making and ſealing *ſubpœnas* was granted for years, and allowed to be good; and there, ſeveral precedents are cited of offices granted for years; as, firſt, offices in which the ſafety of the realm was concerned; as, the office of warden of a haven or port by *H.* 6., of gunpowder, 1 *Car.* 1., of making gunpowder by *Car.* 2. Alſo, offices concerning the trade of the realm have been granted for years; as, 1 *H.* 7. of the exchange of money; 18 *H.* 8. of gauger; 17 *R.* 2. of aulnager Hard. 351., &c. Hob. 146. Dyer, 303. 3 Keb. 80. 1 Vern. 11, 12.

nager though a ſeal belongs to it, with which the officer is intruſted; of the letter-office, 13 *Car.* 1. Alſo, offices in courts of juſtice have been granted for years; as, the office of ſurveyor of the green-wax; of the *6 d.* writs in Chancery and *ſubpœnas;* of comptroller and cuſtomer, and making out proceſs in *C. B.* All theſe and ſeveral others have been granted for years; but no diſpute having been made of the validity of them, how far ſome of them would hold at this day may be a queſtion.

2 Lev. 245. 2 Jon. 126. 6 Mod. 57. But, where one made a grant for years of the ſtewardſhip of a court-leet and court-baron, this was held void as to the court-leet, being a judicial office, but good as to the court-baron, being only miniſterial, and the ſuitors judges thereof: but the grant appearing afterwards to be for years, determinable on the death of the leſſee, it was held good for both; becauſe there was no danger of its coming to executors or adminiſtrators.

4 Co. 33. a. (*a*) Where a ſheriff may grant to his under-ſheriff to hold at will only, The king may grant the office of ſheriff * (*a*) *durante beneplacito;* and although he may determine the office at his pleaſure, yet he cannot determine it for part, as for a vill, *&c.* nor can he abridge the ſheriff of any thing incident or appurtenant to his office.

for he is his deputy, and according to the nature of a deputation muſt be removable, as an attorney is. Hob. 13. Noy, 55. ——— * See the ſtat 24 G. 2. c. 48.

Dyer, 176. pl. 28. The king may grant the office of chirographer of the Common Pleas *quamdiu nobis placuerit*, and it is good.

9 Co. 97. 3 Mod. 149. † See 24 G. 2. c. 17. The office of the king's *Marſhalſea* † may be granted at will.

Co. Lit. 42. a. If the king grants an office at will, and grants a rent to the patentee for his life, for the exerciſe of his office, this is no abſolute eſtate for life; becauſe the rent being granted on account of the office, and in diſcharge of the duty of the place, whenever his intereſt in the office ceaſes, the rent is determined; becauſe it was firſt granted for the exerciſe of the office, which he is no further concerned in.

Co. Lit. 3. b. (*b*) So, an office partly miniſterial and partly judicial, cannot be granted in reverſion; as the office of auditor of the Court of Wards. 11 Co. 4. 2 Roll. Abr. 152. A (*b*) judicial office cannot be granted in reverſion; for though the grantee be never ſo fit at the time of the grant, he may become unfit when it takes effect.

But for the difference between the king's grant of an office in reverſion, and ſuch a grant in reverſion by a ſubject, *vide* Dyer, 80. pl. 58. 259. pl. 18. 3 Leon. 31. Hob. 150. 2 Roll. Abr. 154. Cro. Car. 279. 11 Co. 4. 8 Co. 55. b. Carth. 350. 2 Salk. 465. pl. 2. 4 Mod. 275. The king may grant an eſtate in an office to commence *in futuro*, or upon a contingency, which eſtate ſhall ariſe out of the inheritance he hath in the office itſelf, for ſuch he may have in point of intereſt, though not in execution.

Cro. Car. 279. 555. Jon. 310. 2 Roll. It hath been adjudged, that the office of regiſtrar being uſually granted as well in reverſion as poſſeſſion, a grant to one of ſuch office for life, when by the death or ſurrender of the preſent officer it

it ſhall become void, is good; for though there is no reverſion of an office, unleſs it be an office of inheritance, yet it may well be granted in reverſion, *habend.* after the death of the preſent officer; which is no more than a proviſion of a perſon to ſupply it when it becomes void; and if ſuch proviſion has been uſually made, the cuſtom and uſage (*a*) give ſanction to it. Abr. 153. March, 38. 3 Leon. 31. (*a*) But unleſs there have been ſuch uſage, it is not grantable in reverſion. 2 Vent. 188.

## (I) Offices, by whom to be executed, and who are incapable thereof.

IF an office, either of the grant of the king or ſubject, which concerns the adminiſtration, proceeding, or execution of juſtice, or the king's revenue, or the commonwealth, or the intereſt, benefit, or ſafety of the ſubject, or the like; if theſe or any of them be granted to a man that is unexpert, and hath no ſkill and ſcience to exerciſe or execute the ſame, the grant is merely void, and the party diſabled by law, and incapable to take the ſame *pro commodo regis & populi;* for only men of ſkill, knowledge, and ability to exerciſe the ſame, are capable to ſerve the king and his people. An (*b*) infant therefore is not capable of an office of ſtewardſhip of the court of a manor, either in poſſeſſion or reverſion. Co. Lit. 3. b. (*b*) That an infant cannot be a ſteward, for he cannot by intendment execute it; much leſs may he aſſign it over. Cro. Eliz. 636-7. *per* Popham. ——But a miniſterial office may be granted to an infant, in poſſeſſion or reverſion, for he may exerciſe it by a deputy. 11 Co. 4. a.—As, where the office of regiſtrar to the Biſhop of *Rocheſter* was granted to *J. S.* who was an infant of twelve years of age at the time of the grant, *habend.* after the death of *J. D.* (who was the regiſtrar in poſſeſſion) for his life, to be exerciſed by him or his deputy, and afterwards *J. D.* died, *J. S.* being of the age of thirty; this was held a good grant at the time of making of it, the office being to be exerciſed by him or his deputy. Cro. Car. 279. 2 Roll. Abr. 153. Young v. Stowel. Cro. Car. 555-6. March, 38. S. P. adjudged. 4 Mod. 279. 2 Vent. 188. Pollexf. 136. S. P. cited, and adjudged to be law.

Lord *Broke* gave the office of chief prothonotary to *G.*, but he appearing unfit, he revoked it, and granted it to *W.*, and a precedent was ſhewn, where the office of clerk of the crown was granted by the king to one *Vintner*, who exhibited his patent, and deſired to be admitted; and the juſtices of the King's Bench refuſed to admit him (*c*), becauſe he never had exerciſed that office, nor ever was brought up in it; and recommended a fit perſon, whom the king *ore tenus* commanded to be admitted, and was ſworn. Dyer, 150. b. Cro. Car. 557. S. C. cited. 2 And. 128. S. P. (*c*) If an office of learning be given to a man utterly inſufficient, it is void; and though it be to him and his aſſigns, or to be exerciſed by a ſufficient deputy, it mends not the caſe, but it muſt radically veſt in the firſt grantee, before it can go in procuration or deputation to any other. Hob. 148.——If the king ſhould grant an office in *B. R.* the judges may remove ſuch an officer for inſufficiency, becauſe they are proper perſons to judge of his abilities. 4 Mod. 30.

The Biſhop of *Glouceſter* granted the office of chancellour of his dioceſe to one *S.*, who, becauſe he was unſkilful in the civil and canon law, was adjudged incapable. Car. 95. Latch 228. Noy, 91. Palm. 450. And in 4 Mod. 27. S. P. was argued, where the grant was to him or his deputy; in which caſe it was inſiſted, that inſufficiency did not create an original incapacity, ſo as to avoid the grant; becauſe that he might appoint a deputy learned in thoſe laws, and that if he appointed one who was unſkilful, it would be a forfeiture of the office.

If

Cro. Jac. 17. Lady Ruſſel's caſe.

If the king by his letters patent grants the office of cuſtody of the caſtle of *Dunnington* to a woman, to be exerciſed by her, or her ſufficient deputy, the grant is good, and it ſhall not be intended a caſtle of war rather than a private houſe.

(a) How far diſſenters from the church are rendered incapable or excuſed from ſerving any publick office, *vide* 2 Mod. 299. 2 Vent. 247. 2 Lev. 151. 184. 242. 2 Jon. 81. 137. 4 Mod. 269. Salk. 167. pl. 1. Skin. 574. Carth. 306. 5 Mod. 431. Comb. 315. 10 Mod. 101. 179. 11 Mod. 132. pl. 11. 12 Mod. 67. 2 Stra. 1193. Ld. Raym. 29. & *ſupra* (E).

By the 3 *Jac.* 1. *c.* 5. it is enacted, "That no (*a*) popiſh recuſant convict ſhall exerciſe any publick office or charge in the commonwealth, but ſhall be utterly diſabled to exerciſe the ſame by himſelf or his deputy."

## (K) Of the Manner of executing them: And herein of Offices that are incompatible, and where an Office may be executed by two or more Perſons.

4 Inſt. 100.

OFFICES are ſaid to be incompatible and inconſiſtent, ſo as to be executed by the ſame perſon, when from the multiplicity of buſineſs in them they cannot be executed with care and ability; or when their being ſubordinate and interfering with each other, it induces a preſumption they cannot be executed with impartiality and honeſty. And this my Lord *Coke* ſays is of that importance, that if all offices civil, eccleſiaſtical, &c. were only executed each by a different perſon, it would be for the good of the commonwealth, advancement of juſtice, and preferment of deſerving men.

Inſt. 100. (*b*) Sid. 305.

And hence it is, that the king himſelf, though he may grant an office, yet cannot execute it himſelf (*b*); nor can the Ch. Juſt. of *B. R.* be prothonotary or clerk of the papers, though he may diſpoſe of thoſe places.

4 Inſt. 310.

So, if a foreſter, by patent for his life, is made Juſtice in *Eyre* of the ſame foreſt *pro hâc vice*, the foreſterſhip is become void, for theſe offices are incompatible; becauſe the foreſter is under the correction of the Juſtice in *Eyre*, and he cannot judge himſelf. The ſame law of a warden of a foreſt, and of a Juſtice in *Eyre* of the ſame foreſt.

Sid. 305. 2 Keb. 92. Rex v. Pergam. (*c*) Upon a writ of error upon a judgment in *Northampton*, the error aſſigned was, that the *venire facias* was awarded to the two bailiffs, and the court was held before the mayor and the two bailiffs, ſo that the bailiffs being judges

Upon a *mandamus* to reſtore one to the place of town-clerk, it was returned, that he was elected mayor and ſworn, and therefore they choſe another town-clerk; and the court were ſtrongly of opinion that the offices were incompatible, becauſe of the ſubordination. A coroner made ſheriff ceaſes to be coroner; ſo, a parſon made a biſhop; a judge of *C. B.* made a judge of *B. R.*, and the town-clerk's office is to be attendant on the mayor. In re-diſſeiſin the ſheriff is miniſter and judge, but that is by act of parliament; and by the (*c*) cuſtoms of ſome places the mayor has other offices annexed to his place of mayor, but here they are diſtinct; and the court recommended the caſe to the town for an amicable compoſure.

judges of the court could not be officers; but the court conceived it might be good by cuſtom, and not error; for the judges are not the bailiffs only, but the mayor and bailiffs; and it is a common courſe in many of the ancient corporations, where the bailiffs are judges, or the mayor or they be judges, yet in reſpect of executing proceſs they be the officers alſo. Cro. Car. 138. Crane v. Holland. 4 Mod. 66. S. C. cited. [But this caſe, as is well obſerved by Buller, J. will not aſſiſt in the determination of the point in queſtion. For in a writ of error in a civil action, the queſtion, Whether the judges in the court below are properly judges or not? can never be decided: it is ſufficient, if they be judges *de facto*. 2 Term Rep. 87.]

[The corporation of *Haſtings* conſiſts of a mayor, twelve jurats, freemen, and a town-clerk, which latter is elected by the others, and the jurats ſit as judges in a court of record, and hold pleas of the crown; and any two of them with the mayor may hold a court, but all the jurats have a right to attend as judges without being ſummoned. It was holden, that the acceptance of the office of town-clerk, though an inferior office, vacated that of jurat, for that theſe two offices were incompatible, notwithſtanding there were ſeveral inſtances within the borough of their having been veſted in the ſame perſon.] Milward v. Thatcher, 2 Term Rep. 81.

The cited authorities are to be forthwith considered in this case. P. L.

Miniſterial offices may be granted to two, and ſo may alſo ſome judicial offices, which are eſtabliſhed by act of parliament; but ancient offices cannot regularly be granted to two, nor otherwiſe than they have been. However, it ſeems to be in the diſcretion of the judges, if they ſee an office in their courts comprehend too much for one man to execute it, to put in more. But this muſt be where it is granted to ſeveral as one office; for if divided to two or three, the preſcription is interrupted, and it is not a grant of the ancient office. 4 Mod. 17. 4 Inſt. 146. Lev. 1. Keb. 1. Sid. 40. *& vide* Cro. Car. 138. 259. Jon. 263. Hob. 214.

Therefore, a grant of the office of chief prothonotary of the Common Pleas to two hath been held void. 2 Roll. Abr. 152. Hob. 153. 3 Mod. 145. 4 Mod. 17. cited.

So, a grant to two to be chief juſtices of any of the benches hath been held void; but a grant to two to be clerks of the crown is good. 2 Roll. Abr. 152. 11 Co. 3.

If a grant be made to two of the office of one of the auditors of the Court of Wards, it is good; yet it is but one office, and partly judicial; but this is by the 32 *H.* 8. *c.* 46. 11 Co. 2. Auditor Curl's caſe, 2 Roll. Abr. 152. 4 Mod. 18. S. C. cited.

The office of foreſter of *Waltham* foreſt was granted to two, and held good. Dyer, 167. a.

The clerk of the King's Bench office had granted the office of clerk of the papers to *A.* and *B.*, and the longeſt liver of them; *B.* makes a parol ſurrender, and prays that *C.* ſhould be admitted in his room, which was done accordingly; *B.* dies; *A.* commenced a ſuit againſt *C.*, ſuppoſing that he had no right; but upon the trial it appeared that the plaintiff agreed that *C.* ſhould be admitted, which was looked upon as a ſurrender of the former grant, and the taking of a new one; and it was ruled accordingly. Vent. 296. 2 Mod. 95.

The king granted the office of comptroller of the cuſtoms in the port of *Exeter*, *durante beneplacito* to two; one died; and the queſtion was, Whether the other ſhould have the whole by ſurviverſhip? *Et per cur.* He ſhall not, for there ſhall be no ſurvivorſhip 2 Mod. 260. Anis v. Stukely.

ſhip of an office of (a) truſt, if it is not granted to them and the ſurvivor.

(a) It is ſaid in general, *per cur.* that if an office be granted to two, and one die, the office does not ſurvive, but determines; as, if two ſheriffs, and one die, the other cannot act: otherwiſe, if granted to two and the ſurvivor of them. 2 Salk. 465. pl. 1.

Carth. 213. Jones v. Bew. Show. 283. 4 Mod. 16. 2 Salk. 465. pl. 1. 12 Mod. 10. S. C.

The Biſhop of *Landaff* by deed granted the office of chancellour or commiſſary of his dioceſe to Doctor *Lloyd* and Doctor *Jones*, to hold the ſame *conjunctim & diviſim* to them and to the *ſurviver of them;* Doctor *Lloyd* died, and the ſucceſſor of the biſhop granted the office to another, who ſued *Jones:* it was agreed by counſel on both ſides, that this office had been anciently and uſually granted in this manner; and on a caſe ſtated out of Chancery, and referred to the Judges of *B. R.*, the only queſtion was, Whether this was ſuch a judicial office as could be granted in this manner? And after ſeveral arguments it was adjudged, that this was a good grant; and the principal reaſon of the judgment was, becauſe of the long and conſtant uſage; and it was ſaid, that the offices of moſt of the biſhopricks in *England* are and have been conſtantly ſo granted.

## (L) Of the Execution of an Office by Deputy: And herein of Superiors being anſwerable for their Deputies.

(b) A deputy is ſaid to be one who occupieth in right of another, and for whom regularly his ſuperior ſhall anſwer.

AS to the execution of an office by (b) deputy, we muſt obſerve, that there are ſome offices which in their nature and conſtitution imply a power or right of exerciſing them by deputy; ſome that in their nature cannot be exerciſed by deputy; and ſome, that by having ſuch a power annexed to the grant or inſtitution may be ſo exerciſed, though without ſuch an expreſs proviſion they could not.

Perk. § 100. ——The difference, ſays my Lord *Coke*, between a deputy and an aſſignee is, that an aſſignee is a perſon who has an eſtate or intereſt in the office itſelf, and does things in his own name, for which his grantor ſhall not anſwer, unleſs in ſome ſpecial caſes; but a deputy has not any eſtate or intereſt in the office, but is as ſervant to the officer, and does every thing in the name of the officer, and nothing in his own name, and for whom the grantor ſhall anſwer. 9 Co. 49. But *per* Holt, C. J. it is ſaid, that a deputy cannot regularly have leſs power than his principal, cannot be reſtrained from exerciſing any part of the office by covenant, or otherwiſe, muſt regularly act in his own name, unleſs it be in caſe of an under-ſheriff, who acts in the name of the high ſheriff, becauſe the writs are directed to him. Salk. 95.

2 Inſt. 382. Plow. 380. 9 Co. 47. Style, 357.

Offices of inheritance for years, and thoſe which require only a ſuperintendency, and no particular ſkill, may regularly be exerciſed by deputy; ſuch as that of (c) earl marſhal of *England*, foreſter, park-keeper, &c.

(c) The office of high conſtable of England may be exerciſed by deputy. Keilw. 171. a. ——John Wiltſhire held lands in Heyden in Eſſex by grand ſerjeanty, to hold a towel when the king ſhould waſh his hands before dinner the day of the coronation; but he having no dignity was allowed to make a deputy. Co. Lit. 107. b. ——Anne, wife of the Earl of Pembroke, held lands of the king to perform the office of napery at his coronation; but becauſe a woman could not do it in perſon, ſhe was allowed to make a deputy: So, the heir of the ſaid earl was by tenure to carry the gold ſpurs before the king at his coronation; but becauſe he was not of age, he was allowed to make a deputy. Co. Lit. 107. b.

A ſheriff

A ſheriff, though he is an officer made by the king's letters patent, and though it be not ſaid that he may execute his office *per ſe vel ſufficientem deputatum ſuum*, yet he may make a deputy, which is the under-ſheriff againſt whom actions may be brought by the parties grieved. Roll. Rep. 274. Phelpe v. Winſcombe.

And it is ſaid in general, that when an officer hath power to make aſſigns, he may (*a*) implicitly make a deputy. 9 Co. 49. (*a*) A biſhop on his creation hath power of appointing deputies. 2 Sid. 138. The office of clerk of the outlawries of the Common Pleas belongs to the Attorney-General, who exerciſeth it by deputy. 4 Inſt. 101.

A judicial officer cannot, it is ſaid, make a deputy, unleſs he hath a clauſe in his patent to enable him; becauſe his judgment is relied on in matters relating to his office, which might be the reaſon of the making of the grant to him; neither can a miniſterial officer depute one in his ſtead, if the office be to be performed by him in (*b*) perſon; but when nothing is required but a ſuperintendency in the office, he may make a deputy. 3 Mod. 150. cited *arguendo*. (*b*) Therefore the eſquire of the king's perſon cannot aſſign his office; for the law ſuppoſes it to have been given him in conſideration of his diligence, fidelity, and ſkill. 11 E. 4. 1. 2 Roll. Abr. 154.——The office of carver, being a perſonal truſt, cannot be aſſigned. Dyer, 7. b.

It is clear, that the Judges of *Weſtminſter-hall*, as well as all (*c*) others having judicial authority, muſt hold their courts in their proper perſons, and cannot act by deputy, nor any (*d*) way transfer their power to another. 9 E. 4. 30, 31. a. Bro. tit. Judges, 11. Perk. § 101. (*c*) But the judges of the eccleſiaſtical courts may act by deputy, as the ancient cuſtom hath been. Latch. & *vide ſupra* letter (D). (*d*) And therefore where the Council of the Marches of Wales referred a ſuit to certain perſons to hear and determine it; this was held to be illegal, and a prohibition awarded to the court, to ſtay their proceedings againſt the party for refuſing to obey the order of the referees. Roll. Abr. 32. March, 102.——So, juſtices of the peace cannot delegate a certain number of themſelves, and inveſt them with a power to make rates and orders. 6 Mod. 87.

A coroner cannot make a deputy, nor an eſcheator; becauſe theſe are judicial offices, which they muſt exerciſe in perſon: but it is ſaid, that the king by ſpecial commiſſion may appoint a deputy eſcheator, to inquire by office of the death of a nobleman, or, as the book ſeems to hold, of any other perſon, though under that degree. Lill. Reg. 446.

It is held, that the office of conſtable being wholly miniſterial, and no way judicial, he may appoint a deputy to execute a warrant directed to him, when by reaſon of ſickneſs, abſence, or otherwiſe, he cannot do it himſelf; for the publick good requires, that there ſhould be always ſome officer ready at hand to execute ſuch warrants; and the too rigorous reſtraint of the ſervice of them to the proper officer could not but ſometimes cauſe a failure of juſtice. But it is ſaid, that a conſtable cannot make a deputy, without ſome ſuch ſpecial cauſe. March, 30. Roll. Abr. 591. Moor, 845. Crompt. 222. 3 Bulſt. 77. Dalt. c. 1. Roll. Rep. 274. Sid. 355. Lev. 233. 2 Keb. 309.

[The high conſtable appointed a deputy to billet ſoldiers under the mutiny act. This appointment was by parol only, and the deputy was not ſworn. By the court.—The high conſtable hath power by the act to billet ſoldiers; and he may appoint a deputy to this particular miniſterial act. This is a miniſterial, not a Midhurſt v. Waite, 3 Burr. 1259. 1 Bl. Rep. 350. S. C.

judicial, act; and a conſtable may appoint a deputy to do miniſterial acts.]

Keb. 639. *per* Windham, J. & *vide* 1 Lev. 76.

It ſeems the better opinion, that a (*a*) recorder of a town cannot make a deputy, without a ſpecial grant or cuſtom for that purpoſe, being a judicial office relating to the adminiſtration of juſtice.

(*a*) A bailiff of a liberty may have a deputy. Cro. Jac. 241-2. adjudged.

Roll. Abr. 752. 754. Style, 183. 391. 203. 219. 2 Keb. 385.

And therefore, where a writ was directed to the mayor, aldermen, and recorder of *Lancaſter*, and the record was certified by the mayor, aldermen, and deputy recorder, without ſhewing that the recorder had power to make a deputy; the return was held naught.

39 H. 6. 34. 2 Roll. Abr. 154.

It is held, that the marſhal of the King's Bench, having the inheritance of the office, with power to grant the ſame for life, cannot notwithſtanding give power to ſuch grantee for (*b*) life to make a deputy.

(*b*) That neither tenant at will nor tenant for life can make a deputy, if, in the very grant made to them, there is not an expreſs clauſe for the execution of the office *per ſe vel ſufficientem deputatum ſuum.* 3 Mod. 147. —‡ See the ſtat. 27 G. 2. c. 17. whereby the power of appointing the marſhal. is reveſtel in the crown.

Bryant's caſe, 4 Term Rep. 716. 5 Term Rep. 511.

[The offices of clerk of the papers, and clerk of the day-rules in the King's Bench Priſon, cannot be executed by deputy.]

Cro. Eliz. 187. Watkins v. Johns. Salk. 95. Ld. Raym. 658. Parker v. Kett.

The office of aulnage, or ſealing of cloths, cannot be exerciſed by deputy, being an office of truſt, unleſs there be a clauſe in the patent for that purpoſe.

Regularly, a deputy cannot make a deputy (*c*), becauſe it implies an aſſignment of his whole power, which he cannot aſſign over. But, if *A.* be appointed ſteward of a copyhold court, to be exerciſed *per ſe vel deputatum ſuum*, and he appoint *B.* his deputy, who hath long exerciſed the ſaid office, and *B.* authoriſe *C.* and *D.* jointly and ſeverally, to take a ſurrender of a copyhold tenement from *J. S.*, which is done by *C.*, without reciting his power, or any relation had to it, the ſurrender is good, being only a ſingle act; for the conſtitution in this manner gives *C.* the colour and reputation of an authority to act as a ſteward (*d*) *de facto*; and what he does as ſuch is ſufficient among the tenants, for they have no power to examine his authority, nor is he to render them any account of it.

(*c*) For a deputy being only one who is authoriſed himſelf, he cannot delegate that authority; and if a deputy might make a deputy, ſo ſuch ſecond deputy, and ſo *ad infinitum*, which would be highly inconvenient. Lil. Reg. 446. (*d*) Where the deputy of a deputy of a cuſtomer, ſitting in the cuſtom-houſe with other officers, and acting as an officer, his acts were held good as an officer *de facto*, though not *de jure*; and that it would be very hard to put thoſe who have to do with cuſtom-houſe officers, to inquire into the legality of their inſtitution. Cro. Eliz. 534.

4 Inſt. 291.

The Chief Juſtice in *Eyre* may by the ſtatute of 32 *H.* 8. *c.* 35. make his deputy; yet all the writs of ſummons ancient and late are *coram* the *juſtice itinerant aut ejus deputato.*

Leon. 219. 3 Mod. 147.

It is ſaid, there cannot be an officer without deed, (*e*) nor can there be any deputation of an office without deed, being a matter which lies in grant.

(*e*) A deputation of an office is in its own nature grantable by parol; and therefore though it ſhould happen to be granted by writing, yet ſince it is in itſelf grantable by parol, it may be revoked by parol. Ca. Law & Eq. 74.

But the high ſheriff may make an under-ſheriff, or his deputy, without deed, for he claims no intereſt in the office, but as ſervant; and therefore (*a*) where an action on the caſe was brought againſt the deputy of a ſheriff for an eſcape, who pleaded, that the ſheriff made him his deputy to take bail of priſoners, and that he took bond, *&c.*, and ſhewed no deed of deputation; yet the plea was held good on a demurrer.

3 Mod. 150. (*a*) Cro. Eliz. 67. Clecott v. Dennys, adjudged. —[That a high conſtable may appoint a deputy by parol, ſee *ſupra* Midhurſt v. Waite, 3 Burr. 1259.]

By the ſtatute of 2 *H.* 6. *c.* 10. it is ordained, "That all officers "made by the king's letters patent within the king's courts, who "have power and authority, by virtue of their offices of old time "accuſtomed, to appoint clerks and miniſters within the ſame "courts, ſhall be charged and ſworn to appoint ſuch clerks and "miniſters for whom they will anſwer at their peril."

4 Inſt. 114, 115. 2 Lev. 121.

Upon the rule of *reſpondeat ſuperior*, regularly, all officers ſhall anſwer for their (*b*) deputies, in the ſame manner as if the act were done by themſelves, unleſs it be in criminal caſes; and therefore, ſheriffs ſhall anſwer for the eſcapes, amerciaments, *&c.* of their deputies, *&c.*

4 Co. 33. 2 Inſt. 466. 2 Lev. 160. Dyer, 278. (*b*) But if a clerk in an office miſenter any thing, he himſelf ſhall be puniſhed, and not the maſter of the office, becauſe he takes a fee for it. Leon. 146. & *vide* Hob. 13.

[A conſtable ſhall anſwer for his deputy upon any miſcarriage, unleſs the deputy is allowed and ſworn; for then the deputy is conſtable.]

Wood's Inſt. b. 1. c. 7.

If the coroner be inſufficient, the whole county who made election and choice of him ſhall *tanquam electoꝛ & ſuperior* anſwer for him.

2 Inſt. 466. —So, the lord of a franchiſe ſhall anſwer for a bailiff put in by him. 2 Lev. 160.

If a perſon be appointed cuſtomer or collector of the cuſtoms in a certain port, who is empowered by the ſtatute 1 *Eliz.* *c.* 12. to appoint a deputy, and a deputy ſo appointed by him conceal the goods of a merchant, and the cuſtomer himſelf, being ignorant thereof, return on oath into the Exchequer the cuſtoms of this port, according to the information of his deputy; he ſhall, notwithſtanding his ignorance, anſwer for the act of his deputy, and ſhall forfeit treble the value of the merchandize, and be fined, *&c.* purſuant to the ſtatute 3 *H.* 6. *c.* 3.

Dyer, 238. b. pl. 38. adjudged in the Exchequer-chamber, as Saunders, Ch. Bar. informed the reporter.

If a deputy ſuffers eſcapes, it is a forfeiture by the principal, unleſs ſuch deputation be made for life, and then the grantee for life only forfeits the office.

Dyer, 278. Cro. Eliz. 534. Poph. 119. 2 Lev. 71. Raym. 216. 3 Mod. 146. 3 Lev. 288. like point.

It is ſaid, that if one put in a deputy, without any allowance of ſalary, he has no remedy but by *quantum meruit*, and that againſt his principal.

6 Mod. 235.

It hath been held, That though a *mandamus* will not lie for a deputy, that yet it lies for him who deputes him, to have ſuch his deputy either admitted or reſtored; for that otherwiſe he might be deprived of his power to make a deputy. And in this caſe, on a *mandamus* to reſtore a deputy ſecretary of the courts of Marches,

Lev. 306. 2 Keb. 738. 742. Vent. 110, 111. S. C. adjudged, becauſe re-

turns muſt be certain, there being nothing to be pleaded to them.

it was held to be no good return, that at the time of the writ delivered he was not conſtituted deputy, for that they might have put him out of his place before the writ came to them.

## (M) Of the Forfeiture of an Office.

11 E. 4. 1. b. 2 Roll. Abr. 155.

IT is laid down in general, that if an officer acts contrary to the nature and duty of his office, or if he refuſes to act at all, that in theſe caſes the office is forfeited.

Co. Lit. 233. 9 Co. 50. 3 Mod. 143. (a) If a ſheriff ſuffer felons to eſcape voluntarily, it is a forfeiture of his office, though the office be for life or in fee. Dyer, 151. b. Sir John Savage's caſe. 2 Roll. Abr. 155. 2 Bulſt. 58. 3 Mod. 146. S. P.

But herein it will be neceſſary to conſider more minutely, what ſhall be ſaid ſuch acts as are contrary to the duty of his office, and how far the ſame, whether they be acts of omiſſion or commiſſion, amount to a forfeiture; wherein it hath been clearly agreed, that a (a) gaoler by ſuffering voluntary eſcapes, by abuſing his priſoners, by extorting unreaſonable fees from them, or by detaining them in gaol after they have been legally diſcharged and paid their juſt fees, forfeits his office; for that in the grant of every office it is implied, that the grantee execute it faithfully and diligently.

30 H. 6. 33. 2 Roll. Abr. 155. 2 Vern. 173. & *vide* ſtat. 8 & 9 W. 3. c. 27. tit. Gaol and Gaoler, letter (D), vol. 3. 353.

But it is held, that one negligent eſcape is not a forfeiture, though one voluntary one is, but that two negligent eſcapes amount to a forfeiture.

6 Co. 50. Co. Lit. 233. b. And where non-attendance or non-uſer of an office is a forfeiture, *vide* 2 Roll. Abr. 155. Keilw. 194. Dyer, 151. 3 Mod. 146. 4 Mod. 29. —That non-attendance is a good cauſe of the forfeiture of the office of recorder, 1 Salk. 435. [2 Ld. Raym. 1237.

There are, ſays my Lord *Coke*, three cauſes of forfeiture or ſeizure of offices by matter in deed. 1*ſt*, By abuſer. 2*dly*, Non-uſer. 3*dly*, Refuſal. 1*ſt*, By abuſer; as by a marſhal, or other gaoler's permitting eſcapes. 2*dly*, By non-uſer; in which there is this difference, when the office concerns the adminiſtration of juſtice or the commonwealth, the officer *ex officio* ought to attend without any demand or requeſt, there, by non-uſer or non-attendance the office is forfeited: but, where an officer is not obliged to attend, but upon demand or requeſt made by him whoſe officer he is, there, without ſuch demand or requeſt, there can be no forfeiture. And herein alſo, my Lord *Coke* in another place takes the following diverſity, *viz.* that non-uſer of itſelf, without ſome ſpecial damage, is no forfeiture of private offices, but that it is otherwiſe of a publick one, which concerns the adminiſtration of juſtice. 3*dly*, As to refuſal, he ſays, that in all caſes where an officer is bound upon requeſt to exerciſe his office, if he does not do it upon requeſt, he forfeits it; as, if the ſteward of a manor be requeſted by the lord to hold a court, if he does not do it, it is a forfeiture.

But the bare being abſent, without any particular circumſtance of aggravation, will not induce a forfeiture. Rex v. Corporation of Wells, 4 Burr. 199.] ——Where to a *ſcire facias* to repeal the patent of a ſearcher of a port for non-attendance, the officer pleaded that he was ſick, and that he was confined in priſon at the king's ſuit, *vide* Cro. Car. 491, 492.

The

The king granted to the abbot of *St. Alban* to have a gaol, and to have a gaol-delivery, and divers persons were committed to that gaol for felony; and because that the abbot would not be at the expence of making deliverance, but had detained persons in prison a long time, it was resolved, that the abbot had for that cause forfeited his franchise, and that the same might be seized into the king's hands. 2 Inst. 43.

If a *scire facias* be brought to repeal the patent of a searcher of the customs in a port-town for non-attendance; and upon evidence it appear, that such a ship was imported and unladen, and others also were exported beyond seas, not being searched, and that when these ships were so imported or exported, neither the searcher himself, nor any of his deputies were there, though it does not appear to be by negligence or voluntarily, yet this voluntary absence and neglect, so as neither himself nor servants were there to search, is not only *crassa negligentia*, but a voluntary permission and forfeiture. Cro. Car. 491. The King v. Rooks, adjudged. 3 Mod. 146. S. C. cited.

So, if a gaoler should leave his prison doors unlocked, and the prisoners escape, it is not only a negligent but a voluntary escape. Cro. Car. 492. *per cur.*

If conditions in law, which are annexed to offices, be not observed and fulfilled, the office is lost for ever, for these conditions are as strong and binding as express conditions; and therefore if the office of forester, *&c.* descend to an infant or feme covert, (where by law they may so descend) and these are not exercised by sufficient deputies, they become forfeited. Co. Lit. 233. b. 8 Co. 44. Cro. Car. 556. Hard. 11.

If a parker or a forester cut a tree, not for browse or reparations, this is a forfeiture in law of his office; because he breaks the condition in law annexed to his office, which is, that he will preserve the game, and not do any thing that may impair or destroy them. But other books hold, that the cutting down of trees is no forfeiture, if he leaves sufficient for browse and shade for the deer, and to cover them. 9 Co. 50. a. Cro. Eliz. 285. And. 29. Poph. 117. *Cont.* Moor, 707. 2 Mod. 121.

Insufficiency is an original incapacity which creates the forfeiture of an office. So, if a superior puts in a deputy into an office, which may be exercised by deputy, who is ignorant and unskilful, this is a forfeiture of the office. 4 Mod. 29. *arguendo.*

If the king grants an office in any of the courts at *Westminster*, the judges may remove such an officer for insufficiency, and are the proper persons to judge of his abilities. 4 Mod. 30. *arguendo.* —Where an officer may be removed, but cannot be abridged of his fee. Roll. Rep. 82-3.

A filazer of *C. B.* being absent two years, and having farmed out his office from year to year, without the licence of the court, was discharged by the Chief Justice, *ex assensu sociorum suorum*, by words spoken openly in court. And though there was no record made of the discharge, nor any legal summons for him to answer to any accusation, yet the discharge was held good. Dyer, 114. b. pl. 64. Roll. Abr. 155. S. C.

An officer was turned out, because that he *spoliavit quædam recorda contra officii sui debitum;* and it was objected, *1st*, That it was not certain enough, because not shewn what records; to which the court answered, that it would be prolix, and then he having Keb. 597. Pilkington's case. —— Clerk of the peace in-

dicted and removed for not delivering the records to the new *cuſtos rotulorum*.

having ſpoiled the records, they are not now to be had. 2d Objection, That it may be he did it by chance, and not wilfully; to which the court ſaid, that the concluſion *contra officii ſui debitum* included that. 4 Mod. 31, 32. Show. 282. 12 Mod. 13. [On the removal of the clerk of the peace, the evidence need not be ſet out in the order. Rex v. Lloyd, 2 Str. 996.]

Cro. Jac. 17, 18.

If *A.* hath the cuſtody of a caſtle with all profits, &c., granted to him for life, of which the inheritance hath been granted to *B.*, and *A.* refuſes *B.* to let him inhabit in the houſe, this is a forfeiture in *A.*

11 E. 4. 1.
20 E. 4. 56.
39 H. 6. 32.
22 Aſſ. 34.
8 H. 4. 18.
2 H. 7. 11.
14 H. 7. 1.
3 Mod. 146.

If tenant in tail of an office commit a forfeiture, this ſhall bind the iſſue, by force of the condition tacitly annexed by law to ſuch eſtate. But, if an officer for life commit a forfeiture, this ſhall not affect him who hath the inheritance. 2 Roll. Abr. 155. 7 Co. 34. Poph. 119. 2 Lev. 71. Raym. 216. 3 Lev. 288. Skin. 114. 2 Vern. 173. 2 Vent. 189. 269. Bridgm. 27.

Plow. 378. Sir Henry Nevil's caſe.

The Archbiſhop of *Canterbury* granted the office of guardian and keeper of *Alyngton* Park to Sir *Edward Nevil*, and to *Henry* one of his ſons, with a certain fee during their lives, and the longeſt liver of them, which was confirmed by the prior of *Chriſt Church, Canterbury*, to be exerciſed by them or their ſufficient deputy, for whom they ſhall anſwer; Sir *Edward* was attainted; and the queſtion was, if the king ſhould have the office by the attainder? and it was reſolved, that being only an office of ſkill and confidence, the ſame was not forfeited to the king, but that the ſurvivor ſhould hold the ſame with the profits incident thereto.

Plow. 180.

But, if the king grants an office which concerns truſt and diligence to two, and one of them is attainted, the entire office is forfeited to the king; for he cannot make one to occupy in common with another.

But for this *vide* Dyer, 155. 198. 211.
9 Co. 98.
Co. Lit. 233. Cro. Car. 60, 61.

Wherever an officer who holds his office by patent commits a forfeiture, he cannot regularly be turned out without a *ſcire facias*, nor can he be ſaid to be completely ouſted or diſcharged without a writ of diſcharge; for his right appearing of record, the ſame muſt be defeated by matter of as high a nature. Sid. 81. 134. 8 Co. 44. b. Roll. Abr. 580. 3 Mod. 335. 3 Lev. 288.

## (N) Where for Corruption and oppreſſive Proceedings Officers are puniſhable: And herein of Bribery and Extortion.

That if a man be made an officer by act of parliament, and miſbehave

THERE can be no doubt but that all officers, whether ſuch by the common law or made purſuant to ſtatute, are puniſhable for corruption and oppreſſive proceedings, according to the nature and heinouſneſs of the offence, either by indictment, attachment, action at the ſuit of the party injured, loſs of their offices, &c. himſelf in his office, he is indictable for it at common law, as is every publick officer, who miſbehaves himſelf in his office. 6 Mod. 96.

But

But beſides the puniſhment by indictment, information, &c., all courts of record have a diſcretionary power over their own officers, and are to ſee that no abuſes are committed by them, which may bring diſgrace on the court themſelves. Alſo, the court of King's Bench, by the plenitude of its power, exerciſes a ſuperintendency over all inferior courts, and may grant an attachment againſt the judges of ſuch courts for oppreſſive, unjuſt, or irregular practice, contrary to the obvious rules of natural juſtice. Dyer, 218. Palm. 564.

As to extortion by officers, it is ſo odious, (being more heinous, as my Lord *Coke* ſays, than robbery, as it is uſually attended with the aggravating ſin of perjury,) that it is puniſhable at common law by fine and impriſonment, and alſo by a removal from the office in the execution whereof it was committed; and is defined to be the taking of money by any officer by colour of his office, either where none at all is due, or not ſo much is due, or where it is not yet due. Co. Lit. 368. b. 2 Inſt. 209. 10 Co. 102. 2 Roll. Abr. 32. 57. Cro. Car. 438. 448. Raym. 315.

But the ſtated and known fees allowed by the courts of juſtice to their reſpective officers, for their labour and trouble, are not reſtrained by the common law, or by the ſtatute of *Weſtm.* 1. 3 *Ed.* 1. and therefore ſuch fees may be legally demanded and inſiſted upon, without any danger of extortion. 21 H. 7. 17. Co. Lit. 368.

Alſo it ſeems, that an officer, who takes a reward which is voluntarily given to him, and which has been uſual in certain caſes for the more diligent or expeditious performance of his duty, cannot be ſaid to be guilty of extortion; for without ſuch a *præmium* it would be impoſſible in many caſes to have the laws executed with vigour and ſucceſs. 2 Inſt. 210. 3 Inſt. 149. Co. Lit. 368.

But it has been always held, that a promiſe to pay an officer money for the doing of a thing which the law will not ſuffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made. Roll. Roll. 16. Roll. Rep. 313. Noy, 76. Jon. 65. Cro. Eliz. 654. Moor, 468. Cro. Jac. 103.

If an indictment of extortion charges *J. S.* with the taking of 50 *s.* as bailiff of a hundred *colore officii*, without (*a*) ſhewing for what he took it, this is good, at leaſt after verdict, for perhaps he might claim it generally, as being due to him as bailiff, in which caſe the taking could not be otherwiſe expreſſed. Sid. 91. The King v. Cover. (*a*) That an information for extortion muſt ſet forth the time when the offence was committed. 4 Mod. 101. 103.—That the court of King's Bench will not quaſh an indictment for extortion or oppreſſion, though erroneous, but will oblige the party to plead or demur to it. 5 Mod. 13.

As to bribery, it is ſaid, in a large ſenſe, to be the receiving or offering of an undue reward by or to any perſon whatſoever, whoſe ordinary profeſſion or buſineſs relates to the adminiſtration of publick juſtice, in order to incline him to do a thing againſt the known rules of honeſty and integrity; but that, in a ſtrict ſenſe, it ſignifies the taking of any thing valuable by one in a judicial place, of any one who hath to do before him any way, for doing his office, or by colour of his office, but of the king only. Alſo, it ſignifies the taking or giving a reward for offences of a publick nature, which manifeſtly tending to diſcourage men, and to Forteſcue de Laud. c. 51. 3 Inſt. 145. 149. Hob. 9. Cro. Jac. 65.

introduce all kinds of corruption, is highly puniſhable by the common law.

3 Inſt. 145. Leon. 291. Cro. Jac. 65. Ruſhw. Collections, Part. 1. fol. 31.

And theſe ſeveral offences are ſo odious in the eye of the law, that they are puniſhable not only with the forfeiture of the offender's office of juſtice, but alſo with fine and impriſonment. It is alſo ſaid, that at common law bribery in a judge, in relation to a cauſe depending before him, was looked upon as an offence of ſo heinous a nature, that it was ſometimes puniſhed as high treaſon, before the ſtatute 25 *Ed.* 3. *ſtat.* 5. *c.* 2.

Co. Lit. 233, 234.

Alſo, it is ſaid in general, that all wilful breaches of the duty of an office are forfeitures of it, and alſo puniſhable by fine, *&c.*; for ſince every office is inſtituted, not for the ſake of the officer, but for the good of ſome other, nothing can be more juſt than that he, who either neglects or refuſes to anſwer the end for which his office was ordained, ſhould give way to others who are both able and willing to take care of it, and that he ſhould be puniſhed for his neglect, or oppreſſive execution. But the particular inſtances wherein a man may be ſaid to act contrary to the duty of his office, though various, are yet ſo generally obvious, that it ſeems needleſs to endeavour to enumerate them.

# Outlawry.

Co. Lit. 128. Doct. & Stud. Dial. 2. c. 3. Roll. Abr. 802.

OUTLAWRY is a puniſhment inflicted on a perſon for a contempt and contumacy, in refuſing to be ameſnable to, and abide by, the juſtice of that court which hath lawful authority to call him before it. And as this is a crime of the higheſt nature, being an act of rebellion againſt the ſtate or community of which he is member, ſo doth it ſubject the party to divers forfeitures and diſabilities; for hereby he loſeth *liberam legem*, is out of the king's protection, *&c.*

Co. Lit. 128. 3 Inſt. 161.

And as to forfeitures for refuſing to appear, herein, the law diſtinguiſhes between outlawries in capital caſes, and thoſe of an inferior nature; for as to outlawries in treaſon and felony, the law interprets the party's abſence a ſufficient evidence of his guilt, and, without requiring further proof or ſatisfaction, accounts him guilty of the fact, on which enſues corruption of blood, and forfeiture of his whole eſtate, real and perſonal.

Plow. 541. 9 H. 6. 20. b. Show. Parl. Ca. 73.

But outlawry in leſs crimes, or in perſonal actions, does not occaſion the party to be looked upon as guilty of the fact, nor does it occaſion an entire forfeiture of his real eſtate; it is however,

ever, very fatal and penal in its conſequences; for hereby he is reſtrained of his liberty, if he can be found, forfeits his goods and chattels, and the profits of his lands while the outlawry remains in force.

It hath been ſaid, that anciently any one might as lawfully kill a perſon outlawed as he might a wolf, or other noxious animal (*a*); but that the law herein was changed in *Edw.* III.'s time, which provides, that a perſon outlawed ſhall be put to death by the ſheriff only, having lawful authority for that purpoſe. Co. Lit. 128. b. [(*a*) But this is a vulgar error, for though an outlaw was ſaid *caput greere lupinum*; yet it was never permitted any one who met him to kill him with impunity, but only in caſe he would not ſurrender himſelf peaceably; for if he made no attempt to fly, his death would be puniſhed as that of any other man: though it ſeems, that in the counties of Hereford and Glouceſter, in the neighbourhood of the Marches of Wales, outlaws were treated as having *capita lupina*. Bracton, 128. b.]

Alſo, from the heinouſneſs of the offence the ſheriff may, on a *capias utlagatum*, break open the houſe of the perſon outlawed; for it would be unreaſonable, that this privilege or protection, allowed of in other caſes, ſhould be extended to him who is declared a contemner and violator of the law; and therefore, the ſeizing him as an outlaw, doth imply the liberty of entering and ſeizing him whereſoever he lies hid. Cro. Car. 537. 4 Leon. 41. 2 Hal. Hiſt. P. C. 202. 9 Co. 91. Bulſt. 146. Cro. Eliz. 908. Moor, 606. 668. Yelv. 28. 2 Jon. 233.

But, as the puniſhment of outlawry is of a very ſevere nature, the law hath provided and takes great (*b*) care, that no perſon ſhould be outlawed without due notice, and apparent contempt to the court; as will appear under the following heads: 4 Burr. 2551. (*b*) That no perſon is to be outlawed *niſi per* five county-*gen terræ*. 2 Inſt. 47.—That three *capias*'s are required, and the party to be called in courts, a month between every court. Bract. Lib. 3. tract. 2. c. 11.

(A) In what Caſes Proceſs of Outlawry lies.

(B) By what Juriſdiction ſuch Proceſſes are to iſſue.

(C) Againſt whom Proceſs of Outlawry may be awarded: And herein,

1. Whether it may be awarded againſt a Peer.
2. Whether Proceſs of Outlawry may be awarded againſt an Infant.
3. Of awarding Proceſs of Outlawry againſt a Feme Sole or Covert, and the Proceedings thereon.
4. Of awarding Proceſs of Outlawry againſt ſeveral Defendants, and the Proceedings thereon.
5. Of awarding Proceſs of Outlawry againſt Principal and Acceſſary.

(D) What Forfeitures and Diſabilities an Outlawry ſubjects the Parties to: And herein,

1. Where it is of the ſame Effect with a Sentence or Judgment.

2. Of the Forfeiture as to Lands, Goods, &c., and herein of the Difference between Outlawries in Criminal and Civil Caſes, and of the King's and Party's Intereſt at whoſe Suit the Outlawry was had: *And herein,*

1. *Of the Difference between a Forfeiture in a Criminal and Civil Caſe.*
2. *What Things are forfeited by the Outlawry.*
3. *To what Time the Forfeiture ſhall relate.*
4. *Of the King's and Party's Intereſt at whoſe Suit the Outlawry was had, in the Eſtate and Effects of the Party outlawed, and their Remedies for the ſame.*

3. Of the Party's Diſability to bring any Action.
4. What further Diſabilities Outlawry ſubjects the Party to.

(E) Of the Regularity of the Proceedings on an Outlawry, and for what Errors it may be reverſed: And herein,

1. Where, for want of ſuch Proceſs as is required by Law, the Outlawry may be reverſed.
2. Where, for want of Form in ſuch Proceſſes, the Outlawry may be reverſed.
3. Where, for Variance in ſuch Proceſſes, the Outlawry may be reverſed.
4. Where, for a defective Execution and Return, the Outlawry may be reverſed: And herein,
   1. *To whom ſuch Proceſs is to iſſue and be directed.*
   2. *To what Place the Proceſs is to iſſue; and herein of the* Quinto exactus, *and Proclamation on an Outlawry.*
   3. *What ſhall be ſaid a good Execution and Return.*

(F) Of the Manner of reverſing an Outlawry: And herein of the Difference between Errors in Fact and in Law.

(G) What the Party muſt do in order to entitle him to a Reverſal: And herein,

1. Of appearing in Perſon, or by Attorney, and giving Bail.
2. Of ſuing out a *Scire facias.*

(H) The Effects and Conſequences of a Reverſal: And herein,

1. Where the Proceedings on the Reverſal are in the ſame Plight as if no Outlawry had been.
2. To what the Party ſhall be reſtored on Reverſal of the Outlawry.

## (A) In what Caſes Proceſs of Outlawry lies.

IT ſeems, that originally proceſs of outlawry only lay in treaſon and felony, and was afterwards extended to treſpaſſes of an enormous nature. And herein it is laid down by Serjeant (*a*) *Hawkins*, that proceſs of outlawry at this day lies in all appeals and in all indictments of treaſon or felony, and in all indictments of treſpaſs *vi & armis;* and on all returns of reſcous; and, as it ſeems probable, in all indictments of conſpiracy or deceit, or other crimes of a higher nature than treſpaſs *vi & armis;* but that it lies not on an action, or, an indictment on a (*b*) ſtatute, unleſs it be given by ſuch ſtatute, either expreſsly, as in the caſe of *præmunire;* or impliedly, as in caſes made treaſon or felony by ſtatute, or, where a recovery is given by an action in which ſuch proceſs lay before, as in the caſe of a (*c*) forcible entry.

Staunf. 192. Bro. tit. Outlawry, 26. 36. 59. Co. Lit. 128. b. Dyer, 213, 214.

(*a*) 2 Hawk. P. C. c. 27. § 113, 114. and ſeveral authorities there cited.

(*b*) It does not lie on an indictment on the ſtatutes againſt foreſtalling. 21 Ed. 4. 11. b. 2 Hal. Hiſt. P. C. 194.

(*c*) On a conviction by juſtices on view of a forcible entry proceſs of outlawry lies. 1 Keb. 563.——[Whether the common law gives proceſs of outlawry againſt crimes, being merely *conſtructive* breaches of the peace, was queſtioned in the caſe of the King v. Wilkes on a libel. But Lord Mansfield, in delivering the judgment of the court of King's Bench, ſpoke at large to prove, that ſuch proceſs lies againſt crimes *univerſally*. 4 Burr. 2537. However, the reaſoning on which this opinion is grounded, ſtands oppoſed by a former judgment of the Common Pleas on a prior caſe relative to the ſame offender. 2 Wilſ. 151. But it was adopted by both Houſes of Parliament, when, in Wilkes's caſe, they reſolved, that privilege of parliament doth not extend to *libels*. See Ann. Reg. 1764.]

Verbatim from my note in Co. Lit. 128. b.

In an aſſiſe a *capias pro fine* lies, and upon that, proceſs of outlawry, if the aſſiſe be found with force; but being a mixed action, as favouring of the realty, it is out of the ſtatute of additions, 1 *H.* 5. *c.* 5. which extends only to perſonal actions, appeals, and (*d*) indictments.

2 Inſt. 665. 6 Mod. 85.

(*d*) But a preſentment is the ſame with an indictment, on which proceſs of outlawry lies. 2 Leon. 200.

So, proceſs of outlawry lies in replevin, and is given by the ſtatute 25 *E.* 3. *c.* 17. which gives the *capias* in this manner: when on the *pluries replegiari facias* the ſheriff returns *averia elongata*, then a *capias in withernam* iſſues, and on that being returned *nulla bona*, a *capias* iſſues, and ſo to outlawry: but it does not lie on the original writ of replevin, which is *vicountiel* and determined; and therefore as no addition is required in ſuch original writ, ſo neither ought there to be any in the ſecond writ; for where a writ or proceſs is founded on a former, it muſt purſue the former, and cannot vary from it.

6 Mod. 84. Salk. 5. Earl of Banbury v. Wood. 2 Ld. Raym. 987.

By the common law, in all actions of treſpaſs *quare vi & armis*, and in which there is a fine to the king, a *capias* was the proceſs; and herein proceſs of outlawry lay by the common law.

35 H. 6. 6 b. 22 H. 6. 13. Raſt. Ent. 293. 10 Co. 72. 2 Roll. Abr. 805.

But in account, debt (*e*), detinue, annuity, covenant, and ſuch actions as are grounded upon negligence or laches merely, no *capias* lay at common law, but only ſummons and diſtreſs infinite; and therefore, the *capias* and outlawry in theſe actions were introduced by divers acts of parliament (*f*).

Co. Lit. 128. b. 3 Co. 12. 2 Bulſt. 63. 2 Inſt. 143. Cro. Jac. 222. 261. Yelv. 158. Raym. 128. Keb. 890. 908. Sid. 248. 258.

(*e*) Whether proceſs of outlawry lies in a writ of detinue of charters. Dyer, 223. a. *dubitatur*.

[(*f*) This opinion, that the writ of *capias*

*capias* did not lie at common law for debt and damages, is contradicted by the hiſtory of our legal proceſs. For in the reign of Henry 3. the proceſs in all perſonal actions was as follows: If the party did not appear upon the ſummons, he was attached by pledges; and afterwards by better pledges: if he ſtill did not appear, the ſheriff was commanded *quod habeat corpus:* if the ſheriff returned *non inventus*, there iſſued a *diſtringas per terras et catalla*; after that, another *diſtringas*, commanding him alſo to take the body; after that, another *diſtringas, ne manum apponat*; and laſtly, a writ to take the lands and chattels into the king's hands. Thus, there might be one ſummons, two attachments, a *capias* (as it was afterwards called), and four diſtreſſes. To this, it is added by Bracton, that ſhould the defendant not be found, nor have any lands or goods, whether the action was for money, or for a treſpaſs, he was to be demanded from county to county, and outlawed: and perſons ſo outlawed were condemned to perpetual impriſonment, or to abjure the realm. Bract. 440-1. Reeves' Hiſt. of the Law, vol. 1. 483-4. vol. 2. 439.]

2 Inſt. 145. 380. F.N.B. 259.

By the ſtatute of *Marlebridge*, 52 *H.* 3. *c.* 23. the writ of *monſtravit de compoto* was given, where before, the proceſs in account was ſummons, attachment and diſtreſs infinite; and by *Weſtm.* 2. 13 *Ed.* 1. *ſtat.* 1. *c.* 11. proceſs of outlawry is given in account.

3 Co. 12. 2 Roll. Rep. 295. 2 Bulſt. 63.

By the 25 *E.* 3. *c.* 17. it is accorded, that ſuch proceſs ſhall be made in a writ of debt and detinue of chattels, and taking of beaſts, by writ of *capias*, and by proceſs of exigent, by the ſheriff's return, as is uſed in a writ of account.

And by the 19 *H.* 7. *c.* 9. reciting, "That foraſmuch as "before this time there have been great delays in actions of the "caſe that have been ſued as well before the king in his bench, "as in the court of his common bench, by reaſon of which "delays many perſons have been put from their remedy; it is "therefore ordained, enacted, and eſtabliſhed, that like pro-"ceſs be had hereafter in actions upon the caſe as well ſued and "hanging, as to be ſued in any of the ſaid courts, as in actions of "treſpaſs or debt."

Leon. 329. 2 Roll. Abr. 76. Sid. 159. Keb. 577.

But it hath been adjudged, that proceſs of outlawry lies in no caſe but where a *capias* lies; and that therefore where the proceeding is by bill and not by original, as there can be no *capias*, ſo there can be no proceſs of outlawry, as in a bill of privilege by or againſt an attorney.

## (B) By what Juriſdiction ſuch Proceſſes are to iſſue.

2 Hal. Hiſt. P. C. 198.

IT is clear, that the courts at *Weſtminſter* may iſſue proceſs of outlawry, and that the court of King's Bench, either upon an indictment originally taken there, or removed thither by *certiorari*, may iſſue proceſs of *capias* and exigent into any county of *England*, upon a *non eſt inventus* returned by the ſheriff of the county where the party is indicted, and a *teſtatum* that he is in ſome other county.

2 Hal. Hiſt. P. C. 31. 199.

Juſtices of oyer and terminer may iſſue a *capias* or exigent, and ſo proceed to the outlawry of any perſon indicted before them, directed to the ſheriff of the ſame county where they held their ſeſſion at common law; and by the ſtatute of 5 *E.* 3. *c.* 11. they may iſſue proceſs of *capias* and exigent to all the counties of *England*, againſt perſons indicted or outlawed of felony before them.

2 Hal. Hiſt. P. C. 199.

But juſtices of gaol delivery*, regularly, cannot iſſue a *capias* or exigent; becauſe their commiſſion is to deliver the gaol *de priſonibus*

* But now

*bus in ea exiſtentibus*, ſo that thoſe whom they have to do with are always intended in cuſtody already.

they have commiſſions of oyer and terminer, and other commiſſions, &c. giving them full power in all caſes.

Juſtices of the peace may make out proceſs of outlawry upon (*a*) indictments taken before themſelves, or upon indictments taken before the ſheriff, and returned to the juſtices of the peace, by the ſtatute of 1 *E.* 4. *c.* 1. but the power of the ſheriff, to make any proceſs upon indictments taken before him, is taken away by that ſtatute.

2 Hal. Hiſt. 199.
(*a*) Juſtices of aſſiſe, juſtices of niſi prius, juſtices of oyer and terminer, and juſtices of gaol delivery, and alſo juſtices of the peace in their ſeſſions, may proceed to outlawry in caſes of indictments found before them, and that by the common law; and in caſes of popular actions may proceed to outlawry by the ſtatute of 21 Jac. 1. c. 4. 2 Hal. Hiſt. P. C. 52.—But they cannot iſſue a *capias utlagatum*, but muſt return the record of the outlawry into the King's Bench, and there proceſs of *capias utlagatum*, ſhall iſſue. Dalt. 406. 2 Hal. Hiſt. P. C. 52.

It is made a *quære* by *Hale*, whether a coroner can by law make out proceſs of outlawry againſt a man indicted by inquiſition before him.

2 Hal. Hiſt. P. C. 199. *Per* Hawkins, a coroner may award proceſs until the exigent, on a bill of appeal before him; and that by the better opinion, ſuch proceſs ſhall be awarded by him only, and not by him and the ſheriff jointly, and that he may proceed thereon to outlawry; but that ſince *Magna Charta*, c. 17. by which it is enacted, *That no ſheriff, conſtable, coroner, or other bailiff of the king, ſhall hold pleas of the crown*, he cannot proceed to the trial of the appellee. 2 Hawk. P. C. c. 9. § 41. and ſeveral authorities there cited.

It hath been held, that though the proceſs in inferior courts be a *capias*, that yet they cannot proceed to outlaw the perſon.

Yelv. 158. Cro. Jac. 222. 261. Raym. 128. Sid. 248. 259. Keb. 890. 908.

The proceſs to the outlawry, *viz.* the *capias* and exigent, muſt be in the king's name, and under the judicial ſeal of the king appointed to that court that iſſues the proofs, and with the (*b*) *teſte* of the chief juſtice or chief judge of that court of ſeſſions.

2 Hal. Hiſt. P. C. 199.
(*b*) Where the *capias* was *teſte Edmundo Anderſon* without a *T.*, for this error the outlawry was reverſed; for the *teſte* is the warrant of the writ, as it is of all judicial writs. Cro. Eliz. 592. Gronby v. Iſcham.

## (C) Againſt whom Proceſs of Outlawry may be awarded. And herein,

### 1. Whether it may be awarded againſt a Peer.

IF a nobleman, or peer of the realm, be indicted and cannot be found, proceſs of outlawry ſhall be awarded againſt him, and he ſhall be outlawed *per judicium coronatorum*.

2 Inſt. 49. 3 Inſt. 31. Staunf. 130. 2 Hawk. P. C. c. 44. § 16.

But in civil actions between party and party, regularly, a *capias* or exigent lies not againſt a lord of parliament of *England*, whether ſecular or (*c*) eccleſiaſtical; yet, in caſe of an indictment for treaſon or felony, yea, but for a treſpaſs *vi & armis*, as, an aſſault or riot, proceſs of outlawry ſhall iſſue againſt a peer of the realm; for the ſuit is for the king, and the offence is a contempt againſt him: and therefore, if a reſcue be returned againſt a peer, or, if a peer be convict of a diſſeiſin with force, or deny his deed, and it

2 Hal. Hiſt. P. C. 199. 200. Cro. Eliz. 170. 503. 5 Co. 54. Roll. Abr. 220.
(*c*) That an abbot or prior ought

not to be outlawed. 3 E. 3. 2 Roll. Abr. 805.

it be found againſt him, a *capias pro fine* and exigent ſhall iſſue, for the king is to have a fine: and the ſame reaſon holds upon an indictment of treſpaſs or riot, and much more in the caſe of felony.

## 2. Whether Proceſs of Outlawry may be awarded againſt an Infant.

3 H. 5. Utlag. 11. Fitz. tit. Outlawry, 11. 2 Roll. Abr. 805. Dyer, 104. 2 Hal. Hiſt. P. C. 207, 208.

An infant above the age of fourteen may be outlawed, and the outlawry is not erroneous: but an infant under the age of fourteen cannot be outlawed; for if he be, it is erroneous.

Dyer, 239. a. 2 Roll. Abr. 805.

But the outlawry of ſuch infant is not void, it being of record, but voidable only by writ of error.

## 3. Of awarding Proceſs of Outlawry againſt a Feme Sole or Covert, and the Proceedings thereon.

Co. Lit. 122. b. Lit. § 186.

A woman is ſaid to be waived and not outlawed; and the reaſon, ſays my Lord *Coke*, why the outlawry of a woman is legally called *waiviaria mulieris* is, becauſe women are not ſworn in leets or torns, as men are, who are above the age of twelve; and therefore, ſays he, men are called *utlagati*, i. e. *extra legem poſiti*, but women are *waiviatæ*, i. e. *derelictæ*, left out or not regarded, becauſe they are not ſworn to the law.

Cro. Jac. 358. Middleton's caſe. Roll. Rep. 407. S. P. Roll. Abr. 804. S. P.

Therefore, where a *capias* and exigent were awarded againſt three men and two women, and the return was *utlagati exiſtunt*, where, as to the women, it ought to have been *waiviatæ exiſtunt*, this was held to be error.

For this, *vide* Dyer, 271. b. Cro. Jac. 445. Cro. Eliz. 370. Hut. 86. Sid. 21.

If, in an action againſt huſband and wife, the huſband is outlawed, and wife waived, and ſhe is taken upon the *capias utlagat.*, though ſhe is to be diſcharged of the impriſonment, (becauſe the plaintiff cannot proceed againſt her alone,) yet ſhe ſtill remains waived, and when her huſband is taken he muſt bring her in.

Cro. Car. 58, 59. Smith v. Aſh & *ux.* Hut. 86. S. C.

In an action for a debt due by a wife before marriage, the huſband was returned outlawed and the wife waived, but, before the return of the exigent, an attorney procured for the wife a *ſuperſedeas*, ſurmiſing, that the wife had appeared by him as her attorney: on motion that this appearance of the wife ſhould be received, all the court conceived, that if, upon the exigent, the ſheriff had returned *reddidit ſe*, or, upon *pluries capias*, had returned *capi corpus* for the wife, then her appearance ſhould be entered, but not by attorney, as it is here; and the exigent ſhould only iſſue againſt the huſband, & *idem dies* ſhould be given to the wife. But, when the huſband upon the exigent is returned outlawed, then, it ſhall be entered *aler ſans jour* for the wife, for the proceſs is determined; and if he will purchaſe his pardon, he ſhall not have any allowance thereupon in a *ſcire facias*, unleſs he appear for himſelf

himſelf and his wife. But if for the huſband the ſheriff ſhould return *cepi corpus* upon a *pluries capias*, and a *non eſt inventa* for the wife, yet an exigent ſhall iſſue againſt both, becauſe it muſt be preſumed the huſband might bring in his wife: but, if upon the exigent the ſheriff returned *reddidit ſe* for the huſband, and for the wife, that ſhe is waived, the huſband ſhall go *ſine die*: but in this caſe, becauſe the exigent was returned againſt both to be outlawed, the *ſuperſedeas* ſuppoſing the appearance of the wife is merely idle and void; whereupon it was diſallowed, and the exigent appointed to be filed againſt both.

4. Of awarding Proceſs of Outlawry againſt ſeveral Defendants, and the Proceedings thereon.

If two are ſued in a joint action, and neither of them will appear, proceſs of outlawry muſt be taken out againſt both. Cro. Eliz. 648. Beverley v. Beverley.

If an exigent is awarded againſt two, and the return is *primo exacti fuerunt & non comparuerunt*, without ſaying *nec eorum aliquis comparuit*, it is erroneous. 2 Roll. Abr. 802. Taverner's caſe. 2 Hal. Hiſt. P. C. 204. S. C. cited, and S. P. ſaid to have been often adjudged. Cro. Jac. 358. S. P. adjudged, and ſaid to be manifeſt error. 3 Mod. 89, 90. S. P. adjudged. Roll. Rep. 406. Palm. 388. S. P. adjudged.

If two in a writ of account are adjudged to account, and one is after (*a*) outlawed in the ſuit, and the other appears, he ſhall account alone. 41 E. 3. 3 Roll. Abr. 127. S. C. Brownl. 25. S. P. ſaid. (*a*) But if ſued by bill upon which no outlawry can be, what proceedings ſhall be, *quære*; & *vide* Sid. 159. Keb. 577. [In ſuch caſe the plaintiff muſt diſcontinue, and take out an original, on which he will proceed to outlawry againſt the one, after which he may go on in the action againſt the other. Edwards v. Carter, 1 Str. 473. Symonds v. Parminter, 2 Str. 1269. 1 Wilſ. 78. 1 Bl. Rep. 20. In an action upon a contract, if the defendant plead, that the promiſe was made by another jointly with him, the plaintiff cannot reply that ſuch other perſon is out of the kingdom, and that it is not poſſible to ſummon or attach him, but muſt proceed to outlawry. Sheppard v. Baillie, 6 Term Rep. 327.]

When two are adjudged to account, and one is outlawed and accounts, if he diſcharges himſelf upon the account, this ſhall be a diſcharge to the other, when he ſues a *ſcire facias* upon a charter of pardon; and if he be charged by the account, this ſhall be a charge upon the other, becauſe they were judged to account jointly. 41 E. 3. 13. b. Roll. Abr. 127. & *vide* Moor, 188. 2 Leon. 76.

If in debt due upon an obligation againſt *B.* and *C.*, ſons and heirs of the obligor, and againſt *D.* the daughter and heir of *A.*, who was another of the ſons and heirs of the obligor in gavelkind, proceſs is continued till the uncles are outlawed and the niece waived; and after, the uncles are pardoned, and bring a *ſcire facias* againſt the plaintiff, who thereupon declares againſt them *ſimul cum* the niece; and the uncles plead, their niece is but of the age of ſeven, *unde non intendunt quod durante minori ætate ſua* they ought to anſwer, &c., yet the parol ſhall not demur; for the niece is out of court, and *quoad* her the original is determined, and at her full age no re-ſummons could be ſued againſt her, but the uncles only, becauſe ſhe never appeared in court. Dyer, 239. pl. 203. Hawtry v. Anger. N. Bendl. 148. pl. 205. Moor, 74. pl. 203. and And. 10. S. C. adjudged.

An

Sid. 173. Keb. 642. S. C. Guy v. Barnard.

An action of treſpaſs was brought againſt two; one was outlawed; after the entry of the writ it was entered, *& ſciendum eſt quoad prædict. J. S.* (one of the defendants) *utlagat. eſt*, and then counts againſt one of them: on motion in arreſt of judgment, the court held the declaration naught, and the courſe of pleading in ſuch caſes, after the entry of the writ, was to ſay, *& quod prædict. J. S. utlagat. eſt in breve illo;* and that the laſt words are eſſential, becauſe that he might be outlawed in another writ, and not in this.

## 5. Of awarding Proceſs of Outlawry againſt Principal and Acceſſary.

Herein we muſt firſt take notice, that by the ſtatute of *Weſt.* 1. 3 *Ed.* 1. *c.* 14. it is recited, "That it had been uſed in ſome "counties to outlaw perſons being appealed of commandment, "force, aid, or receipt, within the ſame time that he which is "appealed for the deed is outlawed; and thereupon it is provided, "that none be outlawed upon appeal of commandment, force, aid, "or receipt, unleſs he that is appealed of the deed be attainted, "ſo that one like law be uſed therein through the realm; never"theleſs, he that will ſo appeal, ſhall not by reaſon of this inter"mit or leave off to commence his appeal at the next county "againſt them, no more than againſt their principals which he "appealed of the deed, but their exigent ſhall remain until ſuch "as be appealed of the deed be attainted of outlawry, or other"wiſe."

In the conſtruction of this ſtatute, the following particulars are laid down by Serjeant *Hawkins* as moſt remarkable.

2 Inſt. 183. 2 Hawk. P. C. c. 27. § 129.

1*ſt*, That it ſeems agreed, that it extends as well to indictments as to appeals, not only becauſe the word *appeal* in the ſtatute may in a large ſenſe be taken for an accuſation in general; but becauſe indictments are certainly as much within the reaſon of the ſtatute as appeals; and the common law, for the ſettling whereof this ſtatute was made, did not make any diſtinction in this reſpect between appeals and indictments.

2 Hawk. P. C. c. 27. § 130. 2 Hal. Hiſt. P. C. 200.

2*dly*, That it ſeems to be agreed, that wherever ſome of the defendants are expreſsly charged as principals, and others as acceſſaries, before the award of this exigent, the outlawry thereon of thoſe charged as acceſſaries cannot but be reverſible, becauſe it appears upon the record that the exigent iſſued contrary to the direction of the ſtatute. But, if ſeveral be outlawed on a writ of appeal, which chargeth them all alike without any diſtinction, there can be no advantage taken of the appellant's not having purſued the ſtatute, ſince it appears not but that he might have charged them all as principals.

2 Hawk. P. C. c. 27. § 131. & *vide* 2 Hal. Hiſt. P. C. 200.

3*dly*, That it is ſtrongly holden, that if an appellant take out the exigent at the ſame time againſt all the defendants, he muſt, when they appear, count againſt them all as principals; and ſhall be concluded from charging any of them as acceſſaries, becauſe he has taken out ſuch proceſs as is erroneous where all are not principals.

cipals. But he makes a doubt, whether this be law at this day, ſince all errors, as the law ſeems now to be holden, are ſalved by appearance.

*4thly*, That it ſeems the better opinion, that where there are more than one principal, the exigent ſhall not iſſue till all of them are arraigned: And herein it is ſaid by *Hale*, that if *A.* and *B.* be indicted as principals in felony, and *C.* as acceſſary to them both, the exigent againſt the acceſſary ſhall ſtay till both be attainted by outlawry or plea; for that it is ſaid, if one be acquitted, the acceſſary is diſcharged, becauſe indicted as acceſſary to both, and therefore ſhall not be put to anſwer till both be attaint. But hereof he adds a *dubitatur*, becauſe, though *C.* be acceſſary to both, he might have been indicted as acceſſary to one, becauſe the felonies are in law ſeveral; but if he be indicted as acceſſary to both, he muſt be proved ſo. 2 Hawk. P. C. c. 27. § 132. 2 Hal. Hiſt. P. C. 200, 201.

In treaſon all are principals; and therefore proceſs of outlawry may go againſt him that receives, at the ſame time as againſt him that did the fact. Hal. Hiſt. P. C. 238.

## (D) What Forfeitures and Diſabilities an Outlawry ſubjects the Parties to: And herein,

### 1. Where it is of the ſame Effect with a Sentence or Judgment.

IF a man be outlawed of treaſon or felony, though there be no other judgment (*a*) but *utlagatus eſt per judicium coronatorum*, yet it is of itſelf an attainder, and ſubjects the party to ſuch an award thereupon, to be made by the court where he is brought, as is ſuitable to the offence for which he is indicted and outlawed. 2 Hal. Hiſt. P. C. 399.

(*a*) Whether the outlawry appear by the ſheriff's return of the exigent, or by the coroner's return of a *certiorari* to them directed, to certify whether the party were outlawed or not, the party is as much attainted, and ſhall forfeit and loſe as much, as if ſentence had been given againſt him upon verdict or confeſſion. 2 Hawk. P. C. c. 48. § 22. *ſed vide* 2 Hal. Hiſt. P. C. 205-6.——That thoſe malefactors who wilfully fly from juſtice, add a new crime to their former offence, and therefore ought to have no benefit of the law. 3 Mod. 72.

But, if ſuch outlawry appear to the court to be erroneous, whereof any one as *amicus curiæ* may inform them, the party ſhall have counſel aſſigned him to take advantage of the error. But, if he will neither bring a writ of error, nor plead in convenient time, and the outlawry be voidable only, and not void, the proper execution ſhall be awarded againſt him, but no ſentence pronounced; becauſe the outlawry is a judgment, and no man ſhall have two judgments for one offence. 2 Hawk. P. C. c. 28. § 23.

And herein it is ſaid by *Hale*, that though the court *ex officio* is to prefix the party a day to purchaſe a writ of error, and in the mean time to reſpite execution; yet that muſt be on his alleging error in fact, or error in law upon the outlawry; for if the court be ſatisfied that it is merely a pretence, they may chooſe whether they will allow him a day to ſue forth a writ of error, but may award execution preſently. 2 Hal. Hiſt. P. C. 408.

2 Hawk. P. C. c. 33. § 27. Hal. Hiſt. P. C. 521. 2 Hal. Hiſt. P. C. 350.

But, though an outlawry be an attainder, and equal to a conviction or ſentence by verdict or confeſſion, yet it does not ſubject the party to any ſeverer puniſhment than the crime does for which the outlawry was pronounced; and therefore, if it be in ſuch a crime for which clergy is allowable, the party outlawed ſhall be allowed his clergy in the ſame manner as he who is convicted by verdict or confeſſion.

2 Salk. 494. pl. 1. the King v. Tippin.

One was outlawed upon an information for ſeducing a young gentleman to marry a young woman of a lewd character, and fined 5000*l.* It was moved in behalf of the defendant, that he could not be fined upon the outlawry; becauſe in miſdemeanors the outlawry does not enure as a conviction for the offence, as it does in caſes of treaſon and felony, but as a conviction for the contempt in not anſwering, which contempt is puniſhed by the forfeiture of his goods and chattels; and if he might be fined now, he muſt be fined again upon the principal judgment. And the firſt was held to be irregular; and that the outlawry in theſe caſes is not a conviction, as appears by *Fleta*, *quamvis quis pro contumaciâ & fugâ utlagetur, non propter hoc convictus eſt de facto principali.*

2. Of the Forfeiture as to Lands, Goods, *&c.*; and herein of the Difference between Outlawries in Criminal and Civil Caſes, and of the King's and Party's Intereſt at whoſe ſuit the Outlawry was had: *And herein,*

1. *Of the Difference between a Forfeiture in a Criminal and Civil Caſe.*

9 H. 6. 20. 2 Roll. Abr. 85. Staunf. Pre. 47. Co. Lit. 128. 2 Hal. Hiſt. P. C. 205.

Herein we muſt obſerve, that an outlawry of treaſon or felony is a conviction and attainder of the offence wherewith the party is charged; and ſuch outlawry corrupts the blood, and cauſes an abſolute forfeiture of the party's eſtate both real and perſonal, *viz.* in caſe of outlawry of treaſon, his lands are forfeited to the king of whomſoever they are holden; and in caſe of outlawry of felony, to the lord by eſcheat of whom they are immediately holden.

Plow. 541. 5 Co. 110. Show. Par. Ca. 73. & *vide* the authorities *ſupra.*

Alſo, in civil caſes, the retiring from the inquiries of juſtice is held ſo criminal in the eye of the law, that it is puniſhed with the loſs of the offender's goods and chattels, and the iſſues and profits of his real eſtate: but by outlawries in civil caſes the king has no eſtate, but only a pernancy of the profits; nor can he manure or ſow the ground; and his intereſt continues no longer than the party hath an eſtate, and determines with the party's death; and being originally introduced to compel the defendant to come in the ſooner and anſwer the plaintiff's demand, may more eaſily be ſuperſeded or reverſed, and thereby the king's pernancy of the profits diſcharged, than an outlawry in a capital caſe.

Staunf. Pre. 47. 183. Roll. Abr. 793. Cro. Eliz. 472.

Alſo, if a perſon make default till the award of an exigent, either upon an appeal or indictment of a capital offence, he forfeits his goods, unleſs he was pardoned before the exigent was awarded. And it is holden, that the law is the ſame, as to ſuch a default

a default upon an indictment of petit larceny, and that wherever goods are ſo forfeited, they are not ſaved by an acquittal at the trial; but by a reverſal of the award of the exigent they are ſaved, whether ſuch reverſal be for an error either in fact or in law; as, for the impriſonment of the defendant at the time when the exigent was awarded, or for a defect in the indictment, appeal, or proceſs. 5 Co. 110. Co. Lit. 259. Cro. Jac. 464.

## 2. *What Things are forfeited by the Outlawry.*

Outlawry in a capital caſe being, as hath been ſaid, an attainder and conviction, it is clear, that all lands of inheritance, as all other the real and perſonal eſtate whereof the party outlawed is ſeiſed or poſſeſſed in his own right, are forfeited abſolutely. For which *vide* tit. Forfeiture.

Alſo, the king hath by the common law ſuch a power to require his ſubjects to anſwer all demands of law and juſtice, that the non-appearance on proceſs in a civil action, is ſuch a contempt, that the party guilty is put out of the law, forfeits his goods and chattels, his leaſes for years (*a*), and his truſt in ſuch leaſes, and the profits of his lands of freehold. Salk. 109. 5 Mod. 114. [(*a*) If the outlaw die before his term is ſold by a *venditioni exponas*, the court of Exchequer will let the widow in to plead this matter againſt a purchaſer. Watts v. Robinſon, Bunb. 220.]

But outlawry in treſpaſs, or any civil action, works no corruption of blood; and therefore, if the huſband be outlawed in any ſuch action, the wife ſhall notwithſtanding have dower, and the iſſue ſhall inherit; for it is a forfeiture of the iſſues and profits of the lands (*b*) only during the life of the party outlawed, and ſo long as the outlawry remains unreverſed. Alſo it ſeems, that if the wife herſelf be outlawed or waived in any ſuch action, yet her dower is not forfeited. Bro. tit. Outl. 82. Perk. §388. Co. Lit. 31. a. [(*b*) But of copyhold lands belonging to the outlaw, the king is not entitled even to the profits, by reaſon of the prejudice which would accrue thereby to the lord, who hath not committed any offence, and therefore ſhall not loſe his cuſtoms or ſervices. Rex v. Budd, Parker, 190. Sellard v. Everard, Owen, 37.]

It is ſaid to have been agreed by the whole court, that arrearages of rent reſerved upon an eſtate for life are not forfeited by outlawry, becauſe they are real, and no (*c*) remedy for them but by diſtreſs; otherwiſe, if upon a leaſe for years. Hetl. 164. (*c*) For this *vide* tit. Rents.

Alſo it is held, that there are other things of the party outlawed which are forfeited to the king; and that therefore an executor or adminiſtrator cannot plead in excuſe of aſſets, that his teſtator or inteſtate was outlawed, becauſe he might have debts (*d*) due upon contract: ſo, goods taken for treſpaſs before the outlawry, for which he may have treſpaſs, and recover the value of the goods, which ſhall be aſſets in his hands. Cro. Eliz. 851. Hut. 53. *& vide* 4 Co. 93. a. 2 Roll. Abr. 806. Cro. Eliz. 203. (*d*) That debtors may pay debts to the executor or adminiſtrator of a perſon outlawed, and their releaſe ſhall be a good diſcharge to them, though the executors ſhall be accountable to the king for them. Hut. 54.

So, if the teſtator had mortgaged his land upon condition, that if the mortgagee pay not at ſuch a day to him, his executors or his heirs, 100*l.*, that then it ſhall be lawful for him or his heirs to re-enter; Hut. 53.

re-enter; and after, but before the day, the teſtator is outlawed, and makes his executor, and dies; and at the day the mortgagee pays the money to the executors; this is aſſets, and not forfeited to the king.

9 H. 6. 21. 2 Roll. Abr. 806. If tenant for term of years be outlawed, the term is forfeited to the king, and he may ſeize it, and uſe it at his pleaſure.

2 Roll. Abr. 807. So, if *A.* being poſſeſſed of a leaſe for years grant it over to *B.* in truſt for himſelf, and afterwards is outlawed in a perſonal action, this truſt ſhall be forfeited to the king.

9 H. 6. 21. 2 Roll. Abr. 806. If tenant at (*a*) will ſows the land, and afterwards is outlawed, the king ſhall have the corn.

(*a*) If a man leaſes at will, and the leſſee ſows the land, and the leſſor is outlawed, the king ſhall not have the corn, and can have only the rent, for he is entitled to no more than the leſſor himſelf. 5 Co. 116.

2 Roll. Abr. 807. North v. Fines. If the conuſee of a ſtatute-ſtaple takes the conuſor in execution upon the ſtatute, and afterwards is outlawed in a perſonal action; the debt ſhall be forfeited to the king, and the king may diſcharge the conuſor out of execution.

2 Roll. Abr. 808. So, if there are two conuſees of a ſtatute, and they take the body of the conuſor in execution, and one of the conuſees is outlawed in a perſonal action; it is ſaid to be a forfeiture of the debt againſt both.

22 Aſſ. 33. 2 Roll. Abr. 708. S. C. If a man be outlawed in a perſonal action, the king ſhall preſent to his churches, although he hath a freehold or inheritance in them.

2 Roll. Abr. 807. (*b*) If after the outlawry the party purchaſeth any more goods, the property is immediately veſted in the king. Carth. 442. So, if a perſon outlawed hath an advowſon, that happens to become void (*b*) during the time the outlawry is in force, ſuch avoidance is forfeited to the king, whether the outlawry were in a capital caſe, an action of treſpaſs, or other perſonal action.

Beverley v. Cornwall. Cro. Eliz. 44. And. 148. Moor, 269. Savil, 89. Gouldſ. 103. Owen, 3. S. C. *Vide poſt*, (H. 2). If pending a *quare impedit* brought by *A.*, he is outlawed, and judgment is given for him in the *quare impedit*, and thereupon the incumbent reſigns, and takes a new preſentation from the queen by virtue of the outlawry, and accordingly he is inſtituted and inducted, and afterwards *A.* reverſeth the outlawry, and brings a *ſcire facias* to have execution of the judgment; though the preſentation was veſted in the queen, and executed before the outlawry reverſed, yet *A.* ſhall have execution of his judgment; for upon a recovery in a *quare impedit*, any incumbent that cometh in *pendente placito* ſhall be removed.

Hob. 214. Cro. Jac. 512. (*c*) And ſhall be executed by an information in the Exchequer-chamber, or in Chancery. Hal. Hiſt. P. C. 248. Things perſonal, ſettled by way of truſt on the offender, are as much forfeited as if he had the legal intereſt, or were in poſſeſſion of them; as, if a bond be taken in another's name, in truſt for a perſon who is afterwards outlawed, this is forfeited in the ſame (*c*) manner as if taken in his own name.

Lane, 54. 113. Mod. 16. 38. So, the truſt of a term granted by a man for the uſe of himſelf, his wife and children, &c. is liable in like manner to be forfeited, if

if fraudulently made with an intent to avoid a ſubſequent forfeiture: but it ſhall be forfeited ſo far only as is reſerved for the benefit of the party himſelf, if made *bonâ fide*, whether before or after marriage for good conſideration, without fraud, which is to be left to a jury on the whole circumſtances of the caſe, and ſhall never be preſumed by the court, where it is not expreſsly found. 2 Keb. 564. 608. 644. 763. 772. Lev. 279. Hard. 496. And. 294. Raym. 120. 2 Roll. Abr. 34. Roll. Abr. 343. March, 45. 88. Sid. 260. Keb. 909.

So, where upon an indictment of recuſancy, the party, intending to go beyond ſea, made a deed of gift of all his goods and chattels upon ſome feigned conſideration, and then he went out of the realm, and was afterwards outlawed on the ſame indictment; it was adjudged, that the deed of gift was void to defeat the queen of the forfeiture of the goods, and this by the ſtatute of 13 *Eliz. c.* 5. and that the queen was entitled to his leaſes and goods by the forfeiture. 3 Co. 82. Pawncefoot v. Blunt, cited in Twine's caſe; & *vide* Dyer, 295. a.

The forfeiture, as hath been ſaid, muſt be of goods which the party has in his (*a*) own right, and not the right of another; and therefore an executor or adminiſtrator outlawed forfeit nothing which they have in right of their teſtator or inteſtate. 11 H. 6. 17. 37. Cro. Eliz. 575. 851. 2 Roll. Abr. 806.

Cro. Car. 566. (*a*) So, a term limited to executors, and not veſted in the party himſelf, is not forfeitable. 2 Leon. 5, 6. And. 19. Moor, 100. Dyer, 309.

So, if an executor recovers in account againſt the receiver of the teſtator, and afterwards is outlawed, yet he ſhall not forfeit this debt; for it continues the debt of the teſtator, and is only put in certainty by the judgment. 20 H. 6. 8. b. 2 Roll. Abr. 806.

Debts and duties upon ſimple contract are forfeited to the king by the outlawry of the party, though the debtor might have waged his law on ſuch contract on an action brought by the creditor; of which privilege he is deprived by the outlawry. 4 Co. 95. Slade's caſe.

It hath been adjudged, that the cattle of a ſtranger (*b*) *levant* and *couchant* on lands extended on an outlawry, may be taken for the king upon a *levari facias* as the iſſues and profits of the lands; for that otherwiſe there might be no iſſues at all, or the perſon outlawed may take in other men's cattle to agiſt, and ſo defeat the outlawry. Britton v. Cole, Carth. 441. Salk. 395. 408. S. C. Ld. Raym. 305. S. C. Skin. 617.

S. C. 5 Mod. 112. S. C. Comb. Rep. 51. S. C. (*b*) That it is neceſſary to aver that the cattle were *levant* and *couchant*. Carth. 442.

So, if the perſon outlawed ſhould after the inquiſition make a feoffment of his lands, the cattle of the feoffee may be taken for the iſſues of thoſe lands, for the land is (*c*) debtor to the king. Carth. 442. *per cur.*

(*c*) But if tenant for life is outlawed, and dies, *qu.* Whether the iſſues can be extended on the reverſioner? Carth. 442.

But if the owner of the ſoil is outlawed, the cattle of a commoner cannot be taken as iſſues: however, if they ſhould be taken, he muſt plead his title in the Exchequer, unleſs his right of common is found by inquiſition on the outlawry. Carth. 442.

[Upon a ſeizure of goods of an outlaw in a civil ſuit, the landlord is entitled, under the ſtatute 8 *Ann. c.* 14., to be ſatisfied one year's rent out of the money in the ſheriff's hands.] Graves v. d'Acaſtro, Bunb. 194.

### 3. *To what Time the Forfeiture ſhall relate.*

Co. Lit. 13, 14. (a) But, if the defendant had appeared, and the plaintiff had declared upon his writ, and the defendant had been convicted and attainted by verdict or confeſſion

If a man be outlawed upon an indictment of felony and treaſon, and pending the proceſs he alien the land, yet the king or lord ſhall have the land which he held at the time of the treaſon or felony committed; for the indictment contains the year and day when it was done, unto which the attainder by outlawry relates. But, if a man ſue an appeal by writ of felony or murder, and pending it the party alien, and then is outlawed before appearance, the lord's eſcheat is loſt, becauſe it relates only to the time of the outlawry pronounced; inaſmuch as the writ of appeal is general, and contains no (a) certain time of the offence committed.

; or, if the appeal had been by bill, and thereupon the party had been outlawed, though, before appearance, the eſcheat had related to the time of the fact committed to avoid meſne incumbrances; for in the declaration in the one caſe, and in the bill in the other, the year and day of the felony is ſet forth. Hal. Hiſt. P. C. 261-2.

Co. Lit. 288. b. 41 Aſſ. 13.

As to goods and chattels, the very iſſuing of the writ of exigent in caſe of treaſon or felony gives to the king, or the lord of a franchiſe to whom that liberty is granted, the forfeiture of all the goods of the party ſo put in exigent, from the time of the *teſte* of the writ of exigent.

Staunf. P. C. 184. 41 Aſſ. 13. 4 E. 3. 17. 5 Co. 111. a.

And as the award of the *exigent* gives the forfeiture, ſo, if that be well awarded, the forfeiture ſhall continue, though the outlawry be reverſed for error in law or in fact, ſubſequent to the award of the exigent; for the king's title being by the exigent, and that being of record, muſt be awarded by matter of as high a nature; therefore it is neceſſary for a party outlawed in treaſon to bring his writ of error ſpecially, *tam in adjudicatione brevis de exigi facias quam in promulgatione utlagariæ.* Alſo, a writ of error lies to reverſe the very award of the exigent; and though no error ſubſequent to the award of the exigent will avoid it, yet, if there be error in the exigent, or in the appeal or indictment upon which it iſſues, both outlawry and exigent ſhall be reverſed.

Co. Lit. 197.

And as the award of the exigent gives the forfeiture of the goods, ſo the outlawry gives the forfeiture or loſs of the lands of the party outlawed; but the bare judgment of outlawry by the coroners, without the return thereof of record, is no attainder, nor gives any eſcheat, but it muſt be returned by the ſheriff with the writ of *exigi facias*, and the return indorſed.

Reg. 284. Dyer, 223. a. 317. a.

And therefore, if there be a *quinto exactus*, and thereupon *utlagatus eſt per judicium coronatorum*, but no return thereof be made, there lies a writ of *certiorari* to the coroners, or to the ſheriff and coroners, to certify the outlawry into the King's Bench: but this is only either to ground a charter of pardon on it, or to amerce the ſheriff where he returned only a *quarto exactus*. And as to the effect it has otherwiſe, my Lord Chief Juſtice *Hale* thinks as follows:

Dyer, 317 a. 2 Hal. Hiſt. P. C. 206.

1*ſt*, That it doth not diſable the party to bring an action, because in relation to party and party it ſtands as nothing, till returned by the ſheriff.

2*dly*

2*dly*, That, consequently, barely upon such a return of an outlawry upon a *certiorari*, without the writ of exigent indorsed and returned together with the *certiorari*, it seems no escheat lies for the lord. But this he makes a *quære*. 2 Hal. Hist. P. C. 206.

3*dly*, But, if the writ of *certiorari* be directed to the sheriff and coroners, and the writ of exigent be extant in court, and they return this outlawry; possibly, this may be a sufficient warrant to enter it of record, as a return upon the *exigent* for the king's advantage, and to issue upon it a *capias utlagatum* to have the forfeiture of his goods. 2 Hal. Hist. P. C. 206-7.

4*thly*, But unless the writ is some way returned or extant, it gives the king no title to land or goods; for the writ of *exigi facias* is the warrant of the outlawry, and that which gives the coroners their authority in such a case to give judgment of outlawry: and it is not like the case where there was once a writ and return of outlawry, and the record since lost; for that, upon circumstances, a jury, upon the general issue, may find a record, though not shewn in evidence; but, here, the writ was never in truth indorsed or returned. 2 Hal. Hist. P. C. 207.

5*thly*, But if the writ of *certiorari* were directed to the coroners alone, though it may be a ground to cause the sheriff to mend his return, and make it according to the truth; yet the certificate of the coroners will not make a record to entitle the king or lord to any thing without the writ of exigent extant, and the return upon it amended by the sheriff; for without the *exigi facias*, and the return of the outlawry upon it, there is neither disability, forfeiture, nor escheat; and therefore, a *certiorari* shall not be so much as granted to the coroners to remove an outlawry after the party's death. 2 Hal. Hist. P. C. 207.

*A.* was outlawed, and afterwards made a lease of his lands, and afterwards these lands amongst others were found by inquisition; and this lease was pleaded in bar, to bind the king, being before the inquisition: the court held, that a lease or other estate, made by the party after outlawry, and before an inquisition taken, will prevent the king's title, if it be made *bonâ fide* and upon good consideration; but if it be in trust for the party only, it will not be a bar; but that no conveyance whatsoever made after the inquisition will take away or discharge the king's title. Hard. 101. Attorney General v. Sir Ralph Freeman.

*A.* was outlawed at the suit of *B.*, and his lands extended; afterwards *C.* claiming title to them brought his ejectment, and pleaded to the inquisition; and upon a bill in the Exchequer, an injunction was prayed for the king to stay the proceedings at law, but denied: for though a person outlawed cannot after an extent prevent the king's title by any alienation whatsoever; yet such outlawry gives no (*a*) privilege to the possession of a disseisor, but that the disseisee may enter and bring his ejectment; for by the outlawry the king had no interest in the land itself, but only a title to recover the profits. Hard. 176. Hammond's case.

(*a*) Any one that has an estate or a right, may grant the same over, if his title be precedent to the outlawry. Hard. 422.

—*A.* owes money to *B.* on a judgment, and to *C.* on a bond; *A.* is outlawed at the suit of the obligee, and his lands seised on the outlawry; and the question was, Whether the conusee of a judgment could

could extend those lands? it was held, the outlawry should be preferred, and that the king's hands should not be amoved, unless the conusor could shew covin and practice betwen the obligor and obligee. 2 Salk. 495. pl. 2. Attorney-General v. Baden.

Raym. 17. Lev. 33. Keb. 57. 74. 76. Windsor v. Seywell.

It was found by special verdict in ejectment, that *A.*, being outlawed in a personal action, levied a fine, and the king seised the lands in the hands of the conusee; and it was resolved, that if the seisure was before the fine levied, the king may well retain against the conusee; but, if the fine was levied before the seisure, the conusee may well take.

Salk. 395. Carth. 442. S. C. And that if a person outlawed do alien his lands before any inquisition taken for the king, which he may lawfully do, yet the alience must plead off the extent in the Exchequer, by shewing his title precedent.

From these cases the law seems to be now settled, as laid down in *Salk. viz.* That by a bare outlawry the party immediately forfeits his personal goods, and they are vested in the king, but that he does not forfeit the profits of his lands, nor chattels real, till inquisition taken; and that therefore an alienation after outlawry, and before inquisition, is good to bar the king of the pernancy; but if he makes a feoffment after inquisition, the feoffee has the estate, and the king shall have the profits.

Parker, 90.

[As to the preference upon outlawries, the following differences were stated by *Parker*, C. B., as settled in *Easter* term, 11 *W.* 3. 1699. First, Where there are two outlawries at different times, the first inquisition shall prevail: this was *Bradnell's* case, *Mich.* 36 *Car.* 2. Secondly, Where there are two outlawries on one day, the first inquisition shall be preferred: this was *Pain* and *Dew's* case, *East.* 21 *Car.* 2. Thirdly, Where there are two inquisitions on one day, the first outlawry shall be preferred. And, fourthly, Where there are two outlawries on one day, and both inquisitions on one day, there, the first lease shall be preferred.]

4. *Of the King's and Party's Interest at whose Suit the Outlawry was had, in the Estate and Effects of the Party outlawed, and their Remedies for the same.*

Hard. 422. Carth. 441.

When the outlawry is returned on the *exigi facias* by the sheriff, and recorded in court, execution may be taken out against the party outlawed, either general, to arrest the body, or special, to arrest the body and extend the goods and lands, as also debts and *choses in action* belonging to the party outlawed; and when such inquisition is returned by the sheriff, a transcript of the outlawry and inquisition is transmitted into the Exchequer: and thereupon, if any debt be returned due from any one to the outlawed, on application to the *Exchequer*, a *scire facias* issues to such person, to shew cause why the king should not have such sum so found due on the inquisition to the outlawed. And the reason of returning the transcript of the record into the Exchequer is, *ad ulterior. execution. prædicto domino reg. per eand. cur. de Scacc. superinde fiend.*: for when the inquisition has returned the outlawed to be possessed of any goods or lands, the property of those goods belongs to the king,

king, ſince the outlaw, being out of the king's protection, cannot enjoy any thing, and the profits of the land are to be ſeiſed into the king's hands; but the lands themſelves are not forfeited, unleſs it be in capital caſes: in other caſes, the profits are ſeiſed whilſt the party continues outlawed; and therefore the tranſcript of this record is ſent into the Exchequer, that the court of ordinary revenue may have it in charge. But the court of Exchequer (*a*) uſually grants a *cuſtodiam* to ſuch perſon as ſued out the outlawry.

(*a*) That the king is to ſatisfy the party at whoſe ſuit the outlawry was taken out; but this, *per* Popham, Ch. J. is *de gratiâ*, and not *de jure*, Yelv. 19. [1 P. Wms. 690. S. C. cited in argument. 2 P. Wms. 269. S. P. And the court will not ſubject the property to the debt of the party, unleſs he obtain a grant of it under the Exchequer ſeal, and make the Attorney-General a party. Balch v. Waſtall, 1 P. Wms. 445. Rex v. Fowler, Bunb. 38. ——— v. Broomley, 2 P. Wms. 269.]

The king by his prerogative is to have *bona felonum & fugitivorum*; and (*b*) though the lord of a manor or other private perſon may claim them, yet that, cannot be by preſcription, but muſt be by way of grant; for every preſcription muſt be immemorial; and the goods of felons and fugitives cannot be forfeited without matter of record, which preſuppoſes the memory of that continuance (*c*).

46 E. 3. 16. 5 Co. 109. (*b*) Outlawry in Northumberland for a debt in Durham, whether the king, or biſhop of Durham, he having a grant of *bona fugit.* in Durham, ſhould have the goods, *vide* Lane, 90, 91. 2 Roll Abr. 808. [(*c*) Although they may not be claimed immediately by preſcription, yet may they be had obliquely, or by a mean by preſcription; for a county palatine may be claimed by preſcription, and by reaſon thereof to have *bona et catalla preditorum, felonum*, &c. Co. Lit. 114. b. Durham is a county palatine by preſcription. 4 Inſt. 216.]

There is a difference ſaid to be between an outlawry on meſne proceſs and after judgment; that, as to the firſt, the party hath no intereſt, but that the whole benefit of the forfeiture accrues to the king.

Co. Lit. 288. b. Cro. Eliz. 707. But in 2 Lev. 50. it is held, that there is no difference between outlawries before and after judgment.

If a *capias ad ſatisfaciendum* iſſues upon a judgment in an action of debt, and the ſheriff returns *non eſt inventus*, and after, a *capias utlagatum* iſſues, upon which the party is taken and impriſoned, and he is let to go at large; the party that recovered may have an action of debt for this eſcape againſt the ſheriff, becauſe of the prejudice to him (*d*), he being in execution as well for his benefit as for the king's.

Cro. Jac. 619. Moor and Sir George Reynolds, S. P. But by Bridg. 67. it appears to have been an action upon the caſe. [Throgmorton v. Church, 1 P. Wms. 693. S. P. Leighton v. Walwin, 1 Roll. Abr. 810. pl. 5. Cro. Eliz. 706. S. C. by the name of Leighton v. Garnous, 5 Co. 88. S. C. Moor, 566. S. C. Yelv. 20. S. C. cited. 5 Mod. 201. S. C. cited.] (*d*) Although the *capias utlagatum* iſſue after the year, ſo that the defendant could not be in execution without prayer, yet caſe lies; for the plaintiff was prejudiced by the eſcape; for he ought not to be diſcharged, till he found ſureties to ſatisfy the plaintiff by the ſtat. 5 E. 3. c. 13. 5 Co. 89.

So, if a *capias utlagatum* iſſues upon an outlawry upon meſne proceſs, and the defendant is taken and ſuffered to eſcape, an action upon the caſe lies; becauſe the plaintiff is thereby delayed of his debt.

Cro. Eliz. 652. Bonner v. Stokeley, adjudged. Moor, 641. pl. 882. S. P. adjudged, [Cooke v. Champneſs, Fitzg. 265. S. P. Stanton v. James, 1 Lutw. 119. S. P.]

If within the year a *capias ad ſatisfaciendum* iſſues on a judgment, and the defendant is thereupon outlawed, and two years after

Wolf v. Davidſon, 1 Salk. 381.

5 Mod. 200. S. C. adjudged. Comb. 373. S. C. adjudged. Comb. 373. S. C. adjourned; and Holt, Ch. J. ſaid, he never underſtood the diverſity taken in the caſe where within the year and where after. 1 Sid. 380. S. P. adjourned.

after taken upon a *capias utlagatum*, and the ſheriff ſuffers him to eſcape, debt will lie againſt him; for the defendant was in execution at the ſuit of the plaintiff, without prayer, inaſmuch as the plaintiff was at the end of his proceſs, and no continuance nor *ſcire facias* lay after the *capias utlagatum*, which, being ſued at the charge of the plaintiff, imported an election of the body.

Yelv. 19. Jennings v. Hatley adjudged, by three Judges *cont.* Popham.

If *A.* hath judgment in debt againſt *B.* for 50 *l.*, and thereupon he takes out a ſpecial *capias utlagatum* againſt him, and *J. S.* promiſes, that, in conſideration of his ſtaying any further proceeding on that writ, he the ſaid *J. S.* will ſatisfy him the debt, unleſs *B.* do it before ſuch a day; an *aſſumpſit* lies on this promiſe; for the plaintiff is at the charge of ſuing out the writ, and hath the carriage of it; and the party ſhall be in execution at his ſuit, and the king is to ſatisfy him out of the goods of the party outlawed; although it was objected, that the conſideration was againſt law, being in delay of juſtice, and that the whole benefit accrued to the king.

2 Vent. 89, 90. Dawſon v. the Sheriffs of London.

But it hath been adjudged, that an action on the caſe will not lie againſt the ſheriff for neglecting to extend or ſeize the goods and lands of a perſon outlawed upon a *capias utlagatum*, becauſe it is the king's loſs; and though it was urged, the ſheriff's extending and ſeizing would be a means to enforce the defendant to appear to the plaintiff's action; this, the court ſaid, was ſo remote, as not to be conſidered as a ground to ſupport an action: but, if it had been ſhewn, that the ſheriff might have taken his body, and had neglected to do it, there might have been more reaſon to ſupport the action.

Hard. 106. Marters v. Whitefield.

When after the extent the lands are leaſed out, or a *cuſtodiam* granted to him at whoſe ſuit the outlawry was had, the leſſee ſhall account only according to the extended value; and if they happen to be extended too low, the party hath no remedy but by taking out a *melius inquirend.*, and thereby having them extended at a greater value.

Hard. 6, 7. Croſſe's caſe; *& vide* Hard. 58. where it is ſaid, that ſuch inquiſition ought to be as certain as an indictment or declaration.

If, by the inquiſition, the lands of the perſon outlawed are found in the particular occupation of ſuch and ſuch perſons, but the value of every particular parcel is not found, but by the lump that *in toto* the lands are of ſuch a value; this is a good finding.

Hard. 191. Wilford v. Greaves. [2 Salk. 469. Bunb. 103.]

It was found by inquiſition upon an outlawry, that the party outlawed was ſeiſed in fee *de ſex clauſis prati & paſturæ*; and it was objected, that the inquiſition was void for uncertainty: *per Hale*, Chief Baron, an inquiſition found *de uno meſſuagio ſive tenemento* has been held good; becauſe it is not an office of entitling but of inſtruction or information, which does not require ſuch preciſe certainty as an office of entitling does: ſo, in an inquiſition upon an extent upon a ſtatute or judgment, or in dower, ſuch certainties ſuffice, elſe all ſuch inquiſitions were liable to be quaſhed, which would

would annul all ſuch proceedings; which would be miſchievous; and ſuch inquiſitions have not uſed to be quaſhed for want of ſuch preciſe certainty.

A bill was exhibited by the Attorney-General againſt a perſon outlawed, to diſcover his real and perſonal eſtate, and what ſecret and fraudulent gifts and conveyances he had made, becauſe by the outlawry his goods and the profits of his land were forfeited; to which the defendant demurred; *quia nemo tenetur prodere ſeipſum*, and to diſcover his eſtate upon a forfeiture: but the court held, that he ought to anſwer the bill; becauſe the king is entitled to his eſtate by courſe of law, and the outlawry is in the nature of a gift to the king, or a judgment for him; and a common perſon may have a bill of diſcovery in the like caſe to entitle him to take out execution. Hard. 22. The Protector v. Lord Lumley.

Alſo, in caſe of outlawry, it is ſaid to be the courſe of the Exchequer to prefer an information in nature of trover and converſion againſt him who hath the goods of a perſon outlawed. Mod. 90.

### 3. Of the Party's Diſability to bring any Action.

A perſon outlawed cannot regularly maintain any action, for by his contumacy he is out of the king's protection, and ſhall have no privilege or (*a*) benefit from that law of which he is a violator, and to which he refuſes to be ameſnable. Lit. § 197. Co. Lit. 128. (*a*) But a perſon outlawed may be ſued, being to his prejudice. Noy, 1. Sid. 60. *Utlagatus legem terræ amittit.* Glanvil, lib. 2. c. 3. *Reſpondra a touts, mes nul reſpondra a luy.* Cro. Jac. 426. cited from Britton and Bracton.

This diſability may be taken advantage of by pleading the ſame in bar or abatement, with this diverſity, that it may be pleaded in abatement in all caſes, but it cannot be pleaded in bar, unleſs the ground or (*b*) cauſe of the action be forfeited; as, in felony, where it may be pleaded in bar to all actions concerning lands and tenements, as well as goods and chattels, becauſe all are forfeited by the felony. 28 E. 3. 92. 22 Aſſ. pl. 47. 63. 5 Co. 109. Co. Lit. 29. 2 Ld. Raym. 1056. (*b*) If the demandant in a *ceſſavit* be outlawed in a perſonal action, this outlawry may be pleaded in bar of the action, becauſe the arrearages are due to the king. 2 Inſt. 298.

But, though it cannot be pleaded in bar, unleſs the ground or cauſe of action be forfeited, nor in actions where the damages are uncertain; yet, it is now held, that in actions on the caſe, where the debt to avoid the law-wager is turned into damages, there, outlawry may be pleaded in bar; for it was veſted in the king by the forfeiture, as a debt certain due to the outlaw; and the turning it into damages, whereby it becomes uncertain, ſhall not deveſt the king of what he was once lawfully poſſeſſed. Dyer, 227. in margin. 3 Leon. 197. Owen, 22. Cro. Eliz. 203. 2 Vent. 282. 3 Lev. 29.

It hath alſo been held, that outlawry may be pleaded in bar after it is pleaded in abatement (*c*); becauſe the thing is forfeited, and the plaintiff has no right to recover. Jon. 239. Lutw. 1604. [(*c*) It is ſtated in Lutw. as having been ſo ſaid in 11 H. 7. pl. 27. But no ſuch dictum is to be met with in the place referred to. The deciſion in Jon. 239. was, that the defendant may plead outlawry in bar to a *ſcire facias* by the plaintiff after imparlance.]

The

And. 36. Co. Lit. 128. Dyer, 317. a. pl. 6. 2 Roll. Abr. 805.

The disability cannot be taken advantage of until the exigent be returned; for the inquiring after the party in the county is, in order that he may appear; and therefore, if he does appear at the return of the exigent, the law is satisfied, and the outlawry must not be recorded against him.

Co. Lit. 128. a. Doct. Pl. 390.

Also, this disability is only pleadable when the plaintiff sues in his own right; for, if he sues *en auter droit*, as, executor, administrator, or, as, mayor with his commonalty, outlawry shall not disable him, because the person whom he represents has the privilege of the law, and outlawry being no objection to his representation, it is no objection but he should be answered.

2 Mod. 267. *& vide* 11 Co. 65. Hob. 327.

But it hath been held, that to an information against a justice of peace, for refusing to grant his warrant to suppress a conventicle, outlawry in the informer is a good plea, though objected that he sues in right of the king; for as to a moiety he recovers to his own use, which he cannot do by reason of this disability.

Preced. Chan. 13. Attorney-General of the Duchy, at the relation of Mr. Vermuden v. Sir John Heath & al. in the Duchy-chamber *coram* Ch. B. Atkins and Just. Ventris; *& vide* 2 Bulst. 134. which seems *cont. & vide* And. 30. [The relator in this case seems to have sustained the character of plaintiff, as well as relator; for outlawry cannot be alleged in disability of a *mere* relator. Mitf. Eq. pl. 186.]

Again, a relator in his information set forth, that he and the defendants were part-owners of several coal-mines in *Derbyshire*; that the king had a duty of lot and cope out of all the lead-mines there; that by the custom, if one owner were at the expence of improving and working a mine, all the owners ought to contribute and bear their part of the charge; that the relator had been at great charges in making soughs and other things for working and improving the mines, without which they could not be wrought, and so the king would lose his duty; and that the defendant would not contribute nor pay any part of the charge; therefore to make him account with the relator, and pay his part of the charge, was (amongst other things) the scope of the information. To this the defendant pleaded an outlawry in the relator; and after much debate the plea was held good; for though the Attorney General be plaintiff, yet the relator is to have the whole benefit or loss of the suit, and is himself party to it; for it would abate by his death, *&c.*, and the king's name is only made use of by the form of the court, and he is not directly concerned at all, and very little by consequence, and the suit is not for the king's duty, but the relator's interest.

Sid. 49.

If there be two tenants in common of a rectory for years, and one of them be outlawed, yet the other, on setting forth this matter, may have an action of debt for a moiety.

Co. Lit. 128. Raym. 46. See vol. 1. p. 3. note.

If the party outlawed bring a writ of error to reverse the outlawry, the outlawry in that suit, or any stranger's, shall not disable him; for if he were outlawed at several men's suits, and one should be a bar to another, he could never reverse any of them: and if it be for error in the same outlawry, the outlawry itself is no objection, for that would be *exceptio ejusdem rei cujus petitur dissolutio*: nor is another outlawry pleadable in bar to such writ of error, for then two erroneous outlawries would be irreversible, which

which would amount to *exceptio ejuſdem, rei*, &c. So, if there be an attaint brought on a verdict, outlawry grounded on that verdict ſhall not be pleadable in bar, for the above reaſons.

As this is a dilatory plea, when it is pleaded in another court than where the outlawry iſſued, the defendant muſt bring it in immediately; for this being in delay, if the court ſhould give time, and it ſhould not be brought in, delay of juſtice would be from the court; and ſince there is a way of having it immediately, by producing it under the great ſeal, no time ſhall be given to bring it (*a*) *ſub pede ſigilli*. But otherwiſe, when it is in the ſame court, for then the record is already in court.

10 Aſſ. 10. Doct. Pl. 396. 6 Co. 53. 5 Co. 88. 8 Co. 142. (*a*) That outlawry muſt be pleaded *ſub pede ſigilli*, Salk. 217.

otherwiſe the plaintiff may refuſe it, but he ſhall not afterwards demur for that cauſe.

In pleading outlawry in diſability in another court, the ancient way was to have the record of the outlawry itſelf *ſub pede ſigilli* by *certiorari* and *mittimus*: but this being very expenſive, it is now held to be ſufficient to plead the *capias utlagatum* under the ſeal of the court from whence it iſſues; for as the iſſuing of the execution could not be without the judgment, the execution is a proof to the court that there is ſuch a judgment; which again is a proof by matter of record of the defendant's plea of a matter of record, whereby it appears to the court not to be merely dilatory; and therefore on ſhewing ſuch execution, if the plaintiff will plead *nul tiel record*, the court will give the defendant a day to bring it in.

Co. Lit. 128. Doct. Pl. 392. 394.

Outlawry in a county palatine cannot be pleaded in any of the courts at *Weſtminſter*, for the party is only ouſted of his law within that juriſdiction; and it ſhall not extend to diſable a man in another county where they have no power; for the county palatine being a royal juriſdiction within bounds, the loſing of the privileges of the law within that juriſdiction can be no diſadvantage to him in another county; and if he does not live within the palatine juriſdiction, he is not obliged to attend there. But it ſeems, that outlawry in the county palatine of *Lancaſter* may be pleaded in the courts of *Weſtminſter*; becauſe that county was erected by act of parliament in *Ed.* III.'s time; but *Durham* and *Cheſter* are by preſcription.

Fitz. *Coron.* 233. a. 12 E. 4. 16. Doct. Pl. 396. Co. Lit. 128. 2 Roll. Rep. 38. Cro. Car. 566.

If oulawry be pleaded either in bar or abatement, and the plaintiff reply *nul tiel record*, and the defendant have a day given him to bring in the record, and in the interim the plaintiff remove the record by writ of error, and reverſe it; though the defendant fail in bringing in the record, yet this ſhall not be fatal and peremptory on him: for, in the firſt caſe, he ſhall have liberty to plead a new bar; and in the ſecond, the judgment ſhall only be a *reſpondeas ouſter*; becauſe his plea was a true plea at the time of pleading it, and the plaintiff was actually diſabled from ſuing, not having then his *liberam legem*.

Doct. Pl. 397. 5 Co. 90. Moor, 73. Dyer, 228. Cro. Jac. 484. Salk. 329. 2 Roll. Rep. 38. Yelv. 36. 8 Co. 142. Brownl. 83.

So, that outlawry does not abate the writ, but is only a temporary impediment that diſables a plaintiff from proceeding; for, upon obtaining a charter of pardon, or reverſing the outlawry, he is reſtored to his law, and ſhall oblige the defendant to plead to the ſame writ.

Co. Lit. 128. Doct. Pl. 397.

*Audita*

Cro. Jac. 425. Piers Griffith v. Hugh Middleton.

*Audita querela* to avoid a ſtatute upon the ſtatute of uſury; to which the defendant pleaded outlawry in the plaintiff at the ſuit of *J. S.*; on demurrer it was inſiſted, that outlawry could not be pleaded in this caſe, the ſuit being only by way of diſcharge, and not to recover any thing: but it was held, that a perſon outlawed is not receivable to ſue in any court, unleſs it be to reverſe his own outlawry; and the Chief Juſtice ſaid, that where the action is *ad lucrandum*, there ought to be ability in the perſon, and that it is all one to gain by way of diſcharge, as by way of perquiſition.

Cro. Jac. 616. Bythal v. Harris, adjudged by three Judges v. Houghton.

But, where error was brought by ſix to reverſe a judgment in ejectment, and the defendant in error pleaded outlawry in one of the plaintiffs; the plea was held ill on demurrer; becauſe this was only a commiſſion which went in (*a*) diſcharge, and in which all the plaintiffs were obliged to join: it was alſo ſaid in this caſe, that it would be very miſchievous upon an outlawry in caſe of (*b*) error, attaint, or *audita querela*, which are only by way of diſcharge, if this ſhould be any bar.

(*a*) But it was agreed, that if two plaintiffs in debt be barred, and bring error, the outlawry againſt one is a good bar againſt the other, becauſe they are to recover. Cro. Jac. 616. (*b*) But for this, *vide* Cro. Eliz. 648. 6 Co. 25. Cro. Jac. 117.

Sid. 43. Jaſon v. Kete.

A perſon is outlawed in debt, and taken upon a *capias* and committed to the *Fleet*; the keeper of the *Fleet* lets him eſcape voluntarily; and afterwards the executor of the plaintiff in debt takes him in execution again upon a new writ; and upon this ſecond taking he brings an *audita querela*: to this, outlawry in the plaintiff in the *audita querela* was pleaded; upon which plea he demurred: and it was reſolved, that outlawry was a good plea in this caſe in diſability of the plaintiff; becauſe that this writ is not directly to reverſe the outlawry (as a writ of error is), but is founded upon a wrong, *viz.* upon the eſcape, and not upon the record only.

Salk. 178. pl. 3. Moor v. Green. 5 Mod. 11. S. C.

In debt upon a judgment brought in *Trinity* term, the defendant imparled till *Michaelmas* term, and then pleaded in bar, that the plaintiff *die lunæ prox. poſt teſt. Sanct. Martini* was outlawed; to which the plaintiff demurred. It was urged, that the outlawry was meſne between the action brought and the plea pleaded, and that all matters in diſcharge of the action, which happen after the action brought, ought to be pleaded *puis darrein continuance*. But the court compared this to the common caſe of a judgment confeſſed by an executor after an action brought, which is never pleaded *puis darrein continuance*, but as this caſe is; and in theſe caſes, the time of the outlawry, and the time of the judgment, and when it was, appear in themſelves.

3 Lev. 29.

In pleading outlawry, it hath been adjudged, that the defendant muſt conclude his plea with a *prout patet per recordum*, and not *hoc paratus eſt verificare*.

Cro. Car. 566. Dawſon v. Lee.

If the defendant after imparlance pleads outlawry in bar, and the plaintiff replies *nul tiel record*, and the defendant hath a day to bring in the record, and fails therein, judgment ſhall be given abſolutely againſt him, and not a *reſpondeas ouſter*.

If

If ten outlawries on meſne proceſs be pleaded in diſability of the plaintiff, this is naught for duplicity; for though there be a difference as to pleading double between pleas in bar and abatement, there is likewiſe a difference between a plea of an outlawry in diſability and other pleas in abatement; and the court held this plea ill for duplicity, becauſe the plaintiff is diſabled as well by one outlawry as by all the other nine, to which ſeveral anſwers are required. Carth. 8, 9. Trevelian v. Seccomb. Show. 80. S. C.

Outlawry may be pleaded to a bill in equity, as well as to an action at common law; and in this caſe the defendant need not ſet down the plea, as he muſt other pleas and demurrers, in eight days, or they muſt ſtand over-ruled; but the plaintiff muſt ſet it down, if there be any inſufficiency in point of form in pleading; for being *ſub pede ſigilli* it appears, upon the ſhewing of it, to be a good plea, and therefore not preſumed to be neceſſary to be argued before the court. If an outlawry be not pleaded, yet it may be ſhewed at the hearing as a peremptory matter againſt the plaintiff's demand, if it be perſonal; becauſe it ſhews the right of the thing in demand to be in the king. If a plea of outlawry ſtand allowed, whereby the ſuit is put *ſine die*, and after the outlawry be reverſed, the plaintiff muſt bring his bill of revivor; becauſe that ſuit being abated, the defendant has no day in court, and therefore muſt be brought into court by a new proceſs. This plea muſt be on oath. 2 Vern. 37. [But plea of an outlawry with the common averment of the identity of the perſon need not be on oath. *Id.* 198.]

But, if the bill be for relief againſt an action at law, and an outlawry be pleaded by the defendant in the ſame action, it will not be allowed (*a*); becauſe the outlawry is part of the grievance, and it is *exceptio ejuſdem rei cujus petitur diſſolutio*. Alſo, as at law, an outlawry in an executor, adminiſtrator, or guardian, is no good plea, becauſe they do not claim in their own right; and the real actor being the teſtator or infant, the outlawry in any third perſon is no exception againſt him why he ſhould not ſhare *in judicio*. 2 Vern. 199. *per* Hutchins, Lord Commiſſioner. (*a*) That to avoid pleas of outlawry, the plaintiff may make all that have outlawries againſt him defendants.

4. What further Diſabilities Outlawry ſubjects the Party to.

Perſons outlawed are under ſeveral other diſabilities, beſides that of bringing an action; ſuch a one cannot be a juror, becauſe he is not *liber & legalis homo*, as the law requires. Co. Lit. 6. b. & *vide* tit. Juries.

But one outlawed in a perſonal action may be a witneſs, though he cannot be a juror. *Vide* tit. Evidence.

A perſon outlawed cannot be an (*b*) auditor to take accounts. Co. Lit. 6. b. (*b*) But a perſon outlawed may be a private attorney. Co. Lit. 52. a. ——— May be executor or adminiſtrator, *vide* tit. Executors and Adminiſtrators. ——— Incapable of executing an office in a corporation. Carth. 199. Show. 288.

One outlawed in a perſonal action cannot be an approver; becauſe by his outlawry he is out of the law, and his accuſation ſhall not be of ſuch credit as to put any perſon on his trial. 2 Hawk. P. C. c. 24. § 4.

If a man pledge goods and then is outlawed, he cannot redeem them; becauſe then the abſolute property of them is in the king: but if the outlawry be reverſed, then the outlawed perſon is reinſtated Bulſt. 29.

inſtated in his property as if there had been no outlawry, and therefore may redeem.

Co. Lit. 8. b. Perſons outlawed in debt, treſpaſs, or other civil action, may be heirs.

Brook, 82. Perk. 388. Co. Lit. 31. a. If a huſband be outlawed in treſpaſs, or any civil action, the wife ſhall have dower, for this works no corruption of blood, or forfeiture of lands: ſo likewiſe, it ſeems, if the wife be outlawed or waived in ſuch actions, yet her (*a*) dower is not forfeited.

(*a*) So, a huſband ſhall be tenant by the curteſy, though he be outlawed in a civil action. 5 Co. 110. Co. Lit. 92. b. 391. a.

Owen, 116. Knowles v. Powel. Moor, 237. S. C. *A.* being outlawed, the queen granted him a leaſe for years, rendering rent; he was again outlawed after the grant, but, before any ſeizure, there was a pardon of all goods and chattels forfeited; and it was adjudged, that a perſon outlawed was capable of receiving a leaſe, and that by the pardon, the term, which was forfeited, revived, and was reſtored again.

21 Co. 29. 31. 2 Hawk. P. C. c. 33. § 28. 62. Foſt. 358. It is held, that where clergy is allowable, it ſhall be as much allowed to one who is outlawed by common law for felony, as to one who is convicted by verdict or confeſſion. Alſo, a ſtatute taking away the benefit of clergy, from thoſe who ſhall be found guilty, doth not thereby take it from perſons who are outlawed; neither doth the ſtatute of 25 *H.* 8. *c.* 1. § 3. which takes away clergy from thoſe who are found guilty after the laws of this realm, extend to perſons outlawed (*b*).

[(*b*) For this point ſee Hawk. P. C. *ubi ſupra*, 4 Term Rep. 543.]

2 Inſt. 187. 2 Hawk. P. C. c. 15. § 40. By the ſtatute of *Weſtm.* 1 *Ed.* 1. *c.* 15. it is enacted, that if a perſon be attaint by outlawry of any felony, he is not bailable: but it is held, that the court of King's Bench may in their diſcretion, in ſome ſpecial caſes, bail a perſon upon an outlawry of felony; as, where he pleads, that he is not of the ſame name with the perſon that was outlawed, or alleges any other error in the proceedings.

## (E) Of the Regularity of Proceedings on an Outlawry, and (*c*) for what Errors it may be reverſed: And herein,

### 1. Where, for want of ſuch Proceſs as is required by Law, the Outlawry may be reverſed.

(*c*) By ſtatute of recuſancy the outlawry of a recuſant not to be reverſed for want of form. 5 Mod. 141. 3 H. 6. 9. Roll. Abr. 793. Finch of Law, 351. 355. Raſt. Ent. 188. pl. 18. Co. Lit. 259. THE forfeitures and penalties in an outlawry being ſo ſevere, great care hath been taken and caution uſed, that no perſon ſhould be outlawed without ſufficient notice, and great contumacy to the proceſs of the court; and therefore the law requires, that in all civil cauſes, and in every indictment or appeal for any crime under the degree of capital, there ſhould be three *capiaſes* to the ſheriff of the county where the action or proſecution is commenced, before the exigent is awarded; and if any ſuch proceſs is omitted, the outlawry is erroneous.

But,

But (*a*), after judgment upon a *capias ad ſatisfaciendum*, an exigent may be awarded, with an *alias* and *pluries*, and thereupon the defendant be outlawed; becauſe he having been already in court before judgment, and having conuſance of the debt, ought to pay the debt on the firſt ſuing out of the *capius*; otherwiſe it is a contumacy in not performing the judgment of the court, for which diſobedience he is put out of the king's protection. 40 E. 3. 25. pl. 28. Finch, 476.

(*a*) So, after judgment, there need not be any proclamations to the county where he reſided. Cro. Jac. 577.—If one is outlawed in Middleſex, a *capias utlagat.* may be ſued out againſt him in any other county without a *teſtatum.* Vent. 33. 2 Hal. Hiſt. 198.

It is ſaid to be agreed, that one *capias* before the award of the exigent hath alway been ſufficient in an indictment or appeal of death, or high treaſon; but that it ſeems doubtful whether two *capiaſes* were not required by the common law in all indictments and appeals of any other felony. However, ſays *Hawkins*, it is (*b*) certain, that they are required in all indictments of any other felony by 25 *E.* 3. *c.* 14. by which it is enacted, "That if after "any man be indicted of felony before the juſtices in their ſeſ- "ſions, to hear and determine, it ſhall be commanded to the "ſheriff to attach his body by writ or precept, which is called a "*capias*; and if the ſheriff return that the body is not found, an- "other ſhall be incontinently made, returnable at three weeks "after, wherein it ſhall be compriſed, that the ſheriff ſhall cauſe "to be ſeized his chattels, and ſafely to keep them till the day of "the writ or precept returned; and if the ſheriff return, that "the body is not found, and the indictee cometh not, the exi- "gent ſhall be awarded, and the chattels ſhall be forfeit, as the "law of the crown ordaineth: but, if he come and yield himſelf, "or be taken by the ſheriff or by other miniſter, before the "return of the ſecond *capias*, then, the goods and chattels ſhall "be ſaved." 2 Hawk. P. C. c. 27. § 116.

(*b*) But *vide* 2 Hal. Hiſt. P. C. 194-5.

It is ſaid to have been the general opinion, that this ſtatute extends to appeals, as well as to indictments, though it mention only the latter; but that it extends not to any indictment or appeal of death, though it ſpeak of felony in general. 2 Hawk. P. C. c. 27. § 116.

It is left a *quære*, if three *capiaſes* be ſtill neceſſary in an appeal of rape, as they were at the common law, notwithſtanding it be made felony by ſtatute. 2 Hawk. P. C. c. 27. § 115.

[This ſtatute doth not apply to a court of oyer and terminer, and gaol-delivery, but is confined to the ſeſſions of the juſtices of the peace.] Rex v. Yandell, 5 Term Rep. 521.

2. Where, for want of Form in ſuch Proceſſes, the Outlawry may be reverſed.

If any proceſs required in an outlawry be erroneous, the outlawry for this may be reverſed; for a perſon ſhall not be ſubject to any diſadvantage in reſpect of having ſuch proceſs awarded againſt him, nor ſhall he be condemned barely for not appearing, where 3 H. 7, 8. b. 9. a. Sid. 100. Dyer, 206.

where that which ſhould have compelled him to have appeared is (*a*) defective.

(*a*) Where, for want of form in a writ of proclamation, and for improper abbreviations, the outlawry was reverſed. Style, 182.—So, where in the exigent it was *utleſt.* for *utlagat.*, the outlawry was reverſed. Style, 227. So, where it was *utlegat*, inſtead of *utlagat.* Lev. 164.—But it is ſaid, that a defect in proceſs in an outlawry may be ſalved by the defendant's purchaſing a pardon, and ſhewing it to the court; for that ſuppoſes that there was ſuch an outlawry againſt him as needed a pardon, which, if it were erroneous, it would not do. 2 Hawk. P. C. c. 27. § 111.

Cro. Eliz. 592. 2 Hal Hiſt. P. C. 199.

As, where the *capias* was *eſte Edmundo Aaderſon*, without a T, for this error the outlawry was reverſed; for the *capias* and exigent muſt be in the king's name, and under the judicial ſeal of the king appointed to that court that iſſues the proceſs, and with the *teſte* of the Chief Juſtice or Chief Judge of that court of ſeſſions.

But for this Cro. Eliz. 467. Dyer, 175. Lev. 143. 2 Salk. 700.

Every *capias* ought to be returnable the enſuing term, for the miſchief that might otherwiſe befall the priſoner in being kept always in priſon.

Latch. 11. Lutw. 333.

The *capias utlagatum* can iſſue only in term-time, being a judicial writ; yet in pleading an outlawry, the party need not allege that it iſſued in term-time; for it ſhall be ſo intended, unleſs the contrary appears.

Rex v. Perry, 6 Term Rep. 573.

[It need not indeed be ſtated in expreſs terms on a record of a judgment of outlawry, that a writ of *capias* iſſued; for it is ſufficient, if it appear, "that the ſheriff was commanded to *take* the "defendant."

*Ibid.*

Neither is it neceſſary in ſtating every writ to repeat the day and year when each was iſſued: it will ſuffice, if it appear by reference to the preceding parts of the record; as if, after ſtating that the *capias* was returned on ſuch a day, it proceed, *Whereupon* the exigent was awarded; *whereupon* referring to the day when the *capias* was returned.

Rex v. Yandell, 5 Term Rep. 521.

It need not appear on a record of outlawry, that the *capias* and exigent were ſealed by the juſtices of oyer and terminer, &c.]

Cro. Jac. 577.

If the proceſs be againſt the feme, and the words are, *quat recuperavit verſus eum*, inſtead of *eam*; this is (*b*) ſuch an error for which the outlawry may be reverſed.

(*b*) So, an outlawry was reverſed upon a writ of error, for that in the exigent it was fourteen in figures, and not in words. 2 Keb. 128. So, where the year of the Lord was in figures, and not in words. Style, 334.—So, where it was *ex inſinuatone* for *ex inſinuatione*, for want of *i*, the outlawry was held to be erroneous. Cro. Jac. 577.

Style, 334.

If the writ be *præcipipimus vobis* inſtead of *præcipimus vobis*, this is erroneous; for without a command to the ſheriff the writ is not good, and here, there is none; the word *præcipipimus*, being ſenſeleſs, is of no greater force than if omitted.

3. Where, for Variance in ſuch Proceſſes, the Outlawry may be reverſed.

Fitz. Utlagary, 41. Bro. Variance, 90.

If there be a variance between the original and extent or other proceſs, for this the outlawry may be reverſed.

As

Miſnomer, 80. Error, 172.

As, a variance between the original writ and filazer's rule. 2 Leon. 120.

So, where in error to reverſe an outlawry in treſpaſs, in the original the plaintiff was named *Barnes*, and in the exigent *Bernes*; this was held error. So, where in the original it was *Blaba ſua*, and the *exigent* was *Bladâ*; this was held a plain variance, and the outlawry was reverſed. Cro. Eliz. 240. Elden v. Barnes.

So, where in the original the party was named *Agnes Gargrave* of *Kingſly in com. Ebor.*, and in the *exigent* ſhe is named *Nuper de Kingſly*; this was held error. Cro. Jac. 576.

4. Where, for defective Execution and Return, the Outlawry may be reverſed: *And herein,*

1. *To whom ſuch Proceſs is to iſſue and be directed.*

The exigent and ſeveral proceſſes, in order to an outlawry, are to be directed to the ſheriff of the proper county; and ſuch care hath been taken that there might be no ſurpriſe in the affair, that in civil caſes there are three ſeveral offices concerned in the iſſuing of ſuch proceſs: the firſt is the Chancery, out of which the original iſſues; the ſecond, the filazer, who makes out the *capias*, *alias*, and *pluries*; and the third, the exigenter, who makes out the exigents; which ſeveral proceſs muſt be legally executed before the party can be ſaid to be outlawed: therefore, if the ſheriff returns a *cepi*, if he have not the body at the day, the court will not award an exigent on the ſuggeſtion of an eſcape, unleſs the ſheriff will return one. 2 Hawk. P. C. c. 27. § 117.

If the exigent be directed to the ſheriffs of the city of *Lincoln*, and the direction be *Quod capias corpus ejus ita quod habeas corpus ejus*, where (as it was objected) it ought to have been *capiatis & habeatis*; yet this is no error, for they are both but one officer to the court, and though in the end of the writ it was *Ita quod habeatis ibi hoc breve*; this was likewiſe held to be good, and no way repugnant, being good both ways. Cro. Jac. 576.

But if, in the direction of proceſs of outlawry to the ſheriffs of *London*, it be *precipimus tibi* inſtead of *vobis*; this is ſuch an error for which the outlawry will be reverſed, becauſe that the court will *ex officio* take notice that there are two ſheriffs in *London*. Hetley, 93. Lit. Rep. 150. S. C.

Judgment of outlawry is given by the coroner at the fifth county-court, upon the party's not appearing to the exigent, (which is a writ, commanding the ſheriff to cauſe the defendant to be demanded from county-court to county-court until he be outlawed, &c.) and ſuch judgment is entered thus, *Ideo*, &c. *per judicium coronatoris domini regis comitatûs prædict. utlagatus eſt.* Dyer, 223. pl. 24. Bro. Coron. 166. 3 Inſt. 212.

If the judgment appear not by the return of the exigent to have been given by the coroner, it is erroneous, except in *London*, where the mayor by cuſtom is coroner, and the judgment is given by the recorder. Co. Lit. 288. Dyer, 317. pl. 6. 8 Co. 126.

Cro. Eliz. 648, Palm. 43. Cro. Jac. 358. 531. Roll. Rep. 266.

2 Hal. Hiſt. P. C. 204.

If there be two coroners in a county, the calling upon the exigent may be by one of them, and likewiſe one alone may give the judgment of outlawry; but, it ſeems, the return muſt be by two in miniſterial acts; the name of the coroner muſt be ſubſcribed (*a*) to the judgment of outlawry at the *quinto exactus* upon an outlawry of felony; and it muſt be ſubſcribed alſo by the name of their office, *A. B. & C. D. coronotares*, unleſs in *London*, where the mayor is coroner; the ſheriff's name and office muſt alſo be ſubſcribed to the return of the exigent, *e. g. A. B. armiger vicecomes.*

[(*a*) It is not neceſſary, that the names of the coroners ſhould be ſubſcribed to the judgment of the outlawry: it is ſufficient if it appear on the record, that the judgment of outlawry was given by them. Rex v. Yandell, 5 Term Rep. 541.]

Noy, 113. An attachment granted againſt the coroners of York.

If, after the *quinto exactus*, the coroners refuſe to give judgment of outlawry, the court will grant an attachment againſt them; and it is ſaid, that the coroners of *Stafford* for ſuch an offence were fined 10 *l.*; but after the judgment of the outlawry pronounced, they may (*b*) ſtay the return of the exigent to be adviſed, if the caſe requires it.

(*b*) That a *certiorari* lies to return the outlawry, which muſt be returned by the ſheriff on the *exigi facias*, and ſuch return recorded in the court above. Dyer, 223. a.

2 Hal. Hiſt. P. C. 36.

By the ſtatute of 34 *H.* 8. *c.* 14. the clerks of the crown, clerks of aſſiſe, and clerks of the peace, are to certify into the King's Bench the names of all perſons outlawed, attainted, or convicted; and upon letter from the juſtices aforeſaid, certificates ſhall be made of ſuch perſons outlawed, attaint, or convict, to the juſtices of gaol-delivery.

### 2. *To what Place the Proceſs is to iſſue; and herein of the* Quinto exactus, *and Proclamations on an Outlawry.*

Fitz. Exigent, 26. Dyer, 295.

The exigent muſt be ſued to the county where the party really reſides, for there, all actions were originally laid; and becauſe that outlawries were at firſt only for treaſon, felony, or very enormous treſpaſſes, the proceſs was to be executed at the torn, which is the ſheriff's criminal court; and this held not only before the ſheriff but before the coroners, who were ancient conſervators of the peace, being the beſt men in each county, to preſide with the ſheriff in his court, and who pronounced the outlawry in the county-court on the party's being *quinto exactus*; and therefore anciently there was no occaſion for any proceſs to any other county than that in which the party actually reſided. But this matter being ſince altered, and the learning thereof depending on ſeveral acts of parliament, it will be neceſſary to take notice of the ſtatutes themſelves.

And firſt, it is enacted by the *6 H. 6. c.* 1. "That before any "exigents be awarded againſt perſons indicted in the King's Bench "of treaſon or felony, writs of *capias* ſhall be directed as well to "the ſheriff or ſheriffs of the county wherein they be indicted, a "to the ſheriff or ſheriffs of the county whereof they be named in "the indictments; the ſame *capias* having the ſpace of ſix week

" at the leaſt, or longer time, by the diſcretion of the ſaid juſtices, " if the caſe require it, before the return of the ſame; which " writs ſo returned, the juſtices ſhall proceed in the manner as " they had done before the ſtatute; and if any exigent be " awarded, or any outlawry pronounced hereafter againſt any ſuch " perſons before the return of the ſaid writs, the ſame exigent ſo " awarded, with the outlawry thereof pronounced, ſhall be void " and holden for none."

And it is farther enacted by 8 *H.* 6. *c.* 10. " That upon every " indictment or appeal, by the which any ſubject dwelling in " other counties than where ſuch indictment or appeal ſhall be " taken of treaſon, felony, and treſpaſs, before the juſtices of the " peace, or before any other having power to take ſuch indict- " ments or appeals, or other commiſſioners or juſtices in any " county, franchiſe, or liberty of *England*, before any exigent " awarded, preſently after the firſt writ of *capias* returned, an- " other writ of *capias* ſhall be awarded, directed to the ſheriff of " the county whereof he who is indicted is or was ſuppoſed to be " converſant, by the ſame indictment, returnable before the ſame " juſtices, before whom he is indicted or appealed, at a certain " day, containing the ſpace of three months from the date of the " ſaid laſt writ, where the counties be holden from month to " month, and where the counties be holden from ſix weeks to ſix " weeks, the ſpace of four months, until the day of the return of " the ſaid writ, by which writ of ſecond *capias* the ſheriff ſhall be " commanded to take him which is ſo indicted or appealed, by " his body, if he can be found within his bailiwick; and if he " cannot be found within his bailiwick, to make proclamation in " two counties before the return of the ſame writ, that he which " is ſo indicted or appealed ſhall appear before the ſaid juſtices, " *&c.* at the day contained in the ſaid writ, to anſwer, *&c.* after " which writ ſo ſerved and returned, if he which is ſo indicted " or appealed come not at the day of ſuch writ returned, the " exigent ſhall be awarded; and that every exigent and out- " lawry otherwiſe awarded or pronounced ſhall be holden for " none and void."

But it is expreſsly provided, " That the above recited ſtatute " concerning proceſs to be made before the king in his bench " ſtand in force, and that this preſent ſtatute ſhall not extend to " indictments or appeals taken within the county of *Cheſter*; and " that if any perſons ſhall be indicted or appealed of felony or " treaſon, and at the time of the ſame felony or treaſon ſup- " poſed were converſant within the county whereof the indict- " ment or appeal makes mention, the like proceſs to be made " againſt them as was uſed before."

And it is farther enacted by 10 *H.* 6. *c.* 6. " That ſuch ſecond " *capias* as is required by 8 *H.* 6. *c.* 10. ſhall be awarded upon in- " dictments or appeals removed into the King's Bench, or elſe- " where, by *certiorari* or otherwiſe."

And by the 31 *Eliz.* *c.* 3. it is enacted, " That in every action " perſonal, wherein any writ of exigent ſhall be awarded out of " any court, one writ of proclamation ſhall be awarded and made

" out of the ſame court having day of *teſte* and return, as the ſaid
" writ of exigent ſhall have directed, and delivered of record to
" the ſheriff of the county where the defendant, at the time of
" the exigent ſo awarded, ſhall be dwelling; which writ of pro-
" clamation ſhall contain the effect of the ſame action; and that
" the ſheriff of the county, unto whom any ſuch writ of pro-
" clamation ſhall be directed, ſhall make three proclamations in
" this form following, and not otherwiſe; that is to ſay, one of the
" ſame proclamations in the open county-court, and one other of
" the ſame proclamations to be made at the general quarter
" ſeſſions of the peace in thoſe parts where the party defendant,
" at the time of the exigent awarded, ſhall be dwelling, and one
" other of the ſame proclamations to be made one month at the
" leaſt before the *quinto exactus* by virtue of the ſaid writ of exi-
" gent, at or near the moſt uſual door of the church or chapel of
" that town or pariſh where the defendant ſhall be dwelling at
" the time of the exigent ſo awarded; and if the defendant ſhall
" be dwelling out of any pariſh, then in ſuch place, as aforeſaid,
" of the pariſh in the ſame county, and next adjoining to the
" place of the defendant's dwelling, and upon a *Sunday* imme-
" diately after divine ſervice and ſermon, if any ſermon there be;
" and if no ſermon there be, then forthwith after divine
" ſervice; and that all outlawries had and pronounced, and no
" writs of proclamations awarded and returned according to
" the form of this ſtatute, ſhall be utterly void and of none
" effect."

Note: This ſtatute extends the proviſions of the 31 El. only to criminal caſes *before* judgment: in thoſe caſes *after* judgment, no proclamations are neceſſary.

[By ſtatute 4 & 5 *W.* & *M.* *c.* 22. § 4. made perpetual by 7 & 8 *W.* 3. *c.* 36. § 4. it is enacted, " That upon the iſſuing of
" any exigent out of any of their majeſties' courts, againſt any
" perſon or perſons for any criminal matter, before judgment of
" conviction, there ſhall iſſue out a writ of proclamation, bearing
" the ſame teſt and return, to the ſheriff or ſheriffs of the county
" city, or town corporate, where the perſon or perſons in the
" record of the ſaid proceedings is or are mentioned to be or in
" habit, according to the form of the ſtatute made in the one-and
" thirtieth year of the reign of the late Queen *Elizabeth*, which
" writ of proclamation ſhall be delivered to the ſaid ſheriff or
" ſheriffs three months before the return of the ſame."]

In the conſtruction of theſe ſtatutes the following opinions have been holden:

Cro. Eliz. 179. 3 Co. 59. Plow. 137. Hob. 166.

That though the words are expreſs, that any outlawry pro-nounced contrary to the directions of the ſtatute ſhall be void, yet it is not to be taken, as if ſuch outlawries were abſolutely void, but only voidable by writ of error.

2 Hawk. P. C. c. 27. § 126. 2 Hal. Hiſt. P.C. 195-6.

If a defendant be expreſsly named of the ſame county where he is indicted or appealed and be alſo named under an *alias dictus* of another, it hath been adjudged, that there is no need of a *capias*, with a command for proclamation according to 8 *H.* *c.* 10. becauſe that which comes under the *alias dictus* is no traverſable nor material: Alſo, if a defendant be named of *B.* late of *C.* there is no need of any *capias* to the ſheriff of the county wherein *C.* lies; becauſe that it appears, that the defendant

at preſent converſant at *B.* But if a defendant be named of no certain place at preſent, but only late of *B.* and late of *C.* and late of *D.* &c. being all of them in counties different from that in which the proſecution is commenced, a *capias* ſhall go to the ſheriff of every one of theſe counties.

On a writ of error to reverſe an outlawry upon the ſtatute of 5 *Eliz. c.* 9. of perjury, the firſt error aſſigned was, that the defendant was indicted by the name of *N. L. de parochia de Aldgate*, and not ſhewn in what county *Aldgate* is. 2*dly*, For that a county-court was held 23 *Feb.* and the next county-court was held 23 *March* following, ſo as there were not twenty-eight days between theſe two county-courts, as there ought to be by the law, excluſive and not incluſive. And for the firſt cauſe it was reverſed; although it was objected to be well enough becauſe *Middleſex* was in the margin, ſo the pariſh ſhould be intended to refer thereto; but becauſe an indictment ſhall not be taken by intendment, and becauſe the county in the margin ſhall be referred to the place where the offence was committed, and not to the indictment of the party; and by the ſtatute of 8 *H. 6. c.* 10. there ought to be the addition of the place and county where the party indicted inhabits; therefore it was held to be ill, and reverſed. For the ſecond cauſe alſo, it was held to be erroneous; but *Tanfield* ſaid, that ought to be aſſigned as an error *in fait*, for it might be leap-year, and then it is good, and that matter iſſuable. Cro. Jac. 167. Leech's caſe.

If an *exigi facias* be delivered to the ſheriff, and there be but two county-courts before the return, and the ſheriff return the firſt and ſecond *exactus*, & *non comparuit*, and that there were no more county-days between the delivery of the writ to him and the day of the return, there may iſſue a ſpecial *exigi facias* with an *allocato comitatu*, if it be prayed after the return, and before any new county-day be paſt; but if any county-day be paſt between the laſt of the former county-days and the return, no *exigi facias* ſhall iſſue with an *allocato comitatu*, but an *exigi facias de novo*; for the demand of the party muſt be at five county-courts ſucceſſively held one after another without any county-court intervening: ſo, if after the ſecond *exactus* the offender render himſelf, and find mainpriſe, and at the day of the return make default, no *exigi facias* with an *allocato comitatu* ſhall iſſue, becauſe three county-days intervened, but a new exigent and a *capias* againſt the bail. 2 Hal. Hiſt. P. C. 201, 2.

And therefore it hath been holden, that in *London*, where the holding of the *huſtings* is uncertain, no *exigi facias* ſhall iſſue with an *allocato huſtings*, becauſe the court cannot take notice of the ſet times of holding it, as they may of the times of holding the county-courts. But it is now agreed, that if an exigent iſſues in *London*, and they begin *huſtings de placito terræ* (as they may) they ſhall proceed along at that *huſtings* to the outlawry, without mingling their *huſtings de communibus placitis*; but if an *allocato huſting* comes, they ſhall proceed without omitting any *huſting*. Palm. 287. 2 Leon. 14. 2 Hal. Hiſt. P. C. 202.

[If upon the record of the outlawry, in a criminal caſe *before* judgment, it appear from the writ of proclamation and return, that Barrington v. Regem, 2 Term Rep. 499.

that the party was outlawed after he had a day given to appear in court, and before the arrival of that day, this will be error. Thus, *George Barrington* was outlawed on the 21ſt of *February*, and the writ of proclamation required the ſheriff to proclaim him, ſo that he ſhould be before the juſtices of the peace at the general ſeſſions of the peace to be holden for the county aforeſaid next after the firſt day of *February* next enſuing; and the return by the ſheriffs to that writ was, that he had proclaimed the ſaid *George Barrington* that he ſhould be before his majeſty's juſtices of the general ſeſſions of the peace laſt within mentioned. The next ſeſſions of the peace were holden on the 25th of *February*; ſo that by the terms of the writ, and the proclamation too, the priſoner had a day given him to appear till the 25th of *February*; and if he had appeared on that day, he would have complied with the requiſition of the writ, and have ſaved his default. But he was outlawed before that day came, *viz.* on the 21ſt of *February*; and upon that ground the court held the outlawry bad.

Yandell v. Regem, 5 Term Rep. 521.

But, where it appeared by the writ of proclamation and the return to it, that the priſoners were required to render themſelves to the ſheriffs, ſo that he might have their bodies before the juſtices, *&c.* at the return of the writ; it was adjudged to be good.

*Ibid.*

If it appear upon the record, that the writ of proclamation was delivered to the ſheriff three months before the return of it, it is ſufficient, though it be not expreſsly ſo alleged.

*Ibid.*

The ſheriff need not allege in his return to the writ of proclamation, that "the perſons proclaimed did not appear and render "themſelves;" though he muſt in his return to the exigent.

*Ibid.*

A writ of proclamation requiring the ſheriff to proclaim the parties *in open court in the ſheriff's county* (not ſaying *county* court,) is good.]

### 3. *What ſhall be ſaid a good Execution and Return.*

Before a perſon is pronounced outlawed he is to be *quinquies exactus*, for he hath three days for appearance, one for grace, and if he ſtands in contempt at all theſe days, at the fifth county-court he is pronounced outlawed by the coroners; and therefore (*a*) if a perſon be outlawed the day of the *quinto exactus*, this is error, becauſe he hath all that day to appear.

(*a*) Cro. Jac. 660. Palm. 280. S. C.

But, if an exigent is awarded againſt *A.* and after he is *quinto exactus*, and before the return of the exigent he dies, yet the outlawry ſhall ſtand in its force, and ſhall not be reverſed; for judgment was by the coroners upon the *quinto exactus*, and they may certify the outlawry: but otherwiſe (*b*), if *A.* had died before the *quinto exactus*.

Noy, 49. Hartland v. Yates.

(*b*) If upon an indictment of murder an exigent be awarded, but before the return the party dies, his executors may by writ of error, ſetting forth the ſpecial matter, reverſe the proceedings. 5 Co. 111. a. Eaton's caſe cited in Foxley's caſe.——That an executor may reverſe an outlawry. 2 Keb. 507.——That an heir or executor may. 2 Hawk. P. C. 461.——But a goaler or ſheriff cannot take any advantage of an error in an outlawry. Dyer, 67. a. 3 Keb. 286.

If on an outlawry againſt two, it be returned, that *exacti non comparuerunt*, without ſaying *nec aliquis eorum comparuit*, this is erroneous; for peradventure one of them did appear. Roll. Abr. 802. Clark's caſe. 2 Roll. Rep. 440. S. C. adjudged.

So, where a *capias*, and thereupon an exigent, was awarded againſt five, *viz.* three men and two women, and the return was, *Quod ad quartum comitatum*, &c. *non comparuerunt*, without ſaying *nec eorum aliquis comparuit*; this was held to be manifeſt error; and it being likewiſe returned *utlagati exiſtunt*, where for the women it ought to have been *waviatæ*, this likewiſe was held to be error. Cro. Jac. 358. Middleton's caſe.

[If one exigent be awarded againſt the principal and acceſſary together, it is error only as to the acceſſary.] Rex v. Yandell, 5 Term Rep. 521.

The return muſt ſhew where the county-court was held, and in what county; and this muſt be ſhewn on every *exactus*; and therefore (*a*) an outlawry was reverſed, becauſe the place where the county-court was held was not ſhewn on the *ſecund. exactus*; ſo, (*b*) where not ſhewn on the *tertio exactus*. 2 Hal. Hiſt. P. C. 203. (*a*) Style, 451. (*b*) Keb. 50.

Alſo, the party muſt be named of ſuch a place (*c*) *in com. Midd.*, and not *de Midd.* Cro. Jac. 616. (*c*) An outlawry in London was reverſed upon a writ of error, becauſe the huſtings were ſet out to be held in, but not for the city. Trin. 6 Geo. 2. Martin v. Duckett.

If the ſheriff returns, that *ad comitatum meum* S. *tent. apud* C., and ſays not *in com. præd.*, or *in com.* S., this is erroneous. 11 H. 7. 10. a. 2 Roll. Abr. 102. 2 Hal. Hiſt. P. C. 293.

So, if it be *ad comitatum meum tentum apud* S. *in com. Somerſ.*, and ſay not *ad comitatum meum Somerſ.*, or *ad comitatum Somerſ.*, without ſaying *ad comitatum meum Somerſet*; this is erroneous. 2 Roll. Abr. 802. Palm. 480. Latch. 210.

So, an outlawry was reverſed, for that the proclamations were returned to be *ad comitat. meum tent. apud*, ſuch a place *in com. præd.*, and not ſaid *pro com.*; for anciently one ſheriff had two or three counties, and might hold the court in one county for another. Vent. 108. Show. 319. 3 Mod. 89. 2 Keb. 141. Comb. 19. 2 Show. 60. 68. pl. 52. Lev. 164. [From the authorities referred to in this and the two preceding paragraphs, and ſeveral others, which the court of King's Bench was furniſhed with, it was holden in Wilkes's caſe, that a technical form of words was requiſite in the deſcription of the county-court, at which an outlaw is exacted; and therefore where, in that caſe, the ſheriff ſtated that "at my county-court," without adding "of Mid-"dleſex," and "*held at the houſe known by the ſign of the Three Tuns in Brook-ſtreet, near Holborn, in* "*the county of Middleſex*," without adding the words, "*for the county of Middleſex*," after the word "*held*," the outlawry was reverſed. Rex v. Wilkes, 4 Burr. 2527.——In a later caſe, Buller, J. ſays, "I do not know, that it has ever been determined, that in any return made by a ſheriff, any technical "form of words is neceſſary: certain requiſites muſt be obſerved; but if obſerved in ſubſtance, and the "return be not in equivocal terms, a great deal of argument is neceſſary to convince me, that ſuch a "return is bad." Barrington v. Regem, 2 Term Rep. 502. The inclination of the opinion of the court in this caſe of Barrington ſeems to have been, that a return to a *capias cum proclamatione*, that the priſoner was exacted, "*at my county-court, holden at the houſe known by the name of the Sheriff's Office in* "*Took's Court, Curſitor-ſtreet, in and for the county of Middleſex*," was well enough; though objected, that the name of the county was not added after "*my county-court*," and that the county-court was not ſtated to have been holden in Took's Court, Curſitor-ſtreet, *and* in and for the county of Middleſex. However, the *clearneſs* of the other objection made to the return in that caſe, relieved the court from the neceſſity of giving an opinion upon this.——In Barrington's caſe let it be obſerved, the outlawry was before judgment; in Wilkes's caſe, it was *after* conviction.]

2 Roll. Abr. 802. 2 Hal. Hiſt. P. C. 203. [Rex v. Almon, 5 Term Rep. 202. S. P.]

The ſheriff muſt return the day and year of the king to every *exactus*; and therefore if the day and year of the king be inſerted in the *1ſt*, *2d*, *3d*, and *5th exactus*, but omitted in the *4th*, it is erroneous, and ſhall not be ſupplied by intendment.

2 Roll. Abr. 803. 2 Hal. Hiſt. P. C. 203.

So, if it be *anno regni dominæ reginæ*, without ſaying *Elizabethæ*, or *dominæ Elizabethæ*, without ſaying *reginæ*, or *anno regni domini regis Jacobi*, without ſaying *regni ſuæ Angliæ*, for the year of *England* and *Scotland* differ: ſo, if there be leſs than a month between the firſt and ſecond *exactus*; in theſe caſes, the outlawry is erroneous.

2 Roll. Abr. 802. 2 Hal. Hiſt. P. C. 203.

So, if the return be *ad huſting tent. apud Guildhall civitatis London*, without ſaying *de communibus placitis*, it is erroneous; becauſe they have two huſtings, one *de communibus placitis*, another *de placitis terræ*.

2 Roll. Abr. 803. Chapman's caſe.

If an outlawry be returned, that the party was *exact.* at three ſeveral times 10 *Jac.*, and that he was *quarto exact.* 25th day of *Feb.* & *non comparuit*, without mentioning any year, & *quinto exact.* ſuch a day in *March* 10 *Jac.* although it may be intended, that he was *quarto exact.* in 10 *Jac.*, yet the outlawry ſhall not be good by intendment; for perhaps the clerk would have made it *quarto exact.* 8 *Jac.*, which would have been clearly bad.

## (F) Of the Manner of reverſing an Outlawry: And herein of the Difference between Errors in Fact and in Law.

2 Hal. Hiſt. P. C. 207.

OUtlawries are, regularly, to be reverſed by plea by writ of *identitate nominis*, or by writ of error, for any errors, be they errors in fact or in law.

Co. Lit. 259. 2 Hawk. P. C. c. 50. § 6.

As to errors in fact; as that in felony, the party was an infant under the age of fourteen, was in priſon or beyond ſea; theſe can, regularly, be only taken advantage of by writ of error. But it is agreed, that by the common law *in favorem vitæ* an outlawry of treaſon or felony might be avoided by plea, that the defendant was in priſon, or in the king's ſervice beyond ſea, &c. at the time of the outlawry pronounced againſt him; but that no outlawry for any other crime (againſt a party rightly deſcribed) can be avoided by plea of any matter of fact whatſoever.

2 Roll. Abr. 804. 2 Hal. Hiſt. P. C. 208.

As to avoiding an outlawry of felony, becauſe the party was beyond the ſea, theſe differences are laid down by *Rolle* and *Hale*, as agreed to by the court, *1ſt*, That if a man, having committed a felony, goes beyond the ſea voluntarily, or upon his own occaſions, and not in the king's ſervice, before any exigent awarded, though after the indictment, and then an exigent is awarded, and the offender beyond the ſea is outlawed for the felony, he may aſſign it for error. *2dly*, But if, after the exigent awarded upon the indictment of felony, he goes beyond the ſea voluntarily, or upon his own occaſions, and being ſo beyond ſea is outlawed, he ſhall

ſhall not avoid it by ſuch being beyond ſea; becauſe by the exigent awarded he has notice of the proſecution, and by ſuch a means he may avoid his conviction, by ſtaying till all the witneſſes are dead. 3*dly*, But yet *primâ facie* the error in that caſe is well aſſigned, by alleging he was *ultra mare tempore promulgationis utlagariæ;* and if he were in the realm after the exigent iſſued, it ſhall come in by the plea of the king's attorney to ſhew it. 4*thly*, But, if he were within the realm at the time of the exigent iſſued, and went beyond the ſea upon the ſervice of the king or kingdom, and then is outlawed, being beyond the ſea, this outlawry ſhall be reverſed; if the party allege generally, that he was *ultra mare tempore promulgationis utlagariæ*, and the king's attorney reply, that he was in *England tempore emanationis brevis de exigi facias*, it is a good replication for the plaintiff in the writ of error to allege, that he went out after the exigent, and before the outlawry pronounced, upon the king's command or ſervice, and ſhew it ſpecially, and ſo confeſs and avoid the plea.

As to the avoiding an outlawry in treaſon, on the party's being beyond ſea, it is enacted by the 26 *H.* 8. *c.* 13. and 5 & 6 *E.* 6. *c.* 11. "That all proceſs of outlawry to be had or made within "this realm againſt any offenders in treaſon, being reſiant or in- "habiting out of the limits of this realm, or in any of the parts "beyond the ſeas, at the time of the outlawry pronounced againſt "them, ſhall be as good and effectual in law, to all intents and "purpoſes, as if ſuch offenders had been reſident and dwelling "within this realm at the time of ſuch proceſs awarded, and out- "lawry pronounced (*a*); provided that the party ſo to be outlawed "ſhall, within one year next after the ſaid outlawry pronounced, "yield himſelf to the Chief Juſtice of *England* for the time being, "and offer to traverſe the indictment or appeal whereon the ſaid "outlawry ſhall be pronounced, as is aforeſaid, that then he ſhall "be received to the ſame traverſe; and being thereupon found "not guilty by the verdict of twelve men, he ſhall be clearly ac- "quitted and diſcharged of the ſaid outlawry," &c.

(*a*) For this *vide* Dyer, 287. pl. 48. 2 Jon. 180. 4 Mod. 366.

It is the allowed practice of the court of Common Pleas to ſuffer a defendant, coming in by *capias utlagatum* the ſame term on which an exigent is returnable, to avoid the outlawry without writ of error, by ſhewing, that he purchaſed a *ſuperſedeas* out of the ſame court, and delivered it to the ſheriff before the *quinto exactus*, &c., or by ſhewing any other matter apparent on record which makes the outlawry erroneous; as, the want of an original, or the omiſſion of proceſs, or want of form in a writ of proclamation, &c., or a return by a perſon appearing not to be ſheriff, or the want of ſuch addition as required by 1 *H.* 5. *c.* 5.: yet it is ſaid in many books to be the conſtant courſe of the court of King's Bench never to reverſe an outlawry on the crown ſide, either in the ſame or a different term, for theſe or other errors of a like nature, without a writ of error.

2 Hawk. P. C. c. 50. and ſeveral authorities there cited.

It is agreed, that any outlawry whatſoever may be avoided by a defendant's coming in upon the *capias utlagatum*, and pleading a miſnomer either of the name or addition in the writ, &c. as, by ſhewing,

2 Hawk. P. C. c. 50. § 9.

ſhewing, that whereas he is called by ſuch a name of baptiſm or ſurname, he hath been always known by a different one, and not by that in the writ, &c. Alſo, it is ſaid in many books, that he may plead, that there is no ſuch town as that whereof he is named; and it ſeems clearly agreed, that he may plead, that at the time of the writ purchaſed, and ever ſince, he hath made his abode at ſome other town, and not at that in the writ, &c. And it is ſaid, that by ſuch plea the outlawry ſhall only be avoided as to the perſon who pleads it, (who ſhall not be intended to be the perſon meant,) and ſhall ſtand in force againſt the perſon of the name and addition in the record. But it is ſaid, that a perſon of the ſame name and addition as are mentioned in a record of outlawry cannot avoid it, by averring, that there are two perſons of ſuch name and addition, and that the perſon intended is the elder, and he himſelf is the younger, but ſhall be put to his writ *de identitate nominis*; which is ſaid by ſome to be the only remedy in ſuch caſe, after an outlawry returned. And it ſeems, that notwithſtanding in civil caſes, before an outlawry is returned, one of the ſame name may come into court, and ſhew that he is not the perſon intended; whereupon, if the plaintiff confeſs it, the diverſity of the names ſhall be entered on the roll, and a new exigent ſhall iſſue, with a fuller deſcription of the perſon intended; yet this cannot be done upon an indictment without a writ of *identitate nominis*, becauſe it would make the proceſs variant from the indictment, which cannot be altered without the conſent of the jurors.

8 Co. 141, 142. Doctor Drury's caſe. Vaugh. 158. S. C. cited. (a) For this *vide* Co. Ent. 157. 3 Keb. 291. Mod. 111. Hern. Ent. 49. Aſt. Ent. 143.

If *A.* brings an *audita querela* againſt *B.*, and declares, that whereas *B.* had recovered againſt *A.* 200 *l.* debt, &c. and thereupon the ſaid *A.* was outlawed, and upon a *capias utlagatum* taken, and in execution at the ſuit of the ſaid *B.*, and after from the ſaid execution was delivered, and ſuffered to go at large, &c. and yet *B.* hath taken out execution upon the ſaid judgment, and endeavours, &c., the defendant may plead and ſhew, that after the ſaid enlargement, and before the purchaſe of the *audita querela*, the outlawry was ſet aſide and made void; and ſo conclude *quod* (a) *non habetur tale recordum.*

2 Vent. 46. 2 Jon. 211. Comb. 19. 2 Salk. 495. pl. 3. S. P. where an outlawry was reverſed, on motion, at the charge of him who procured it, on affidavit, that the defendant was actually in the Fleet in execution for the plaintiff in another ſuit, and that he knew it.—But in the ſame page in Salk. it is ſaid, that though ſuch motions are frequently granted in B. R. becauſe it is a great charge to reverſe an outlawry there, yet that it is otherwiſe in C. B., the charge there being but 16 *s.* 8 *d.*

If a perſon procures another to be outlawed clandeſtinely, who appears openly and in publick, the court will, on motion, oblige ſuch perſon who procures the outlawry to reverſe the ſame at his own coſts. But if it appears, that the party outlawed had lurked backward and forward between two counties, and that the perſon procuring the outlawry had dealt openly, and had been regular in ſending down the proclamations to the ſheriff of the county where he ſometimes reſided; the court will not interpoſe in this ſummary manner, but will leave the party to his ſpecial remedies by plea or writ of error.

Biſcoe v. Kennedy, 2 Wilſ. 127.

[In debt upon bond entered into by the wife *dum ſola*, the huſband was abroad and outlawed; and the wife, though ſhe appeared publickly

publickly, *waived.* On motion to ſet aſide the outlawry againſt the wife, and to reſtore her the goods taken on a ſpecial *capias utlagatum*, on affidavit, that they were her ſeparate goods, the court held, that the goods muſt be taken to be her huſband's goods in point of law; and that, if ſhe had any equitable right to them, ſhe muſt reſort to a court of equity: but, as ſhe appeared publickly, ſhe had been wrongfully waived; and therefore the rule was made abſolute for ſetting aſide the outlawry as to the wife, but diſcharged as to reſtoring the goods.

The defendant was taken on a *capias utlagatum*, on a *Sunday*, and therefore he moved to be diſcharged, the taking being contrary to the 29 *Car.* 2. But, notwithſtanding the court held the taking bad, they refuſed to grant an attachment, and put the defendant to take the remedy given by the ſtatute. Oſborne v. Carter, Barnes, 329.

The defendant was waived ſpecially on meſne proceſs, as a ſingle woman, by the name of *Dunſter*; and after the exigent, and before the outlawry, ſhe married one *Priſeley*; and on being taken by a *capias utlagatum* after the outlawry, on motion, a rule was obtained to ſhew cauſe, why the outlawry ſhould not be reverſed at her huſband's expence, on his entering a common appearance for himſelf and his wife. But the rule was diſcharged, the court refuſing to interpoſe in a ſummary way, as the marriage was after the exigent.] White v. Dunſter, Barnes, 322.

## (G) What the Party muſt do in order to entitle him to a Reverſal: And herein,

### Of appearing in Perſon, or by Attorney, and of giving Bail.

REgularly, in all outlawries, as well perſonal as criminal, the party in order to reverſe the ſame was to appear in perſon, and could not appear by attorney. 2 Leon. 22. —Where the huſband and wife being outlawed, and the wife refuſing to appear, the outlawry could not be reverſed. Cro. Eliz. 611. —— One outlawed prayed to appear by attorney, and upon an affidavit made of his ſickneſs, the court *ex ſpeciali gratiâ* allowed him to appear by attorney; but the clerk was commanded to enter it, *quod venit in propriâ perſonâ*, the law being clear, that upon an outlawry he ought to appear in perſon. Cro. Jac. 462. Having once appeared in perſon, the reſidue of the proceedings may be by attorney. 2 Keb. 507. —— Said that there was a difference where the error appeared on the face of the record; that in ſuch caſe error may be aſſigned *per attorn.*, without a ſpecial rule of court for that purpoſe. Carth. 7.

But now by the 4 & 5 *W. & M. c.* 18. for the more eaſy and ſpeedy reverſing of outlawries in the court of King's Bench, it is enacted, "That, from and after the firſt day of *Eaſter* term thence "enſuing, no perſon or perſons whatſoever, who is, are, or ſhall be "outlawed in the ſaid court for any cauſe, matter, or thing what-"ſoever, (treaſon and felony only excepted,) ſhall be compelled "to come in perſon into or appear in perſon in the ſaid court to "reverſe ſuch outlawry, but ſhall or may appear by attorney, and "reverſe the ſame without bail in all caſes, (except where ſpecial "bail ſhall be ordered by the ſaid court)."

And

And it is further enacted by the ſaid ſtatute, " That if any " perſon or perſons outlawed, or hereafter to be outlawed, in the " ſaid court, (other than for treaſon or felony,) ſhall from and " after the ſaid firſt day of *Eaſter* term be taken and arreſted up- " on any *capias utlagatum* out of the ſaid court, it ſhall and may " be lawful to and for the ſheriff or ſheriffs, who hath or ſhall " have taken and arreſted ſuch perſon and perſons, (in all caſes " where ſpecial bail is not required by the ſaid court,) to take an " attorney's engagement under his hand to appear for the ſaid " defendant or defendants, and to reverſe the ſaid outlawries, and " thereupon to diſcharge the ſaid defendant and defendants from " ſuch arreſt; and in thoſe caſes, where ſpecial bail is required " by the ſaid court, the ſaid ſheriff and ſheriffs ſhall and may take " ſecurity of the ſaid defendant or defendants by bond, with one " or more ſufficient ſurety or ſureties, in the penalty of double " the ſum for which ſpecial bail is required, and no more, for " his, her, or their appearance by attorney in the ſaid court at the " return of the ſaid writ, and to do and perform ſuch things as " ſhall be required by the ſaid court (*a*); and after ſuch bond " taken to diſcharge the ſaid defendant and defendants from the " ſaid arreſt."

[(*a*) That is, to put in bail to a new action, plead within the limited time, put the plaintiff in the ſame condition, and ſuch like matters. 4 Burr. 2540.]

And it is further enacted by the ſaid ſtatute, " That if any " perſon or perſons outlawed as aforeſaid, and taken and arreſted " upon a *capias utlagatum*, ſhall not be able within the return of " the ſaid writ to give ſecurity, as aforeſaid, in caſes where ſpecial " bail is required, ſo as he or they is or are committed to gaol for " default thereof, that whenſoever the ſaid priſoner or priſoners " ſhall find ſufficient ſecurity to the ſheriff or ſheriffs, in whoſe " cuſtody he or they ſhall be, for his or their appearance by at- " torney in the ſaid court at ſome return in the term then next " following, to reverſe the ſaid outlawry or outlawries, and to do " and perform ſuch other thing and things as ſhall be required " by the ſaid court, it ſhall and may be lawful to and for the ſaid " ſheriff and ſheriffs, after ſuch ſecurity taken, to diſcharge and " ſet at liberty the ſaid priſoner and priſoners for the ſame; any " law or uſage to the contrary notwithſtanding."

2 Salk. 496. It hath been held, that if the party outlawed comes in by *capi corpus*, he ſhall not be admitted to reverſe the outlawry without appearing in perſon, as in ſuch caſe he was obliged to do at common law; or putting in bail with the ſheriff for his appearance upon the return of the *capi corpus*, and for doing what the court ſhall order.

2 Hawk. P. C. c. 15. § 40. *Vide* tit. Bail in Criminal Cauſes, letter (D). By *Weſtm.* 1. 3 *Ed.* 1. *c.* 9. it is expreſsly provided, that thoſe who are outlawed, or have abjured the realm, *&c.* ſhould be excluded the benefit of replevin; yet it hath been always held, that the court of King's Bench may in their diſcretion, in ſpecial caſes, bail a perſon upon an outlawry of felony; as, where he pleads, that he is not of the ſame name, and therefore not the ſame perſon with him that was outlawed, or alleges any other error in the proceedings.

By

By the 31 *Eliz. c.* 3. § 3. it is enacted, "That before any allowance of any writ of error, or reverſing of any outlawry be had by plea, or otherwiſe, through or by want of any proclamation to be had or made according to the form of this ſtatute, the defendant and defendants in the original action ſhall put in bail, not only to appear and anſwer to the plaintiff in the former ſuit in a new action to be commenced by the ſaid plaintiff for the cauſe mentioned in the firſt action, but alſo to ſatisfy the condemnation, if the plaintiff ſhall begin his ſuit before the end of two terms next after the allowing the writ of error, or otherwiſe avoiding of the ſaid outlawry *."

* *Vide* the ſtat. 4 & 5 W. & M. c. 18. *ante*.

*A.*, who was a foreign merchant, and never in *England*, was outlawed at the ſuit of *B.*, in an action on ſeveral promiſes for goods ſold and delivered; and upon a ſpecial *capias utlagatum* a ſhip and other effects belonging to *A.* were ſeiſed, as forfeited upon this outlawry; and it was moved, that this outlawry may be vacated, and reſtitution awarded, upon affidavits produced and read, that the defendant was never *infra legem*, *i. e.* that he never was in *England*, and therefore could not be outlawed, becauſe that was putting him *extra legem*. *Sed per cur.*—This outlawry ſhall not be vacated upon ſuch affidavits, but the defendant may bring a writ of error, which he was compelled to do, and thereupon to put in bail to the action in which he was outlawed according to the new ſtatute of 4 & 5 *W. & M. c.* 18. *ante*; and then the plaintiff conſented to the reverſal of the outlawry.

Carth. 459. Ld. Raym. 349. Matthews v. Erbo, Tidd's Pr. 64.

*H.* was outlawed in two actions, one was for 10 *l.*, the other for 40 *s.*, and upon reverſing the outlawry the court took ſpecial bail for the firſt, and an appearance for the other, upon the ſtatute 4 & 5 *W. & M. c.* 18. and the recognizance was taken purſuant to 31 *Eliz. c.* 3. § 3.

2 Salk. 496.

[The defendant was outlawed in a perſonal action, without any affidavit made of the plaintiff's demand; and having brought error, he aſſigned his being beyond ſea at the time of the outlawry, for which the court made no difficulty to reverſe it. But then the queſtion was, upon what terms they ſhould do it, the plaintiff inſiſting upon ſpecial bail, and having now made a proper affidavit; and the defendant inſiſting to file common bail only. The court, upon conſidering the words of 4 & 5 *W. & M. c.* 18. § 3. which empowers the outlaw to appear by attorney, (as he did here,) and ſays, "It ſhall be reverſed without bail in all caſes, but where ſpecial bail ſhall be ordered by the court," declared, they were of opinion, they had a diſcretionary power to require it or not; and that the want of an affidavit before, was no objection; becauſe that is only neceſſary to warrant an arreſt; and here was one in time for the new action that muſt be brought. And although the 31 *Eliz. c.* 3. § 3. is the only act that expreſsly requires bail; it is not to be inferred from thence, that in other caſes it is not to be inſiſted upon; for that act makes a new error, and the bail upon it is abſolutely to pay the condemnation money. And it is now ſettled, that on reverſing an outlawry for any other error in law, beſides the

Serocold v. Hamſon, 2 Str. 1178. 1 Wilſ. 3. S. C.

Tidd's Pr. 73.

the want of proclamations, the bail is *common* or *ſpecial*, in like manner as upon the arreſt.

1 Ld. Raym. 605. 2 Str. 951. 2 Barnardiſt. 298. S. C. Impey, 456.

Where ſpecial bail is required, it need not be put in before the allowance of the writ of error; but it is well enough, if put in at any time before the reverſal.

The bail may render the defendant, and are not, at all events, anſwerable for the debt.

Cracraft v. Gledowe, 3 Burr. 1482.

Defendant being arreſted on a *capias utlagatum*, the ſheriff took an attorney's engagement, under his hand, to appear for the defendant, and reverſe the outlawry, without taking ſecurity by bond in double the ſum for which bail was required, purſuant to the above ſtatute of 4 & 5 *W. & M.* On ſhewing cauſe why an attachment ſhould not iſſue againſt the ſheriff for diſcharging the defendant out of his cuſtody, it was urged, that he neither did, nor could know, that it was a caſe requiring bail, as the *capias utlagatum* was not marked for bail; and that the 12 *G.* 1. *c.* 29. required an affidavit; and that the ſum, for which bail is to be taken, is to be marked on the proceſs, *&c.* For the plaintiff, it was urged, that proceſs of outlawry is not within the ſtatute of 12 *G.* 1.; that this was by *ſpecial original*, and the cauſe of action is expreſſed in the original proceſs, in which it appears the plaintiff was entitled to bail. The court were clear, that this was not a caſe within the 12 *G.* 1., and thought the ſheriff had acted improperly; but, as there was an affidavit of the under-ſheriff, that he had acted to the beſt of his underſtanding without any ill intention, they enlarged the rule, in order to give the ſheriff an opportunity to put in bail. After which the ſheriff undertook to pay the debt and coſts.

Rex v. Wilkes, 4 Burr. 2539-40.

The ſtatute of 4 & 5 *W. & M.* hath been conſtrued not to extend to *criminal* caſes; at leaſt, not to miſdemeanours after conviction. And even in *civil* caſes, the defendant cannot be bailed, where he was not bailable on the proceſs to outlawry; for it was the deſign of the ſtatute to put him in the ſame condition, as if he had not been outlawed: and therefore, he is not bailable, when taken upon an outlawry *after* judgment.

Symmons v. Bing, 2 Salk. 496.

Two perſons were outlawed in a joint action againſt them, and one moved, that on filing common bail, he might have liberty to reverſe the outlawry. *Sed per cur.*—The writ of error to reverſe the outlawry muſt be brought in the names of both the parties that are outlawed; and, if one only appears, the other may be ſummoned and ſevered, and then the outlawry may be reverſed for the benefit of the party appearing.]

## 2. Of ſuing out a *Scire Facias*.

Dyer, 34. pl. 20. Cro. Eliz. 935. Keb.

It is clearly agreed, that an attainder of felony of a perſon who had any lands ſhall never be reverſed by writ of error, without a *ſcire facias* againſt all the ter-tenants and lords mediate and immediate.

diate. But it is (*a*) ſettled, that ſuch *ſcire facias* is not neceſſary in the caſe of high treaſon. 141. pl. 11. Sid. 316. 3 Keb. 29.

3 Mod. 42. 47. 4 Mod. 366. 2 Hal. Hiſt. P. C. 209. S. P. and that ſuch writ is to iſſue returnable at fifteen days; and if any lords do appear, they may plead to the errors; and if the ſheriff return there are no lands, &c., then the court proceeds to examine the errors. (*a*) So ruled, Mich. 12 Annæ, the Queen v. Strafford, upon examination of all the precedents. 2 Hawk. P. C. c. 50. § 13. Ca. Law and Eq. 188.

Alſo it is ſaid, that it is not neceſſary in the caſe of felony, when it is ſuggeſted on the roll that the party had no lands, and the Attorney-General confeſſes it. 2 Salk. 495. pl. 5. Ld. Raym. 154.

[Where the defendant has obtained a charter of pardon, he muſt ſue out a *ſcire facias*, to give notice thereof to the plaintiff, in order that he may further proſecute his action, if he think proper.] Trye, 131. 154.

## (H) The Effects and Conſequences of a Reverſal: And herein,

### 1. Where the Proceedings on the Reverſal are in the ſame Plight as if no Outlawry had been.

IT is agreed, that after an outlawry of treaſon or felony is reverſed, the party ſhall be put to plead to the indictment, for that ſtill remains good, and (*b*) he may be tried at the King's Bench bar; or the record may be remitted into the country, if it were removed into the King's Bench by *certiorari*, with a command to the juſtices below to proceed by the ſtatute of *6 H. 6. c. 6.* Cro. Jac. 464. Cro. Car. 365. 3 Mod. 42. 6 Mod. 115. (*b*) 2 Hal. Hiſt. P. C. 209.

So, if a man be outlawed by proceſs in an information, and come in and reverſe the outlawry, he muſt plead *inſtanter* to the information. Salk. 371. pl. 10. Rex v. Hill, 5 Mod. 141. S. P.

The law is the ſame in civil caſes; and therefore, if an outlawry in a perſonal action be reverſed, the original remains. March, 9.

Treſpaſs for taking and detaining his beaſts till he made a fine: the action was laid in *Suſſex*. The defendant pleads, that the cauſe of action did not accrue within ſix years before ſuing of the writ. The plaintiff replies, that at another time he brought an original in battery in *London*, intending when the defendant had appeared to have declared for this treſpaſs; and that the defendant was outlawed in *London*; and that within ſuch a time after the reverſal of the outlawry he declared here. The defendant demurred; and for the defendant it was inſiſted, that the original being laid in *London*, he could not in this action declare in another county, though the cauſe of action be tranſitory. But, upon information by the prothonotaries, that the courſe of the court is, that although the original be laid in *London* for expediting the outlawry, yet, when the defendant comes in, the plaintiff may declare againſt him in any other county, be the action local or tranſitory; and the ſtatute 21 *Jac. 1. c. 16.* gives to plaintiffs generally a power to commence a new ſuit within the year after the outlawry reverſed; it was ruled, that ſo he might do in this caſe to warrant his declaration within the courſe of the court, and judgment was given for the plaintiff. 3 Lev. 145. Whitwick v. Hovenden.

2. To

## 2. To what the Party ſhall be reſtored on Reverſal of the Outlawry.

And. 188. (a) Shall, after outlawry reverſed, be reſtored to his law, and be of ability to ſue.

It hath been adjudged, that if the king grant over the lands of a perſon outlawed for treaſon or felony, and afterwards the outlawry be (a) reverſed, the party may enter on the patentee, and needs neither to ſue a petition to the king, nor a *ſcire facias* againſt the patentee. Co. Lit. 288. b.

5 Co. 90. Hoe's caſe, Roll. Abr. 778. S. C. cited. Cro. Eliz. 278. S. P. adjudged; where a termor being outlawed upon the ſtatute of recuſancy, the Lord Treaſurer and Barons of the Exchequer ſold the term; & *vide* 2 Jon. 101. 2 Show. 68. pl. 52. and 3 Keb. 871. that there ſhall be reſtitution of the profits actually paid into the Exchequer. *Vide etiam* Bunb. 104. 220.

If the goods of a perſon outlawed are ſold by the ſheriff upon a *capias utlagatum*, and after the outlawry is reverſed by writ of error, he ſhall be reſtored to the goods themſelves; becauſe the ſheriff was not compellable to ſell thoſe goods, but only to keep them to the uſe of the king.

Moor, 267. Beverley v. Cornwall.

If an advowſon comes to the king by forfeiture upon an outlawry, and, the church becoming void, the king preſents, and then the outlawry is reverſed; yet the king ſhall enjoy that preſentment, becauſe the preſentment there came to the king as the profit of the advowſon.

Moor, 269. agreed *per curiam.*

But, if the church is void at the time of the outlawry, and the preſentation is thereby forfeited as a chattel principally and diſtinct of itſelf, there, upon the reverſal of the outlawry, the party ſhall be reſtored to the preſentation.

Cro. Eliz. 170. Ognal's caſe, & 13 Co. 20. 22.

If a termor being outlawed for felony grants over his term, and after the outlawry is reverſed, the grantee may have treſpaſs, for the profits taken between the reverſal of the outlawry and the aſſignment; for by the reverſal it is as if no outlawry had been, and there is no record of it.

5 Mod. 61.

* *Sed qu.* If reſtitution would not be made on petition to the king?

It is ſaid, that if a man be outlawed in the King's Bench, and the party's goods ſeiſed into the king's hands, and then the outlawry be reverſed, there can be no reſtitution; the reaſon whereof is, for that the court of King's Bench cannot ſend a writ to the treaſurer; and the court of Exchequer have no record before them to iſſue out a warrant for reſtitution *.

2 Vern. 312. Peyton v. Ayliffe; & 2 Lev. 49. the caſe of Pinfold v. Northey.

It hath been adjudged in Chancery, that if *A.* being poſſeſſed of ſeveral houſes for a long term of years, mortgages the ſame, and is outlawed for high treaſon, upon which thoſe houſes are ſeiſed into the king's hands, and the ſame granted for valuable conſideration to *J. S.*, who likewiſe gets an aſſignment of the mortgage; that yet the repreſentative of *A.* may redeem the mortgage upon reverſal of the outlawry; and herein the Lord Keeper ſaid, that the judgment upon the reverſal is, that the party ſhall be reſtored to all that has not been anſwered to the king; which in all caſes has been underſtood of the meſne profits anſwered to the king, and not as to the principal thing itſelf, though ſeiſed into the king's hands; and that it was undoubtedly ſo as to a freehold or inheritance, and he ſaw no ſubſtantial difference in the caſe of a leaſehold.

# Papiſts and Popiſh Recuſants.

THE laws for reſtraining the growth of popery, by which papiſts are ſubjected to divers penalties, forfeitures, diſabilities, and inconveniencies, may be conſidered in general, as relating to popiſh (*a*) recuſants, ſuch as refuſe to make the declaration againſt popery, and ſuch as promote, encourage, or profeſs the popiſh religion. And theſe laws, though made for the advancement of religion and the publick good, yet, being conſidered as penal laws, have, like all other penal laws, been conſtrued ſtrictly.

(*a*) *i. e.* Thoſe who refuſe to come to church, and being perſons profeſſing the popiſh religion, and convicted of ſuch refuſal or recuſancy, are termed popiſh recuſants convict. But the 23 Eliz. c. 1. extends to all recuſants; and the courts cannot take notice of the grounds of the recuſancy, but muſt puniſh them for not coming to church, without examining into the cauſe why they did not. Skin. 99. pl. 14. *per* Sanders, Ch. J. but for this, *vide* tit. Hereſy, and Offences againſt Religion. ——And what ſhall be evidence to prove a perſon a popiſh recuſant convict, *vide* Keb. 7.

For the better underſtanding of theſe penalties, *&c.* the laws herein are ranked under the following heads: Hawk. P.C. c. 12, 13, 14.

## (A) The Diſabilities, Reſtraints, Forfeitures, and Inconveniencies which Popiſh Recuſants are ſubject to: And herein,

1. *Of their Diſability to bring any Action.*
2. *Of bearing any Publick Office or Charge.*
3. *Of claiming any Part of a Huſband's perſonal Eſtate.*
4. *Of claiming an Eſtate by Curteſy, or by Way of Dower, after a Marriage againſt Law.*

2. Of the Reſtraints they are put under. And herein,

1. *From going five Miles from Home.*
2. *From coming to Court.*
3. *From keeping Arms.*
4. *From coming within ten Miles of* London.

3. Of the Forfeitures they are liable to. And herein,

1. *That of two Parts of a Jointure or Dower.*
2. *That of* 20 l. *for not receiving the Sacrament yearly after Conformity.*
3. *That of* 10 l. *for an unlawful Marriage.*
4. *That of* 100 l. *for an Omiſſion of lawful Baptiſm.*
5. *That of* 20 l. *for an unlawful Burial.*

4. Of the Inconveniencies they are ſubject to: And herein,

1. *That their Houſes may be ſearched for Reliques, whether they be Men or Women.*

2. *If they be Women, and married, that they may be committed.*

(B) Of the Offence of not making a Declaration againſt Popery, and the Reſtraints it ſubjects the Parties to: And herein,

1. From ſitting in Parliament.
2. Holding a Place at Court.
3. From living within ten Miles of *London*.
4. From keeping Arms.

(C) Of the Offence in Promoting or Profeſſing the Popiſh Religion: And herein,

1. Of the Offence of ſaying or hearing Maſs or other Popiſh Service.
2. Of giving or receiving Popiſh Education.
3. Of buying or ſelling Popiſh Books.
4. Of keeping Schools.
5. Of withholding a competent Maintenance from a Proteſtant Child.
6. Of the Diſability of thoſe profeſſing the Popiſh Religion to preſent to a Church.
7. Of their Diſability to purchaſe.

---

(A) The Diſabilities, Reſtraints, Forfeitures, and Inconveniencies which Popiſh Recuſants are ſubject to: And herein,

1. *Of their Diſability to bring any Action.*

BY the 3 *Jac.* 1. *c.* 5. § 11. it is enacted, "That every Popiſh "recuſant convict ſhall ſtand to all intents and purpoſes diſ"abled as a perſon lawfully excommunicated, and as if ſuch per"ſon had been ſo denounced and excommunicated according to "the laws of this realm, until he or ſhe ſhall conform, &c. and "that every perſon ſued by ſuch perſon ſo diſabled, may plead "the ſame in diſabling of ſuch plaintiff as if he or ſhe were ex"communicated by ſentence in the eccleſiaſtical court, except the "actio

" action of ſuch recuſant do concern ſome hereditament or leaſe, " which is not to be ſeiſed into the king's hands by force of ſome " law concerning recuſancy."

In the conſtruction of this branch of the ſtatute, it hath been holden,

That the plea of ſuch a conviction, like all other pleas in diſability, ought to be pleaded before (*a*) imparlance, and alſo conclude with a (*b*) demand if the plaintiff ſhall be anſwered. Noy, 89. Latch, 176. Hetl. 18. 1 Hawk. P. C. c. 12. § 2.

(*a*) Cannot be pleaded after a general imparlance, but may be pleaded *puis darrein continuance*, becauſe being in diſability of the perſon, may accrue after a continuance. Mod. Ca. in Law and Eq. 43. 381. (*b*) In debt for rent by the plaintiffs as executors of *J. S.*, defendant pleads in abatement by *pet. judicium de brevi*, &c. for that one of the plaintiffs is a popiſh recuſant convict, and *quaſi excom.* by this ſtatute; but it was held, that this, as here, ought not to be pleaded in abatement, becauſe the writ is not abated thereby, but only ſuſpended; and the pleading ought to be *reſponderi non debent*. 3 Lev. 208.——So, where judgment was demanded generally. Mod. Ca. in Law and Eq. 43. 381.

That ſuch plea ought alſo to ſhew before what juſtices the conviction was, that the court may know where to ſend for a certificate thereof, if it be denied; and alſo that the record itſelf, or at leaſt a certificate thereof, ought to be immediately produced, according to the general rule of law, as to all dilatory pleas grounded on records. Noy, 89. Latch, 176. 3 Lev. 333-4.

That, if after ſuch a plea it be certified, that the plaintiff hath conformed, and thereupon the defendant be ordered to plead in chief, and then the plaintiff relapſe, and be convict again, the defendant cannot plead the ſame in diſability a ſecond time. Hetl. 176.

That it muſt appear, either from the conviction itſelf, or by proper averments, that the plaintiff is convicted of popiſh recuſancy, becauſe no recuſants, except popiſh ones, are within the ſaid clauſe. But this is ſufficiently ſet forth, by alleging, that the plaintiff being *papalis recuſans* was indicted and convicted *ſecundum formam ſtatuti*, &c. 3 Lev. 11, 12. 332-3. 2 Lutw. 1117.

It ſeems to be the better opinion, that this being a penal law, and therefore to be conſtrued ſtrictly, the words *as perſons lawfully excommunicate*, &c. mean no more than diſabling the party, in the ſame manner as an excommunicated perſon, to bring an action, but do not ſubject the party to the other conſequences of an excommunication. 2 Bulſt. 155. Cawley, 216. Hawk. P. C. c. 12. § 6.

## 2. *Of bearing any Publick Office or Charge.*

By the 3 *Jac.* 1. *c.* 5. § 8. it is enacted, " That no recuſant con- " vict ſhall at any time practiſe the common law of this realm " as a counſellour, clerk, attorney, or ſolicitor in the ſame; nor " ſhall practiſe the civil law as advocate or proctor; nor practiſe " phyſick, nor uſe or exerciſe the trade or art of an apothecary; " nor ſhall be judge, miniſter, clerk, or ſteward of or in any court, " or keep any court; nor ſhall be regiſtrar or town-clerk, or other " miniſter or officer in any court; nor ſhall bear any office or " charge as captain, lieutenant, corporal, ſerjeant, ancient bearer, " or other office in camp, troop, band, or company of ſoldiers;

" nor shall be captain, master, governor, or bear any office or " charge of or in any ship, castle, or fortress of the king's ma- " jesty's, his heirs and successors, but be utterly disabled for the " same; and every person offending herein shall also forfeit for " every such offence 100*l.* the one moiety whereof shall be to " the king's majesty, his heirs and successors, and the other moiety " to him that will sue for the same by action of debt, bill, plaint, " or information, in any of the king's majesty's courts of record; " wherein no essoin, protection, or wager of law shall be admitted " or allowed."

And by § 9. of the said statute it is further enacted, " That no " popish recusant convict, or any having a wife being a popish " recusant convict, shall exercise any publick office or charge in " the commonwealth, but shall be utterly disabled to exercise the " same by himself or by his deputy, except such husband him- " self, and his children which shall be above the age of nine years " abiding with him, and his servants in household, shall once " every month at the least, not having any reasonable excuse to " the contrary, repair to some church or chapel usual for divine " service, and there hear divine service; and the said husband, " and such his children and servants as are of meet age, receive " the sacrament of the Lord's Supper at such times as are limited " by the laws of this realm, and to bring up his said children in " the true religion."

Hawk. P.C. c. 12. § 9. On these sections it hath been observed, 1*st*, That the latter extends to all publick offices and charges in general, whereas the former extends only to those which are particularly enumerated. 2*dly*, That this latter expresly disables a popish recusant to exercise such an office by himself or his deputy, but the other says nothing at all of the exercise of an office by a deputy.

### 3. *Of claiming any Part of a Husband's Personal Estate.*

By the 3 *Jac.* 1. *c.* 5. § 10. it is enacted, " That every woman " being a popish recusant convict, (her husband not standing con- " victed of popish recusancy,) which shall not conform herself and " remain conformed, but shall forbear to repair to some church " or usual place of common prayer, and there hear divine service " and sermon, if any then be, and receive the sacrament of the " Lord's Supper, according to the laws of this realm, by the " space of one whole year next before the death of her said hus- " band, shall not only be disabled to be executrix or administra- " trix of her said husband, but also to have or demand any part " of her said husband's goods or chattels by any law, custom, " or usage whatsoever;" and by 3 *Jac.* 1. *c.* 5. § 13. every woman is put under the like disability, being a popish recusant, who shall be married otherwise than according to the church of *England*.

4. *Of*

4. *Of claiming an Eſtate by Curteſy, or by Way of Dower, after a Marriage againſt Law.*

By the 3 *Jac.* 1. *c.* 5. § 13. it is enacted, "That every man, who, "being a popiſh recuſant convict, ſhall be married otherwiſe "than in ſome open church or chapel, and otherwiſe than ac- "cording to the orders of the church of *Egnland*, by a miniſter "lawfully authorized, ſhall be diſabled to have any eſtate as te- "nant by the curteſy; and that every woman, being a popiſh "recuſant convict, who ſhall be married in other form than as "aforeſaid, ſhall be diſabled to hold her dower, or jointure, or "widow's eſtate."

2. Of the Reſtraints they are put under: And herein,

1. *From going five Miles from Home.*

To this purpoſe it is enacted by 35 *Eliz. c.* 2. and 3 *Jac.* 1. *c.* 5. §§ 6, 7. "That every popiſh recuſant convict ſhall repair to his "place of dwelling, *&c.* and not remove above five miles from "thence, unleſs he be urged by proceſs, *&c.* or have a licence "from the privy council, *&c.* or under the hands and ſeals of "four juſtices of the peace, with the aſſent in writing of the "lieutenant of the county, or of the biſhop, *&c.* (every licence "of which kind by juſtices of peace muſt expreſs both the par- "ticular cauſe and the time for which it was given, and ought "not to be granted without a previous oath of ſome reaſonable "cauſe,) under pain of forfeiting all his goods and hereditaments, "(whether freehold or copyhold,) for his life, or of abjuring the "realm, if he be not worth twenty marks a-year, or forty pounds "in goods, unleſs he recant before conviction, and alſo continue "conformable."

In the conſtruction hereof it hath been holden, that the privy council may grant ſuch licence without any ſuch ſpecial cauſe or oath, *&c.* but that juſtices of peace cannot. Alſo it hath been holden, that in pleading a licence of juſtices of peace, it muſt be expreſsly ſhewn, that it was made under their hands and ſeals; the cauſe in particular for which it was granted muſt be ſet forth, and the time for which it was limited, and that the party was ſworn to the truth of ſuch cauſe. Hawk. P.C. c. 12. § 13. Cro. Jac. 352. Roll. Rep. 108. Moor, 836.

It is ſaid, that if the ſame perſon be both a juſtice of peace and a lieutenant, he cannot both join in a licence as juſtice of peace, and alſo give his aſſent as lieutenant, but can only act in one capacity. Hawk. P.C. c. 12. § 4.

It ſeems, that the miles ſhall be computed according to the *Engliſh* manner, allowing 5280 feet, or 1760 yards, to each mile; and that the ſame ſhall be reckoned not by ſtrait lines, as a bird or arrow may fly, but according to the neareſt and moſt uſual way. Cawley, 130. Cro. Eliz. 212.

2. *From coming to Court.*

By the 3 *Jac.* 1. *c.* 5. § 2. it is enacted, "That no popish recusant convict shall come into the court or house where the king or his heir apparent shall be, unless he be commanded so to do by the king, upon pain of 100*l.* And it is further enacted by 3 *Car.* 2. *stat.* 2. § 5 & 6. that every popish recusant convict, who shall come advisedly into or remain in the presence of the king or queen, or shall come into the court or house where they or any of them reside, shall be disabled to hold or execute any office or place of trust civil or military, or to sue in law or equity, or to be an executor, &c. or capable of any legacy or deed of gift, and shall forfeit for every offence 500*l.*, unless such person do, within the term next after such his coming or remaining, take the oaths of allegiance and supremacy, and make the declaration against transubstantiation and the invocation of saints, &c. in the court of Chancery."

3. *From keeping Arms.*

By the 3 *Jac.* 1. *c.* 5. § 27, 28, 29. it is enacted, "That all such armour, gunpowder, and munition of whatsoever kind, as any popish recusant convict shall have in his own house, or elsewhere, or in the possession of any other, at his disposition, shall be taken from him by warrant of four justices of peace at their general or quarter sessions, (except such necessary weapons as shall be allowed him by the said four justices for the defence of his person or house,) and that the said armour, &c. so taken, shall be kept at the costs of such recusants in such place as the said four justices at their said sessions shall appoint; and that if any such recusant, having such armour, &c. or if any other person who shall have any such armour, &c. to the use of such recusant, shall refuse to discover to the said justices, or any of them, what armour he hath, or shall let or hinder the delivery thereof to any of the said justices, or to any other person authorized by their warrant to take the same; that then every person so offending shall forfeit his said armour, &c. and also be imprisoned for three months without bail, by warrant from any justice of peace of such county. And it is further enacted, that notwithstanding the taking away such armour, &c. yet such recusant shall be charged with the maintaining of the same, and with the providing of a horse, &c. in such sort as others of his majesty's subjects."

4. *From coming within ten Miles of* London.

By the 3 *Jac.* 1. *c.* 5. § 4, 5. it is enacted, "That no popish recusant, &c. shall remain within the compass of ten miles of *London*, under pain of 100*l.* except such persons as at the time of

" of the ſaid act did uſe ſome trade, myſtery, or manual occupa-
" tion in *London*, &c. and ſuch as ſhall have their only dwelling
" in *London*," &c.

3. Of the Forfeitures they are liable to: And herein,

1. *That of two Parts of a Jointure or Dower.*

By the 3 *Jac.* 1. *c.* 5. § 10. it is enacted, " That every mar-
" ried woman, being a popiſh recuſant convict, (her huſband not
" ſtanding convicted of popiſh recuſancy,) who ſhall not conform
" herſelf and remain conformed, but ſhall forbear to repair to
" ſome church or uſual place of common prayer, and there to
" hear divine ſervice and ſermon, if any then be, and receive the
" ſacrament of the Lord's Supper, according to the laws of this
" realm, within one year next before the death of her ſaid huſ-
" band, ſhall forfeit to the king the profits of two parts of her
" jointure and dower of any hereditaments of her ſaid huſ-
" band," *&c.*

2. *That of* 20 l. *for not receiving the Sacrament yearly after Conformity.*

By the 3 *Jac.* 1. *c.* 5. § 1, 2, 3. it is enacted, " That if any
" popiſh recuſant convict who hath conformed himſelf to the
" church, *&c.* ſhall not receive the ſacrament in his own pariſh-
" church, *&c.* within one year after his conformity, he ſhall for-
" feit 20 *l.* and for the ſecond year 40 *l.* and for every year after
" 60 *l.*" *&c.*

3. *That of* 100 l. *for an unlawful Marriage.*

By the 3 *Jac.* 1. *c.* 5. § 13. it is enacted, " That every popiſh
" recuſant convict, who ſhall be married to a woman who is no
" inheritrix, otherwiſe than according to the church of *England*,
" ſhall forfeit 100 *l.*"

4. *That of* 100 l. *for an Omiſſion of lawful Baptiſm.*

By the 3 *Jac.* 1. *c.* 5. § 14. it is enacted, " That every popiſh
" recuſant ſhall, within one month after the birth of his child,
" cauſe the ſame to be baptized by a lawful miniſter according to
" the laws of this realm, in the open church of the ſame pariſh
" where the child ſhall be born, or in ſome other church near
" adjoining, or chapel where baptiſm is uſually adminiſtered; or,
" if by infirmity of the child it cannot be brought to ſuch place,
" then the ſame ſhall within the time aforeſaid be baptized by the
" lawful miniſter of any of the ſaid pariſhes or places aforeſaid;
" upon pain that the father of ſuch child, if he be living, by the
" ſpace of one month next after the birth of ſuch child, or if he
" be dead within the ſaid month, then the mother of ſuch child
" ſhall for every ſuch offence forfeit 100 *l.*" *&c.*

5. *That of* 20 l. *for an unlawful Burial.*

By the 5 *Jac.* 1. *c.* 5. § 15. it is enacted, "That if any popish "recusant, not being excommunicate, shall be buried in any other "place than in the church or church-yard, or not according to "the laws of this realm, the executors, &c. of such recusant "knowing the same, or the party that causeth him to be so bu-"ried, shall forfeit 20 *l.*" &c.

4. Of the Inconveniencies they are subject to: And herein,

1. *That their Houses may be searched for Reliques, whether they be Men or Women.*

[Repealed by 31 G. 3. c. 32.]

To this purpose it is enacted by the 3 *Jac.* 1. *c.* 5. § 26. "That "any two justices of peace, and all mayors, bailiffs, and chief "officers of cities and towns corporate in their respective juris-"dictions, may search the house and lodgings of every popish "recusant convict for popish books and reliques, and that if any "altar, pix, beads, pictures, or such like popish relique, or any "popish book be found in the custody of such person, as in the "opinion of the said justices, &c. shall be unmeet for him or "her to have or use, it shall be defaced or burnt, if it be meet "to be burnt; and if it be a crucifix, or other relique of any "price, the same shall be defaced at the general quarter sessions "in the county where it shall be found, and then restored to the "owner."

2. *If they be Women, and married, that they may be committed.*

[Repealed by stat. 31 G. 3. c. 32. § 3. in favour of persons taking the oath therein required.]

To this purpose it is enacted by the 7 *Jac.* 1. *c.* 6. § 28. "That "if any married woman, being a popish recusant convict, shall not "within three months after her conviction conform herself, and "repair to church and receive the sacrament, &c. she may be "committed to prison by one of the privy council, or by the "bishop, if she be a baroness; or if under that degree, by justices "of peace, whereof one to be of the *quorum*, there to remain till "she perform, &c. unless the husband will pay to the king ten "pounds a-month for her offence, or else the third part of all his "lands, &c. at the choice of the husband," &c.

## (B) Of the Offence of not making a Declaration against Popery, and the Restraints it subjects the Parties to: And herein,

1. From sitting in Parliament.

BY the 30 *Car.* 2. *stat.* 2. *c.* 1. it is enacted, "That no peer "shall vote or make his proxy in the House of Peers, or sit "there during any debate; and that no member of the House of "Commons

" Commons ſhall vote or ſit there during any debate after the " Speaker is choſen, until ſuch peer or member ſhall take the " oaths of allegiance and ſupremacy, and make a declaration of " his belief that there is no tranſubſtantiation in the ſacrament of " the Lord's Supper, and that the invocation or adoration of the " Virgin *Mary*, or any other ſaint, and the ſacrifice of the maſs, " as they are now uſed in the church of *Rome*, are ſuperſtitious " and idolatrous, *&c.*, on pain that every ſuch offender ſhall be " adjudged a popiſh recuſant convict, and diſabled to hold or " execute any office, *&c.*, or from thenceforth to ſit or vote in " either houſe of parliament, to ſue in law or equity, or to be " guardian, executor, or adminiſtrator, or capable of any legacy " or deed of gift, and ſhall forfeit for every offence 500*l.*"

## 2. Holding a Place at Court.

By the 30 *Car.* 2. *ſtat.* 2. § 9. 12, 13. it is enacted, " That " every perſon who ſhall be a ſworn ſervant to the king ſhall take " the ſaid oaths, and ſubſcribe the ſaid declaration in Chancery " the next term after he ſhall be ſo ſworn a ſervant, *&c.*; and " that if any ſuch perſon neglecting ſo to do ſhall adviſedly come " into or remain in the preſence of the king or queen, or ſhall " come into the court or houſe where they are, or either of them " reſide, he ſhall ſuffer all the penalties expreſſed in the foregoing " ſection; unleſs ſuch perſon coming into the king's pre- " ſence, *&c.* ſhall firſt have licence ſo to do by warrant under " the hands and ſeals of ſix privy counſellours, by order of the " privy council, upon ſome urgent occaſion therein to be ex- " preſſed; which licence ſhall not exceed ten days, and ſhall be " firſt filed, *&c.* in the petty-bag office for any body to view with- " out fee, *&c.*; and no perſon to be licenſed for above thirty " days in one year."

[The fifth ſection ſubjects peers of Great Britain and Ireland, and members of the Houſe of Commons, not conforming as mentioned in the text, and all recuſants convict, who ſhall come unadviſedly into or remain in the king or queen's preſence, to the like penalties. But this clauſe is repealed as to peers of Great Britain and Ireland by ſtat. 31 G. 3. c. 32. § 20. who ſhall take the oaths therein appointed.]

## 3. From living within ten Miles of *London*.

By the 1 *W. & M. c.* 9. it is enacted, " That every juſtice of " peace in *London* and *Weſtminſter*, and within ten miles thereof, " ſhall cauſe to be arreſted and brought before him all reputed " papiſts, (except foreigners, being merchants or menial ſervants " to ſome ambaſſadour or publick agent, and except all ſuch as " uſed ſome trade, myſtery, or ſome manual occupation at the " time of the ſaid act, in *London*, &c. and alſo except all ſuch per- " ſons as had their dwelling in *London*, &c. within ſix months " before the thirteenth of *February* 1688, and no dwelling elſe- " where, and certified their names to the ſeſſions before the firſt " of *Auguſt* 1689,) and that every ſuch juſtice ſhall tender the " ſaid declaration to every ſuch perſon; and that every ſuch per- " ſon refuſing the ſame, and afterwards remaining in *London*, &c,

[Repealed by 31 G. 3. c. 32. § 19. as to perſons taking the oaths therein mentioned.]

" or

" or within ten miles thereof, on being certified to the King's " Bench or quarter sessions at the next term or sessions, as hav- " ing refused to make the said declaration, and neglecting to " make the same in such court, shall suffer as a popish recusant " convict," &c.

### 4. From keeping Arms.

By the 1 *W. & M. c.* 15. it is enacted, " That any two justices " of peace may and ought to tender the said declaration to any " person whom they shall know or suspect, or have information " of as being a papist, or suspected to be such; and that no such " person so required, and not making and subscribing the said " declaration, or not appearing before the said justices upon no- " tice to him given or left at his usual abode, by one authorized " by warrant under the hands and seals of the said justices, shall " keep any arms, or ammunition, or horse above the value of 5*l.* " in his own possession, or in the possession of any other person to " his use, (other than such necessary weapons as shall be allowed " him by the quarter sessions for the defence of his house or per- " son,) and that any two justices of peace, by warrant under their " hands and seals, may authorize any persons in the day-time, " with the assistance of the constable or his deputy, or tithing- " man, to search for all such arms, &c. and horses, and seize them " to the king's use; and that the said justices shall deliver the " said arms and ammunition at the next quarter sessions in open " court, and that whoever shall conceal, &c. or shall be aiding to " the concealing any such arms or horses, shall be committed to " the common gaol by warrant under the hands and seals of any " two justices of peace, and also forfeit treble the value; and " that those who discover any such arms or ammunition, so as the " same may be seized, shall have the full value thereof, to be " awarded to them by the sessions, &c., and that such refusers of " the said declaration, &c. shall be discharged whenever they " make the same."

## (C) Of the Offence in Promoting or Professing the Popish Religion: And herein,

### 1. Of the Offence of saying or hearing Mass or other Popish Service.

[Repealed by 31 G. 3. c. 32. §4. as to persons taking the oaths therein appointed.]

BY the 23 *Eliz. c.* 1. §4. it is enacted, " That every person " who shall say or sing mass, being thereof lawfully convicted, " shall forfeit two hundred marks, and be committed to prison in " the next gaol, there to remain by the space of one year, and " from thenceforth till he have paid the said sum of two hundred " marks; and that every person who shall willingly hear mass " shall forfeit the sum of one hundred marks, and suffer a year's " imprisonment."

2 Show. 216. pl. 220.

A

Alſo it is enacted by the 11 & 12 *W.* 3. *c.* 4. " That every " perſon who ſhall apprehend any popiſh biſhop, prieſt, or Jeſuit, " and proſecute him to conviction for ſaying maſs, or exerciſing " any other part of the function of a popiſh biſhop or prieſt, ſhall " receive 100 *l.* of the ſheriff; and that every ſuch popiſh " biſhop, *&c.* (except, being a foreigner, he be entered in the " ſecretary's office, and officiate only in the houſe of a foreign " miniſter,) ſhall be adjudged to perpetual impriſonment." [Repealed by 18 G. 3. c. 60. as to popiſh biſhops, &c. taking the oath therein appointed before they ſhall have been apprehended, or any proſecution commenced againſt them.]

## 2. Of giving or receiving Popiſh Education.

To this purpoſe there are ſeveral ſtatutes, and firſt by the 1 *Jac.* 1. *c.* 4. § 6, 7. it is enacted, " That if any perſon or per- " ſons under the king's obedience ſhall go or ſend, or cauſe to be " ſent, any child, or any other perſon under their or any of their " government, beyond the ſeas out of the king's obedience, to the " intent to enter into, or reſide in, or repair to, any college, *&c.* " of any popiſh order, profeſſion, or calling, to be inſtructed, " perſuaded, or ſtrengthened in the popiſh religion, or in any " ſort to profeſs the ſame; every ſuch perſon ſo ſending ſuch " child, *&c.* ſhall forfeit 100 *l.*; and every ſuch perſon ſo paſſing " or being ſent, *&c.* ſhall in reſpect of him or herſelf only, and " not in reſpect of any of his heirs or poſterity, be diſabled to " inherit, purchaſe, take, have, or enjoy any profits, hereditа- " ments, chattels, debts, legacies, or ſums of money, *&c.* what- " ſoever; and that all eſtates, terms, and other intereſts whatſo- " ever to be made, ſuffered, or done, to the uſe or behoof of any " ſuch perſon, or upon any truſt or confidence, mediately or im- " mediately, to or for the benefit or relief of any ſuch perſon, " ſhall be utterly void."

And it is further enacted by 3 *Jac.* 1. *c.* 5. § 16. " That if " the children of any ſubject within the realm (the ſaid children " not being ſoldiers, mariners, merchants, or their apprentices, or " factors) ſhall be ſent or go beyond ſea to prevent their good " education in *England*, or for any other cauſe, without the li- " cence of the king or ſix of his privy council, (whereof the prin- " cipal ſecretary to be one,) under their hands and ſeals; that then " every ſuch child ſhall take no benefit by any gift, conveyance, " deſcent, deviſe, or otherwiſe, of or to any hereditament or chat- " tel, till ſuch child being of the age of eighteen years, or above, " take the oath therein mentioned before ſome juſtice of peace " of the county, liberty, limit, where the parent of ſuch child did " and ſhall inhabit; and that in the mean time the next of kin to " ſuch child, who ſhall be no popiſh recuſant, ſhall have the ſaid " hereditaments, *&c.* ſo given, *&c.* until ſuch child ſhall con- " form, *&c.* and take the ſaid oath, and receive the ſacrament; " and after ſuch conformity, *&c.* he who hath received the profits " of the ſaid hereditaments ſhall account for the ſame, and in " reaſonable time make payment thereof, and reſtore the value of Keb. 263.

" the

" the said goods, &c.; and that whoever shall send such child " over seas shall forfeit 100*l.*, which by 11 & 12 *W.* 3. *c.* 4. " § 6. shall be to the sole use and benefit of the person who shall " discover the offence."

Also it is enacted by 3 *Car.* 1. *c.* 2. " That if any person un- " der the obedience of the king shall go, or shall convey or send, " or cause to be sent or conveyed, any person out of the king's " dominions into any parts beyond the seas, out of the king's obe- " dience, to the intent to enter into or be resident, or trained up " in any priory, abbey, nunnery, popish university, college, or " school, or house of Jesuits, priests, or in a private popish fa- " mily, and shall be there by any popish person instructed, per- " suaded, or strengthened in the popish religion, in any sort to " profess the same; or shall convey or send, or cause to be con- " veyed or sent, any thing towards the maintenance of any person " so going or sent, and trained and instructed as is aforesaid, or " under the colour of any charity towards the relief of any " priory, &c. or religious house whatsoever; every person so " sending, &c. any such person or thing, and every person passing " or sent, being thereof convicted, &c. shall be disabled to prose- " cute any suit in law or equity, or to be executor or administrator " to any person, or capable of any legacy or deed of gift, or to bear " any office within the realm; and shall forfeit all his goods and " chattels, and shall forfeit all his hereditaments, offices, and " estates of freehold, during his life."

Hob. 73. 74. Ley, 59. Tredway's case.

In the construction of the 3 *Jac.* 1. *c.* 5. it hath been holden, that if *E. T.*, being the king's ward of lands holden of the king by knights-service in chief, die the king's ward, and it be found that *A.* and *B.* are his sisters and heirs, both of full age, and that *A.* in the lifetime of her brother departed this realm contrary to this statute, and is a nun professed; the king may retain *A.*'s moiety in his own hands till she, according to the 1 *Eliz.* *c.* 1. take the oath of supremacy * required on suing out livery; for the words of the statute 3 *Jac.* 1. *c.* 5. are, *shall take no benefit by descent*, &c. not that the party should not take by descent; and therefore the estate does not vest absolutely in *B.* the sister and next heir, but her right is to the rents and profits during the non-conformity of her sister, for which in case of common lands she might enter; but in this case the king is interested, and is not obliged to give livery to the heir, till such time as the oath of supremacy be taken.

* *Vide* 5 Eliz. c. 1. § 19. and 27 Eliz. c. 12.

Hob. 74. *per* Hobart.

So, if such an heir, being beyond sea, should bargain and sell his lands to a stranger, the bargain in such case will prevent the next of kin, and the bargainee may take the lands out of the hands of the next of kin, in case he had entered; for the estate never vested absolutely in such next of kin; but in such case the king may refuse to give livery sued out on such bargain in the name of the heir, except the heir himself appears and takes the oath of supremacy in his proper person.

Hill. 12 Ann. in C. B.

*C.* Lord *Gerard* in the year 1660 settled the estate in question to the use of himself and the heirs male of his body, remainder to the

the heirs male of the body of *Thomas* first Lord *Gerard*, remainder to his own right heirs. *Charles* Lord *Gerard*, upon the death of *Digby* Lord *Gerard* (only son of the said *C.*) without issue male, entered, claiming the estate as heir male of the body of *Thomas* first Lord *Gerard*, by virtue of the said limitation in the settlement; and by virtue of this title enjoyed that estate above twenty-two years, and during the time of his enjoyment suffered several recoveries, and settled the estate upon his marriage in 1689, and died without issue in the year 1707, leaving *Philip* his only brother then surviving, who was heir male of the body of *Thomas* first Lord *Gerard*. Upon the death of Lord *Charles*, the Duchess of *Hamilton* claimed the estate as right heir of *C.* Lord *Gerard*, notwithstanding the estate-tail limited to the heirs male of the body of *Thomas* Lord *Gerard* subsisted in *Philip*, alleging, that Lord *Charles* and his brother *Philip*, being sent abroad and educated in a popish seminary, were made so utterly incapable of taking any estate, that she had the right of entry in her. It was insisted for her, that the 1 *Jac.* 1. *c.* 4. § 6. had so far disabled Lord *Charles* to take the estate by descent, that the recovery suffered by him was void, and that the same disability being still upon *Philip*, and there being no person in being who could take the estate-tail, the Duchess, as heir at law, must be entitled to take at present, as if the estate were actually spent. But it was resolved, that the words of the act being, that the offender shall be disabled as in respect of himself only, and not in respect of any of his heirs or posterity, to inherit, purchase, *&c.*, this qualifies and restrains the disability; so that the act does not extend beyond the person offending, nor beyond the time of his non-conformity; so that the act hath preserved in the offender an ability to inherit, *&c.* for the benefit of posterity: and this act having made no application of the profits during the disability, and this being a penalty inflicted for a publick offence, the king is entitled to the penalty. And to create in the offender a total disability would be very inconvenient; for in the case of an inheritance, it would be difficult to know when or in what manner the heir should take; it could not be in the life of the ancestor, for no man can be heir of a person living; and if there be a son under no disability who cannot take, it would be merely by construction to carry the estate over his head for the benefit of a remainder-man, who was not intended to take as long as there was any issue of a prior tenant in tail; and an heir can entitle himself only through his ancestors, and such as are inheritable; that this is not like the case of a monk, for in times of popery he was civilly dead: the 3 *Jac.* 1. *c.* 5. gives the pernancy of the profits in cases of disabilities to the next of kin, that is not a popish recusant; and *R. Ow.* was the next protestant of kin; the 3 *Car.* 1. *c.* 2. does not repeal the 1 *Jac.* 1. *c.* 4. but was made to explain, amend, and enforce it; the 1 *Jac.* 1. *c.* 4. was silent how the penalties of that act were to arise; the 3 *Car.* 1. *c.* 2. has provided, that it shall be upon conviction, and expressly makes a forfeiture for life, and a restitution in case of conformity, in which the former act was silent; so that if the former act were

and affirmed in the House of Lords; Thornby v. Fleetwood, *alias* the Duchess of Hamilton's case. Stra. 318. Comyns, 207. pl. 124. Andr. 104. 10 Mod. 113.

to

to be put in execution, under the explanation of 3 *Car.* 1. *c.* 1. there being no conviction in the case, the Duchess could have no title, but the land on conviction would be forfeited for life, which must be to the king.

### 3. Of buying or selling Popish Books.

By the 3 *Jac.* 1. *c.* 5. § 25. it is enacted, "That no person "shall bring from beyond the seas, nor shall print, buy, or sell "any popish primers, ladies' psalters, manuals, rosaries, popish "catechisms, missals, breviaries, portals, legends, and lives of "saints, containing superstitious matter, printed or written in "any language whatsoever, nor any other superstitious books "printed or written in the *English* tongue, on pain of forfeiting "forty shillings for every book, &c. and the books to be "burnt."

### 4. Of keeping School.

[Repealed by 31 G. 3. c. 32. § 13. as to persons taking the oaths and subscribing the

By 11 & 12 *W.* 3. *c.* 4. § 3. it is enacted, "That if any papist, or person making profession of the popish religion, shall "be convict of keeping school, or taking upon themselves the "education or government, or boarding of youth, in any place "within the realm or the dominions thereunto belonging, they "shall be adjudged to perpetual imprisonment."

declaration therein appointed. Roman Catholicks, however, are restrained from holding the master-ship of any college or school of royal foundation, or of any endowed college or school, and from keeping a school in either of the universities: neither is any catholick school-master to educate in his school the child of any protestant father; nor is any school-master or mistress to keep a school until his or her name shall have been registered at the quarter or general sessions of the peace for the county, division, or place wherein such school shall be situated, by the clerk of the peace. § 14, 15, 16.]

### 5. Of withholding a competent Maintenance from a Protestant Child.

By the 11 & 12 *W.* 3. *c.* 4. it is enacted, "That if any popish "parent, in order to compel a protestant child to a change of re-"ligion, shall refuse to allow such child a sufficient maintenance "suitable to the degree and ability of such parent, and to the age "and education of such child, the Lord Chancellour upon com-"plaint may make such order therein as shall be agreeable to the "intent of the said act."

### 6. Of the Disability of those professing the Popish Religion to present to a Church *.

Precedents of a title made under these sta-

By the 3 *Jac.* 1. *c.* 5. § 18, 19, 20, 21. popish recusants con-vict are disabled to present to a church; and by the 1 *W.* & *M.* *c.* 26. this disability is extended to persons refusing to make the declarati

[* This disability from presenting to advowsons is not taken away by any of the acts which have been passed in favour of the Catholicks; and it is complained of as a hardship peculiar to them, all other non-conformists, even Jews, having the full enjoyment of the right of presentation. See Mr. Burke's

declaration againſt popery, mentioned in 30 *Car.* 2. *ſtat.* 2. and by the ſaid ſtatute 1 *W.* & *M.* *c.* 26. § 4. it is enacted, "That "if the truſtee, mortgagee, or grantee of any avoidance, whereof "the truſt ſhall be for any popiſh recuſant convict, ſhall preſent "without giving notice in writing of the avoidance to the uni- "verſity, &c. within three months after the avoidance, he for- "feits 500 *l.*" tutes. 2 Lutw. 1101. & *vide* 3 Lev. 332. Lutw. 1117.

And by the 12 *Ann.* *c.* 14. this diſability is extended to all perſons making profeſſion of the popiſh religion; to which purpoſe it is enacted, "That every papiſt or perſon making profeſſion of "the popiſh religion, &c. and every mortgagee, truſtee, or per- "ſon any ways intruſted by or for ſuch papiſt, &c. with or with- "out writing, ſhall be diſabled to preſent to any benefice, ſchool, "or hoſpital, &c., or to grant any avoidance of any benefice, "prebend, or eccleſiaſtical living, and that in all ſuch caſes the "univerſities ſhall preſent."

Alſo, by force of the ſaid ſtatute, "The ordinary may tender "the declaration againſt tranſubſtantiation to any reputed papiſt "making a preſentation, and upon a refuſal to take the ſame the "preſentation ſhall be void: alſo, the ordinary may examine "every preſentee upon oath, whether the perſon who preſented "him be the true patron, or only a truſtee; and the court, where- "in a *quare impedit* ſhall be brought, may in like manner examine "the parties, and a bill may be brought in any court of equity to "diſcover ſuch ſecret truſts, &c., and the anſwer of ſuch perſons, "upon any ſuch examination or bill, ſhall be good evidence againſt "ſuch patron, in reſpect of ſuch a preſentation, but not as to any "other purpoſe."

In the conſtruction of the 3 *Jac.* 1. *c.* 5. the following points, which are ſaid to be likewiſe applicable to the 1 *W.* & *M.* *c.* 26. and 12 *Ann.* *c.* 14. have been holden. Hawk. P.C. c. 15. § 8.

That where a preſentment is *pro hâc vice* veſted in the univerſity, by reaſon of the patron's being a popiſh recuſant at the time when the church became void, it ſhall not be deveſted again by his conforming himſelf to the church. 10 Co. 57. b.

That ſuch a patron is only diſabled to preſent, and that he continues patron as to all other purpoſes, and therefore that he ſhall confirm the leaſes of the incumbent, &c. Cawley, 230.

---

note on Co. Lit. 391. a.—It is indeed remarkable, that a proviſion ſo eſſential to the ſecurity of the eſtabliſhment, and to the integrity of the doctrines it maintains, ſhould be confined only to one deſcription of non-conformiſts. To leave the right of preſentation in the hands of men who are inimical to our church, is, in truth, to create an intereſt in the church againſt the church. It has the pernicious tendency too of ſetting the private intereſts of the individual in oppoſition to the ſuperior intereſts of the church; and of tempting the clergy to temporize with the errors of thoſe to whom they look up for preferment. For is it probable, that a bold and honeſt zeal for the doctrines and diſcipline of our eſtabliſhment will recommend to a patron, who diſſents from the one, or diſapproves of the other? In the preſentee of ſuch a perſon, we muſt expect either a cold friend, or a ſecret enemy to our church: one, who can be ſilent, where he ought to object; paſſive, when he ought to reſiſt; or, one who can ſubſcribe to doctrines he deems erroneous, and can pledge himſelf to the maintenance of a ſyſtem it is his wiſh to ſubvert. By this means, the effect of thoſe proviſions which have been eſtabliſhed for ſecuring an orthodox clergy, and which, it is urged, render it unneceſſary to lay diſſenters under any reſtriction in this reſpect, will in a great meaſure be done away: it is to little purpoſe to inſiſt upon a profeſſion of conformity, if we allow a temptation to ſchiſm; to exact a vow of chaſtity, if we encreaſe ſeduction.]

Jon. 19, 20. That such a person, by being disabled to grant an avoidance, is no way hindered from granting the advowson itself in fee, or for life or years, *bonâ fide*, and for good consideration.

Hob. 126. Winch. 7, 11. Moor, 372. Jon. 20. That if an advowson or avoidance belonging to such a person come into the king's hands by reason of an outlawry or conviction of recusancy, &c., the king, and not the university, shall present.

On the statute 12 *Ann. c.* 14. it was resolved by my Lord Chancellour *Talbot*, in the case of Mr. *Brett*, who was presented by the university of *Oxford* to a living belonging to Mr. *Fitzherbert* of *Swinerton* in *Staffordshire*, that a bill founded on this statute cannot be for relief, but only for a discovery.

Cottington v. Fletcher, 2 Atk. 155. [So, it hath been resolved upon the same statute, that it doth not make the whole trust void, but only the turn upon an avoidance, so that if the party conforms before any avoidance happens, nothing can vest in the universities.]

By the 11 *G.* 2. *c.* 17., reciting the 3 *Jac.* 1. *c.* 5. and 1 *W.* & *M.* *c.* 26., and that whereas for the better discovery of all secret trusts and fraudulent conveyances made by papists, or persons making profession of the popish religion, of their advowsons and right of presentation, nomination, and donation to any benefices or ecclesiastical livings, several provisions were made by the act 12 *Ann.* *c.* 14. which have been fraudulently evaded by persons obtaining from such papists, without a full and valuable consideration, grants of such advowsons, and right of presentation, nomination, and donation, upon confidence only that such grantees will, at the request of such papists, present to such benefices or ecclesiastical livings clerks nominated by such papists, who have been presented accordingly, contrary to the true intent and meaning of the said act, and to the great hurt of the protestant interest of this kingdom; it is therefore enacted, "That every grant to be made from "and after the 6th day of *May* 1738, of any advowson or right "of presentation, collation, nomination, or donation of or to any "benefice, prebend, or ecclesiastical living, school, hospital, or donative, and every grant of any avoidance thereof by any papist, "or person making profession of the popish religion, or any mortgagee, trustee, or person any ways intrusted directly or indirectly, mediately or immediately, by or for any such papist, or person "making profession of the popish religion, whether such trust be "declared in writing or not, shall be null and void; unless such "grant shall be made *bonâ fide*, and for a full and valuable consideration, to and for a protestant purchaser, and merely and only "for the benefit of a protestant; and that every such grantee, or "person claiming under any such grant, shall be deemed to be a "trustee for a papist, or person professing the popish religion, as "aforesaid, within the true intent and meaning of the said act; "and that all such grantees, or persons claiming under such grants, "and their presentees, shall be compelled to make such discovery "relating to such grants and presentations made thereupon, and "by such methods as in and by the said act 12 *Ann.* *c.* 14. are "directed in the case of trustees of papists, or persons professing "the

" the popiſh religion, and that every deviſe to be made from and " after the ſaid ſixth of *May* by any papiſt, or perſon profeſſing " the popiſh religion, of any ſuch advowſon or right of preſenta- " tion, collation, nomination, or donation, or any ſuch avoidance, " with intent to ſecure the benefit thereof to the heirs or family of " ſuch papiſt or perſon profeſſing the popiſh religion, ſhall be null " and void, and that all ſuch deviſees and their preſentees ſhall " in like manner, and by ſuch methods, be compelled to diſcover " whether, to the beſt of their knowledge and belief, ſuch deviſes " were not made with the ſaid intent."

## 7. Of their Diſability to purchaſe.

The ſtatutes relating to eſtates conveyed by or to papiſts, and the diſabilities they are under to take by purchaſe, *&c.* are the 11 & 12 *W.* 3. *c.* 4. 3 *G.* 1. *c.* 18. and 11 *G.* 2. *c.* 17.

By the 11 & 12 *W.* 3. *c.* 4. it is enacted, " That from and after " the 29th day of *September*, which ſhall be in the year of our " Lord 1700, if any perſon educated in the popiſh religion, or " profeſſing the ſame, ſhall not, within ſix months after he or ſhe " ſhall attain the age of eighteen years, take the oaths of alle- " giance and ſupremacy, and alſo ſubſcribe the declaration ſet " down and expreſſed in an act of parliament made the 30 *Car.* 2. " *ſtat.* 2. entitled, *An act for the more effectual preſerving the king's* " *perſon and government, by diſabling papiſts from ſitting in either* " *houſe of parliament*, to be by him or her made, repeated, or " ſubſcribed in the courts of Chancery or King's Bench, or quar- " ter ſeſſions of the county where ſuch perſon ſhall reſide; every " ſuch perſon ſhall, in reſpect of him or herſelf only, and not for " or in reſpect of any of his or her heirs or poſterity, be diſabled " or made incapable to inherit or take by deſcent, deviſe, or " limitation in poſſeſſion, reverſion, or remainder, any lands, te- " nements, or hereditaments within the kingdom of *England*, do- " minion of *Wales*, or town of *Berwick-upon-Tweed*; and that " during the life of ſuch perſon, or until he or ſhe do take the " ſaid oaths, and make, repeat, and ſubſcribe the ſaid declaration " in manner as aforeſaid, the next of his or her kindred, which " ſhall be a proteſtant, ſhall have and enjoy the ſaid lands, tene- " ments, and hereditaments, without being accountable for the " profits by him or her received during ſuch enjoyment thereof, " as aforeſaid; but in caſe of any wilful waſte committed on the " ſaid lands, tenements, or hereditaments, by the perſon ſo having " or enjoying the ſame, or any other, by his or her licence or au- " thority, the party diſabled, his or her executors and adminiſtra- " tors, ſhall and may recover treble damages for the ſame againſt " the perſon committing ſuch waſte, his or her executors or ad- " miniſtrators, by action of debt in any of his Majeſty's courts of " record at *Weſtminſter*; and that from and after the 10th day of " *April* 1700, every papiſt, or perſon making profeſſion of the " popiſh religion, ſhall be diſabled and is hereby made incapable " to purchaſe, either in his or her own name, or in the name of " any

11 & 12 W. 3. c. 4. [Repealed by 18 G. 3. c. 60. as to all papiſts or perſons profeſſing the popiſh religion, claiming under titles not theretofore litigated, who within ſix months after the act paſſed, or their coming of age, ſhould take the oath thereby preſcribed.— Upon this act a caſe was decided in Chancery, on the 18th December 1783, under the name of Bunting v. Williamſon. In that caſe, a bill had been filed, claiming an eſtate given to a perſon profeſſing the popiſh religion, by will, alleging, the incapacity oc-

casioned by the act of 11 & 12 W. 3 The testator died many years before, and after his death, a suit had been instituted by another person, who claimed as his heir at law, and

"any other person or persons to his or her use, or in trust for "him or her, any manors, lands, profits out of lands, tenements, "rents, terms, or hereditaments, within the kingdom of *England*, "dominion of *Wales*, and town of *Berwick-upon-Tweed*; and that "all and singular estates, terms, and any other interests or pro-"fits whatsoever out of lands, from and after the said 10th day "of *April*, to be made, suffered, or done, to or for the use or be-"hoof of any such person or persons, or upon any trust or con-"fidence mediately or immediately, to or for the benefit or "relief of any such person or persons, shall be utterly void "and of none effect, to all intents, constructions, and purposes "whatsoever."

that suit was depending at the time when this statute of 18 G. 3. was passed; but was afterwards dismissed for want of prosecution. The plaintiff filed his bill, some time after the act, claiming in right of his wife, as heir at law. The defendants pleaded their title under the testator's will; and that the defendant, who was beneficially interested, having or claiming the estate under that will, had taken the oath prescribed by the act, and concluded with an averment, that the title had not been before litigated by the plaintiff, or any one under whom he claimed. The plaintiffs, on argument of the plea, contended, that the words *not hitherto litigated*, extended to the case then before the court, because the title had been litigated, and was in litigation at the time the act passed. But the Lords Commissioners, Ashhurst and Hotham, were clearly of opinion, that the plaintiff not having before litigated the title, nor claiming under any person, who had litigated it, the case of the defendants was within the benefit of the act, notwithstanding the prior litigation: and the plea was allowed. Co. Lit. last edit. 391. a. note 2.—Note, The oath prescribed by the 18 G. 3. c. 6., and that prescribed by the 31 G. 3. c. 32. are different. As the last act was originally framed, and as it stood, when, having past the Commons, it was brought into the House of Lords, the first clause in it directed, that the oath contained in the act of the 18th year of the reign of his present Majesty should be taken no longer; but that the oath appointed by the bill should, in future, be administered in its stead, and should give the same benefits and advantages, and should operate to the same effects and purposes, as the oath contained in the 18th of his present Majesty. This clause was altered in the House of Lords to the form in which it now stands. It does not express, that the oath contained in it shall entitle the persons taking it to the benefits of the act of the 18th of his present Majesty: it only expresses, that *it shall be lawful* for catholicks to take the oath of the 31st of his present Majesty at the places and times, and in manner therein mentioned. Thus, it is very uncertain, whether persons taking only the oath prescribed by the 31st of his present Majesty will be entitled to the benefit of the act of the 18th of his present Majesty. It seems therefore advisable for every Roman catholick, who wishes to be secure in the enjoyment of his landed property, to take both the declaration and oath prescribed by the act of the 31st, and the oath prescribed by the 18th of his present Majesty. *Ibid.*]

3 G. 1. c. 18. (a) *Viz.* An act passed in the sessions before, entitled, *An act to oblige papists to register their names and real estates.*

By the 3 *G.* 1. *c.* 18. reciting, that some doubts have arisen upon the (a) act therein recited, as also upon one other act made and passed in the parliament held in the 11 & 12 *W.* 3. *c.* 4. entitled, "*An act for "the further preventing the growth of popery*," and upon another act made in the 1 *Jac.* 1. *c.* 4. for the due execution of the statutes against Jesuits, seminary priests, recusants, and other acts made against papists and popish recusants touching the sale of the real estates of persons professing the popish religion, or incurring the disabilities and incapacities in the said acts mentioned, it is enacted, "That "no sale for a full and valuable consideration of any manors, "messuages, lands, tenements, or hereditaments, or of any in-"terest therein by any person or persons, being reputed owner "or owners, or in the possession or receipt of the rents or profits "thereof, heretofore made, or hereafter to be made, to or for "any protestant purchaser and purchasers, and merely and only "for the benefit of protestants, shall be avoided or impeached for "or by reason or upon pretence of any of the disabilities or inca-"pacities in the said acts or any of them contained, incurred, or "supposed to be incurred, by any of the persons making or join-"ing

" ing in ſuch ſale, or by any other perſon or perſons, from or " through whom the title to ſuch manors, *&c.* is or ſhall be de- " rived, or ſuppoſed to be derived, unleſs before ſuch ſale the " perſon entitled to take advantage of ſuch diſability or incapa- " city ſhall have recovered ſuch manors, meſſuages, lands, tene- " ments, and hereditaments by reaſon of ſuch diſability or inca- " pacity, and have entered ſuch claim in open court at the gene- " ral ſeſſions of the peace for the county, city, riding, or diviſion " wherein ſuch manors, meſſuages, lands, tenements, or hereditа- " ments lie or ariſe, and *bonâ fide*, and with due diligence, purſued " his remedy in a proper courſe of juſtice for the recovery thereof.

" Provided nevertheleſs, that whereas it was amongſt other " things enacted, by the ſaid 11 & 12 *W.* 3. *c.* 4. that from and " after the tenth day of *April*, which ſhould be in the year 1700, " every papiſt, or perſon making profeſſion of the popiſh religion, " ſhould be diſabled, and was thereby made incapable to pur- " chaſe, either in his or her own name, or in the name of any " other perſon or perſons to his or her uſe, or in truſt for him or " her, any manors, lands, profits out of lands, tenements, rents, " terms, or hereditaments, within the kingdom of *England*, do- " minion of *Wales*, and town of *Berwick-upon-Tweed*; and that " all and ſingular eſtates, terms, and any other intereſts or profits " whatſoever out of lands, from and after the ſaid 10th day of " *April* to be made, ſuffered, or done, to or for the uſe or behoof " of any ſuch perſon or perſons, or upon any truſt or confidence, " mediately or immediately, to or for the benefit or relief of any " ſuch perſon or perſons, ſhould be utterly void and of no effect, " to all intents, conſtructions, and purpoſes whatſoever: It is " hereby declared and enacted, that the ſaid recited part of the " ſaid act of parliament ſhall not be hereby altered or repealed, " but the ſame ſhall be and remain in full force as if this act had " never been made."

And it is further enacted by the authority aforeſaid, " That " from and after the 29th of *September* 1717, no manner of lands, " tenements, hereditaments, or any intereſt therein, or rent or " profit thereout, ſhall paſs, alter, or change from any papiſt, or " perſon profeſſing the popiſh religion, by any deed or will, ex- " cept ſuch deed within ſix months after the date, and ſuch will " within ſix months after the death of the teſtator, be enrolled in " one of the king's courts of record at *Weſtminſter*, or elſe within " the ſame county or counties wherein the manors, lands, and " tenements lie, by the *cuſtos rotulorum* and two juſtices of the " peace and the clerk of the peace of the ſame county or coun- " ties, or two of them at the leaſt, whereof the clerk of the peace " to be one." [Repealed abſolutely by 31 G. 3. c. 32. § 21.]

The 11 *G.* 2. *c.* 17. reciting that " Whereas perſons profeſſing " or educated in the popiſh religion are by divers acts of parlia- " ment ſubjected to ſeveral diſabilities and incapacities, which " may affect perſons conforming from the popiſh to the proteſt- " ant religion, and whereas many perſons have already conformed " to the proteſtant religion, and are willing to ſubmit to his Ma-

" jeſty's government in as full and ample manner as any other of
" his Majeſty's ſubjects, and others are likely ſo to do, it is en-
" acted, That all and every perſon or perſons, being reputed
" owner or owners, or in poſſeſſion or receipt of the rents and
" profits of any manors, meſſuages, lands, tenements, or hered-
" taments, or of any intereſt therein, who having been or reputed
" to be a papiſt or papiſts, or educated in the popiſh religion, hath
" or have conformed to, or hereafter ſhall conform to and profeſs
" the proteſtant religion, and hath or have taken or ſhall take the
" oaths of allegiance, ſupremacy, and abjuration, and alſo ſub-
" ſcribed or ſhall ſubſcribe the declaration ſet down and expreſſed
" in an act of parliament made the 30th *Car.* 2. *ſtat.* 2. entitled,
" *An act for the more effectual preſerving the king's perſon and*
" *government, by diſabling papiſts from ſitting in either houſe of par-*
" *liament*, to be by him, her, or them repeated and ſubſcribed
" in the courts of Chancery or King's Bench, or quarter ſeſſions
" of the county where ſuch perſon or perſons ſhall reſide, (all
" which ſhall be recorded in one of his Majeſty's courts of record
" at *Weſtminſter*, or ſuch quarter ſeſſions as aforeſaid,) and all and
" every perſon and perſons conforming and performing the re-
" quiſites as aforeſaid, for their own benefit, or for the benefit of
" any other proteſtant or proteſtants, and not for the benefit of
" any papiſt or papiſts, ſhall hold, poſſeſs, and enjoy all ſuch ma-
" nors, meſſuages, lands, tenements, and hereditaments, freed
" and diſcharged of and from the diſabilities and incapacities in
" the ſaid acts or any of them contained, incurred, or ſuppoſed
" to be incurred, by ſuch perſon or perſons ſo reputed owner or
" owners, or in poſſeſſion or receipt of the rents and profits as
" aforeſaid, or by any other perſon or perſons by, from, or
" through whom the title to ſuch manors, meſſuages, lands, te-
" nements, or hereditaments, or any intereſt therein, was or ſhall
" be derived or ſuppoſed to be derived for ſuch eſtate, right, title,
" or intereſt, as he, ſhe, or they had or would have, if no ſuch
" diſability or incapacity had been incurred; unleſs the perſon or
" perſons entitled to take advantage of ſuch diſability, incapacity,
" or defect of title hath or have actually and *bonâ fide* recovered,
" or ſhall hereafter recover ſuch manors, meſſuages, lands, tene-
" ments, and hereditaments, by judgment or decree in ſome
" action or ſuit already commenced, or hereafter to be com-
" menced, ſix kalendar months at leaſt before the making of ſuch
" record, and to be proſecuted with due diligence.

" Provided nevertheleſs, that this act, or any thing herein con-
" tained, ſhall not take away or prejudice the right of any perſon
" or perſons entitled to take advantage of ſuch diſability or inca-
" pacity, who now is or are in the actual poſſeſſion of, or ſhall
" have, precedent to the making of ſuch record, been in quiet
" poſſeſſion of any ſuch manors, meſſuages, lands, tenements, or
" hereditaments, by the ſpace of two kalendar months.

" Provided always, and it is further enacted, that if any ſuch
" perſon or perſons, ſo conforming as aforeſaid, ſhall, after ſuch
" conformity, return to or again profeſs the popiſh religion, every

" ſuch

" such person and persons shall for ever afterwards be disabled " from, and be incapable of, having or enjoying any benefit, pri- " vilege, or advantage of this act, and shall from thenceforth be " liable to the same disabilities, incapacities, and forfeitures as if " he, she, or they had not taken the said oaths and subscribed the " declaration as aforesaid.

" Provided always, that nothing in this act contained shall ex- " tend to take away or prejudice the right of any person entitled " to any remainder or reversion in any such manors, messuages, " lands, tenements, or hereditaments, in case such person shall " pursue his or her said right by some action or suit, to be com- " menced within the space of twelve kalendar months next after " the precedent estate or estates, on which such remainder or re- " version depends and is expectant, shall be determined; or with- " in twelve kalendar months from and after the 29th of *Septem-* " *ber* 1738, if such precedent estate or estates be already deter- " mined by the death or deaths of any person or persons whose " deaths have been concealed from or not known to the person " entitled to such remainder or reversion, by reason of their having " been buried beyond the seas, or in a private and clandestine " manner at home, and shall prosecute such action or suit with " due diligence."

On the first of these statutes there have been the following cases and resolutions.

*John Roper* Esq. being seised in fee of several manors, lands, *&c.* by indentures of lease and release, bearing date respectively the 17th and 18th of *January* 1708, granted and conveyed the same to *William Constable*, *Richard Snow*, and *Daniel Hickman*, and their heirs, in trust to sell the same, and out of the purchase-money and rents till sale to pay a debt of 4000*l.* due to *E.* and *H. W.* by mortgage of the premises, with interest, and after satisfaction thereof, then in trust for payment of the debts mentioned in the schedule annexed to the indenture of release; and the overplus of the money so to be raised, to be paid as the said *John Roper* by any attested writing or by his will should appoint; and for want of such appointment, in trust for the benefit of the said *John Roper* and his heirs. The 5th of *March* 1708, the said *John Roper* made his will, and after reciting the said lease and release, and the power reserved to him over the surplus of the said estate, he bequeathed several pecuniary legacies to his relations, and the residue of all his real and personal estate he gave to *William Constable* and *Thomas Radclyffe*, and to *Robert Hewett* and *Daniel Hickman*, and to their heirs and assigns for ever, and appointed them joint executors: the 1st of *April* 1709, he added a codicil to his will, and thereby gave the further several legacies therein mentioned, and all the remainder, whether in lands or personal estate, he gave to his executors Mr. *Radclyffe* and Mr. *Constable*. The said *John Roper* died soon after; and Mr. *Radclyffe* and Mr. *Constable* brought their bill in Chancery against *Edward Roper* Esq. the heir at law of the said *John Roper*, and also against *Hickman*, *Hewett*, *Snow* and others, to have the trust-estate

Roper v. Radclyffe, Hil. 1713. *in Canc.* 9 Mod. 181. S. C. 1 Br. P. C. 450. S. C.

sold, and for an account of the profits, and after the debts and legacies paid, to have the surplus money arising by sale equally divided between the plaintiffs, according to the said codicil. The said *Edward Roper* by his answer insisted, that as heir at law to the testator he was entitled to all such real estate as was undisposed of by him, and that Mr. *Radclyffe* and Mr. *Constable* were then and at the testator's decease papists, and as such, by 11 & 12 *W.* 3. *c.* 4. were incapable of purchasing any manors, lands, profits out of lands, &c. The said *Hewett* and *Hickman* by their answer insisted, that the real estate devised by the said will ought to be considered as the remaining part of the testator's lands, (after a sufficient part sold for payment of debts and legacies,) and not as a personal estate, and that so much only ought to be sold as would be sufficient to pay the debts; and that in case Mr. *Radclyffe* and Mr. *Constable* were incapable of taking them, they as protestants claimed the said real estate, as being the only devisees capable to take the same: they also insisted, that the codicil, with reference to the devise of the remainder of the testator's lands, did not control the devise thereof mentioned in the will; for that if the plaintiffs were incapable to take the lands as purchasers by the devise, they were to be esteemed as persons not *in esse*, and that the codicil as to the lands was void; but if the plaintiffs were capable, yet such devise did not give the remainder of the premises to them but for their lives, and that the reversion in fee belenged to them the said *Hewett* and *Hickman;* and they brought a cross-bill, insisting thereby on the same matters; and the legatees brought a bill for payment of their legacies. The 27th of *June* 1712, the said causes came on to be heard before the Lord Chancellour *Harcourt*, who desired to have the assistance of the Judges; and a case was made and argued before my Lord Chancellour *Parker*, *Trevor* Chief Justice of *C. B.*, Justice *Powel*, and the Master of the Rolls, and after time taken to consider of the case, my Lord Chancellour, *Trevor* C. J., the Master of the Rolls, and Justice *Powel* were of opinion, that the devise of the surplus of the purchase-money (after debts and legacies paid) to Mr. *Radclyffe* and Mr. *Constable* was good, notwithstanding the said disabling act; the surplus-money being a personal interest in them, and not made void by the words or intention of that statute; and as to *Hewett* and *Hickman*, my Lord Chancellour was of opinion, that the first codicil was a revocation of the will, as to the residue of the real and personal estate. Mr. *Roper* appealed to the House of Lords, and it was there ordered, before the appeal was determined, that the estates should be sold, and all debts and legacies paid; which was accordingly done; but afterwards the Lords reversed the decree, principally for this reason, that (*a*) if the devise of the residue to the plaintiffs was good, they would in equity be entitled to pay off the antecedent debts and legacies, and when that was done, keep the estate, which would be a means of evading the statutes, and enabling a papist to take an estate contrary to the intention of them. It was also resolved in this case, that a devise is a purchase within the meaning of the act.

(*a*) But it seems, that where lands are devised to or vested in trustees, to be sold for payment of particular sums to several people, some of whom happen to be papists, that this act does not prevent such papists from taking the particular sums or legacies intended for them; because they cannot insist upon paying off the other incumbrances, and holding the estate, as a person can do to whom the residue of the purchase-money is devised. [*A fortiori* then it does not prevent a papist, who is a creditor, from receiving his debt out of money arising from the sale of an estate by the appointment of a will. Foone v. Blount, Cowp. Rep. 464.]

The

The Earl of *Derwentwater* was tenant in tail, with remainder in fee to himſelf, and intending to marry Sir *John Webb*'s daughter, he, by advice of counſel, ſuffered a common recovery without declaring any uſes, it being intended, that he ſhould thereby become tenant in fee, and be enabled to make a proper ſettlement. Accordingly, by indentures of leaſe and releaſe, he ſettled his eſtate to the uſe of himſelf for life; remainder to truſtees for preſerving contingent uſes; remainder in tail ſucceſſively to the firſt and other ſons of the intended marriage, with remainders over. The marriage took effect, and there was iſſue a ſon and a daughter. The ſaid earl was attainted of high treaſon on account of the *Preſton* rebellion, and was executed; and by an act made thereupon, all the forfeiting perſons lands were veſted in commiſſioners for the uſe of the publick; and it was expreſsly provided, that where the forfeiting perſon was ſeiſed of an eſtate-tail at the time of the forfeitures, the ſame ſhould be veſted in the commiſſioners as an abſolute fee diſcharged of all remainders and reverſions. The commiſſioners of forfeitures, on a claim exhibited before them in the name of the ſaid earl's ſon, determined, that the whole eſtate was in them on this foundation, that the earl continued tenant in tail notwithſtanding the recovery, and, conſequently, nothing more than an eſtate for his own life paſt by the leaſe and releaſe. The reaſon they went upon was, that if by ſuffering a common recovery he could turn his eſtate-tail into a fee, then he would gain a new eſtate by purchaſe, which they apprehended he, being a papiſt, was diſabled to do by the ſtatute 11 & 12 *W.* 3. *c.* 4. But the majority of the judges, upon an appeal from the decree of the commiſſioners, were of a contrary opinion, and held, that this was only a new-modelling of the eſtate, and not a purchaſe or acquiſition within the act; and that the earl was capable of taking a new fee at leaſt for the benefit of his heirs and poſterity, and that he was capable of ſettling the ſame by leaſe and releaſe; and therefore allowed of the ſon's claim.

Lord Derwentwater's caſe, upon an appeal to the Lords Delegates from the judgment of the commiſſioners for forfeited eſtates. Hil. 6 G. 1. 9 Mod. 172. S. C.

It was likewiſe reſolved, by the delegates appointed to hear appeals from the determinations of the commiſſioners for the eſtates forfeited in the year 1716, that a papiſt may be a truſtee for a proteſtant, notwithſtanding the ſtatute 11 & 12 *W.* 3. *c.* 4.

*Anne Stephenſon* had two grandchildren, one the plaintiff *Hill*, the other *Frances* the wife of the defendant *Filkins*, who was educated by her in the popiſh religion: the grandmother, by her will made in the year 1716, deviſed the lands in queſtion to truſtees, in truſt to be ſold for the payment of her debts and legacies, and the reſidue of the money, ariſing by ſuch ſale, ſhe deviſed to her ſaid grand-daughter, *Frances*, when ſhe ſhould attain her age of twenty-one years, or be married with the conſent of the ſaid truſtees, and ſoon after died. The ſaid *Frances*, at the age of fifteen, was married to *Filkins* according to the ceremony and uſage of the church of *Rome*, and a week afterward by a miniſter of the church of *England*: at the age of eighteen ſhe conformed according to the directions of the ſtatute: it was held, that ſhe was within the firſt clauſe, and that a deviſe to a papiſt under the age of eighteen is

Hill v. Filkins, Trin. 11 G. 1. 2 P. Wms. 9. S. C.

good, if he conforms within six months after he comes to that age; and the age of eighteen was a proper period for them to make their election, whether they would conform or not; and the bill exhibited by the protestant heir was dismissed with costs.

Carrick v. Errington, Trin. 9 G. 1. in Canc. 2 P. Wms. 361. S. C. 9 Mod. 33. S. C. 2 Eq. Abr. 623. pl. 13. 624. fol. 20. 625. pl. 21, 22, 23. S. C.

*J. S.*, a papist, made a settlement of his estate to trustees, to the use of the trustees and their heirs, in trust for *A.* for life; remainder to the said trustees to preserve contingent remainders; remainder to the first and every other son of *A.*, and for default of such issue, then in trust for *B.* and his issue. *A.* was a papist and *B.* a protestant. *B.* exhibited his bill in Chancery, suggesting that *A.* was a papist and had no son, and that therefore the trustees might account to him for the rents and profits; he also made the heir at law defendant; and on hearing this cause before the Lord *Macclesfield*, and afterwards by the Lord *King*, they both held, that though the trust to *A.* was void, he being a papist, yet that notwithstanding, the legal estate was still in the trustees, because they were trustees not only for the papist, but also for *B.* the protestant, and for the sons of *A.*, who were yet unborn; and as they were trustees to preserve contingent remainders for such sons who might be protestants, they thought that the estate should remain in the trustees for that purpose; and they held that the heir at law was entitled to receive the profits during the life of *A.* as a trust undisposed of, but that *B.* the remainder-man could have no right till the death of *A.*, without a son capable of taking. And this decree was affirmed in the House of Lords.

Marwood v. Dorrel, Hil. 8 G. 2. in B. R. Ca. temp. Hardw. 91. S. C.

The case upon a special verdict in ejectment was: *Thomas Dorrel* had one brother and four sisters, and being seised in fee, by will 4 *Decemb.* 1703, devised the lands in question to trustees, to the use of them and their heirs, in trust for his first and every other son in tail male; and for want of such issue, remainder to his brother *Arthur* for life, remainder to his first and every other son in tail male; and for want of such issue, that then the trustees should stand and be seised for the sole and proper use and benefit of such eldest and first son lawfully begotten, or to be begotten of *John Dorrel*, as shall not be heir at law and inheritor to the said *John Dorrel*, and the heirs of his body; and for default of such issue by him, remainder to the third, fourth, and fifth, and every other son of the said *John Dorrel*, and the heirs of their respective bodies. The trustees, by a clause in the will, were empowered, by the rents and profits of the estate, or by mortgage and sale, to raise so much money as would satisfy the testator's debts: *Thomas* and *Arthur* both died without issue, *John Dorrel* is living, and has seven sons; *George* the defendant is the second son; all the sons of *John* are papists, and educated in the popish religion, except his younger son, who is too young to be said, as yet, to be of any religion; *George Dorrel* was under eighteen years of age when the limitation by the devise fell upon him, but is now above eighteen years, and has not taken the oaths directed by 11 & 12 *W.* 3. *c.* 4., and is married, and has now two sons very young, for whom, as well as for his wife, he has made a settlement of these lands; the four sisters of *Thomas Dorrel* are lessors of the plaintiff, as heirs at law; and the question is, Whether

*George*

*George* the ſon of *Arthur*, or the heirs at law, be entitled to the lands? For the plaintiffs, the heirs at law, it was urged, 1ſt, That *George* is a papiſt, and that papiſts who ſhall refuſe, above ſix months after they arrive at the age of eighteen, to take the oaths of allegiance, *&c.* are by the ſaid ſtatute expreſsly diſabled from purchaſing; and therefore as a deviſe is a purchaſe, and ſo held *Co. Lit.* 18., and by the Lords, in the caſe of *Roper* and *Radclyffe*, conſequently, *George Dorrel* takes nothing by it. 2*dly*, That the deviſe was void for uncertainty, being to ſuch eldeſt and firſt ſon of *J. D.* as ſhall not be heir at law to him; but, as no one can ſay who will be heir to *J. D.*, ſo it is impoſſible to ſay who will not, for *nemo eſt hæres viventis;* and he who is to be heir is not to take, ſo that none but a ſon who will not be heir can take; for both deſcriptions muſt coincide. *Hob.* 29. *Hardwicke*, Ch. J. breaking the caſe ſaid, two objections have been made to the defendant's title; 1*ſt*, That the limitation, under which he claims, is void for the uncertainty of the deſcription. 2*dly*, That ſuppoſing the deſcription to be certain enough, yet by 11 & 12 *W.* 3. *c.* 4. the defendant is diſabled from taking the eſtate, as being a papiſt. There ſeems at preſent to be a good deal of weight in the firſt objection, and yet it may poſſibly be reduced to a certainty, and if ſo, may be made good. And it ſeems natural to imagine, that by the words of the will, the teſtator intended the ſecond ſon of *John Dorrel* ſhould take, and the rather, as the teſtator has made the next limitation to the third, fourth, and fifth ſons, *&c.* of the ſaid *John Dorrel.* But, if the ſecond ſon cannot take, yet, if the third, *&c.* ſons are well deſcribed, the daughters of *Thomas* cannot recover; and at preſent they ſeem to be certainly deſcribed. As to the ſecond objection, I think myſelf bound by the determination of the Houſe of Lords in the caſe of *Roper* and *Radclyffe*, that the word *purchaſe* extends to a deviſe, and therefore that a papiſt is incapable of taking an eſtate by will. But yet, be the defendant's title as it will, the plaintiff muſt recover on his own ſtrength, and not on the weakneſs of the defendant's title; and my greateſt doubt is this, the deviſe here is to truſtees to the uſe of them and their heirs, *&c.* I think this would clearly be a deviſe to the uſe of the truſtees, though the clauſe of raiſing money by rents and profits was omitted; ſo here is a deviſe to truſtees, in truſt not only for the ſecond ſon of *John Dorrel*, but for all other his ſons now living, one of which is not found to be a papiſt. It hath been ſaid indeed, that this deviſe being for the benefit of papiſts, the truſt itſelf is void; but the queſtion is, if the entire truſt ſhould not be for the benefit of papiſts? In the preſent caſe, the youngeſt ſon of *John Dorrel* may be able to take, for ought appears to the contrary; and therefore I think that this latter part of the truſt being lawful, will ſupport the legal eſtate in the truſtees. And here he put the caſe *ſupra* of *Carrick* v. *Errington*, and ſaid, that, according to the reſolution in that caſe, the lands in queſtion cannot be in the heirs at law, but in the truſtees; becauſe here is a truſt for a ſon of *John Dorrel*, who was not a papiſt, as well as for other children yet unborn; ſo that the plaintiffs have no title

to

to recover in this action, but have miſtaken their remedy; for if they have any, it ſeems to be by bill in equity againſt the truſtees for an account of the profits. And it is certain, in the above-mentioned caſe, that the eſtate could not veſt in the remainder-man, becauſe he being then in by purchaſe, it could never be afterwards deveſted for the benefit of ſuch child as *A.* ſhould happen to have: but, he ſaid, that he did not give this as his abſolute opinion, but only to point out the difficulties which ſtuck with the court: it was adjourned, and no farther proceedings were had therein.

Pelham v. Fletcher, Mich. 1729.

A mortgage was made to a papiſt, who aſſigned to a proteſtant for a full conſideration: an ejectment was brought againſt the aſſignee by a ſubſequent mortgagee, who recovered by reaſon of the diſability of the firſt mortgagee: all this appeared upon a bill brought in Chancery; and my Lord Chancellour was of opinion, that a mortgage to a papiſt is void: but in this caſe the aſſignment to the proteſtant, and the trial in ejectment, were both before the 3 *G.* 1. *c.* 18. which, were it otherwiſe, would, it ſeems, have made an alteration.

On Lord Dover's will.

In a caſe which came on before my Lord *King* in the court of Chancery, it appeared, that my Lord *Dover* was poſſeſſed of a long term for years, and made his will, and his lady, who was a papiſt, executrix thereof. It was reſolved by my Lord Chancellour, that, notwithſtanding the diſabling act 11 & 12 *W.* 3. *c.* 4., the term veſted abſolutely in her, and that this was not a purchaſe within that act; and he ſaid, that a papiſt may be tenant in dower, or by the curteſy; becauſe in all theſe caſes it is by operation of law, and not by any act of the party, that the eſtate comes to him.

Mallom v. Bringloe, Paſch. 1738, in C. B.

It hath been adjudged, that a papiſt may deviſe to a proteſtant; in which caſe it was agreed, that where an anceſtor dies ſeiſed of an eſtate of inheritance, it deſcends upon and veſts in his heir, (though a papiſt) for the benefit of his heirs, and that the next proteſtant a-kin has only a right to the perception of the profits during the nonconformity of the heir.

Smith v. Read, Trin. 12 G. 2. 1 Atk. 526. S. C.

Upon the marriage of Mr. *Paine* with one Mrs. *Gage*, lands in the county of *Surrey* were ſettled and conveyed to the uſe of the huſband and wife for their lives, and the life of the ſurvivor of them; then to the uſe of the firſt and every other ſon in tail, remainder to the right heirs of the huſband: the marriage took effect, but Mr. *Paine* the huſband died in the lifetime of Mrs. *Paine*, without leaving iſſue, having firſt deviſed all his lands to his wife and her heirs. In 1730, Mrs. *Paine*, the wife, deviſed all her real eſtate to the defendant, ſubject to a few legacies mentioned in her will, but lived and died a papiſt; but that being difficult to prove at law, the plaintiff Mr. *Smith* who had married *Eliz. Paine*, heir at law to Mr. *Paine*, he and his wife filed their bill againſt the defendant to ſet aſide the marriage-ſettlement and will of Mr. *Paine* the huſband, under which Mrs. *Paine* claimed; and in particular, prayed, that the defendant might diſcover whether Mrs. *Paine* the wife, under whoſe will he claimed, was a papiſt or not.

not? To which the defendant pleaded the ſtatute of 11 & 12 *W.* 3. *c.* 4. Upon arguing this plea, it was inſiſted upon for the defendant, that it was a ſtanding rule in this court, that no perſon was bound to diſcover what might ſubject him to the penalty of an act of parliament; that the ſtatute of 11 & 12 *W.* 3. *c.* 4. was a penal law, and the party, who would take advantage of ſuch law, would never be aſſiſted in a court of equity, which never aſſiſts a forfeiture; he, who would claim any thing forfeited, muſt make out the forfeiture himſelf; for no perſon ſhall be obliged to diſcover a fact that would be a forfeiture of his own eſtate. If a copyholder commits waſte, it is a forfeiture of his eſtate to the lord of the manor; but, if the lord of the manor comes into this court for a diſcovery, whether the copyholder has been guilty of waſte or not, the copyholder is not bound to anſwer; for no law in the world obliges a man to accuſe himſelf: if an eſtate is given to a woman *durante viduitate*, ſhe is not bound to diſcover whether ſhe is married or not; becauſe the diſcovery of that fact might be the loſs of her eſtate. That diſabilities and forfeitures were of the ſame nature; that a total incapacity or diſability to hold at all (which is the caſe of papiſts) was certainly as much a penalty, as a forfeiture of an eſtate which the party before was capable of holding; that as Mrs. *Paine* would not have been obliged in her lifetime to diſcover whether ſhe was a papiſt or not, the defendant, who claims under her, ought not to be obliged to diſcover it. On the other hand, it was inſiſted by the counſel for the plaintiff, that it was not their buſineſs to examine, whether the acts of parliament made againſt papiſts were hard laws or not; they were laws, and that was ſufficient for their purpoſe: that this was not the caſe of a forfeiture, but it was to diſcover a fact, which, if true, the eſtate was never in Mrs. *Paine*, becauſe the act of parliament makes all papiſts abſolutely incapable of being purchaſers; if ſhe was a papiſt, the eſtate never veſted in her; and as ſhe was not capable of holding it, ſhe could not give it away to the defendant, therefore could never forfeit the eſtate; for no perſon can be ſaid to forfeit an eſtate he never had. An alien is incapable of holding lands at common law, yet he is obliged to diſcover whether he is an alien or not; and his diſcovery of that fact, whether he is ſo or not, can never be a forfeiture of his eſtate, becauſe he never had a right to it: ſo, in caſe of a baſtard who is *nullius filius*, and incapable of claiming lands by deſcent, he ſhall diſcover whether he is ſo or not, for the ſame reaſon: ſo, a perſon claiming under a bankrupt, whoſe goods are veſted in the aſſignees of the commiſſion of bankruptcy for the benefit of creditors, muſt diſcover whether the perſon, under whom he claims, was a bankrupt or not at the time of the conveyance: That all theſe caſes depend upon the ſame reaſon, and were no forfeitures, becauſe the eſtates were never in them; ſo, if Mrs. *Paine* was a papiſt, ſhe was incapable of having the eſtate herſelf, and could not give it away; and therefore the defendant could never forfeit it, becauſe the eſtate was never in him. But my Lord *Hardwicke* was of opinion, that the defendant was not obliged to diſcover whether Mrs. *Paine* was a papiſt or not;

not; that there is no rule better eſtabliſhed in this court, than that a man ſhall not be obliged to anſwer to what may ſubject him to the penalty of an act of parliament. No perſon can doubt whether this act is not a penal law, and whether the clauſes relating to papiſts are not diſabilities or incapacities, impoſed by way of penalty upon all perſons exerciſing that religion. It is objected, that this is not the caſe of a forfeiture, becauſe the eſtate was never veſted, and therefore can never be deveſted; yet it all falls under the ſame reaſon; and an incapacity or diſability to hold at all by act of parliament, is certainly as much a penalty, as the forfeiture of an eſtate by a perſon who had a right to enjoy it before the forfeiture. That if a bill is brought againſt the perſon for a diſcovery whether he is a papiſt or not, he is not bound to diſcover; and where is the difference between him and the perſon claiming under him? Here is a diſability impoſed by parliament, by way of penalty, upon a particular ſet of men upon the account of their religion, the diſcovery of that fact ſubjects them to a penalty; and this is not like the caſe of an alien or baſtard, who are incapable by the general laws of the land to inherit: beſides, what ſways with me much, is the great inconvenience that would follow, ſhould this plea be diſallowed; we ſhould have nothing in this court but bills of diſcovery, whether ſuch and ſuch perſons were papiſts or not, and nobody knows what confuſion would follow; therefore the plea muſt be allowed (*a*).

(*a*) So, in Harriſon v. Southcote, the ſame plea was allowed to a bill brought againſt a purchaſer to diſcover, whether the perſon, under whom he derived title, were a papiſt. 1 Atk. 528. 2 Vez. 389. S. C.

[All the ſtatutes of recuſancy are now repealed by the 31 *G.* 3. *c.* 32. in favour of perſons taking the oaths thereby required. Nor is any catholick to be ſummoned to take the oath of ſupremacy preſcribed by 1 *W.* & *M.* § 1. *c.* 8. and 1 *G.* 1. § 2. *c.* 13. or the declaration againſt tranſubſtantiation required by 25 *Car.* 2. The act diſpenſeth perſons acting as a counſellour at law, barriſter, attorney, clerk, or notary, from taking the oaths of ſupremacy, or declaration againſt tranſubſtantiation. It alſo tolerates under due regulations the publick exerciſe of the popiſh religion, provides againſt diſturbing the congregation, and miſuſing the officiating miniſter, and exempts the miniſters from ſerving upon juries, and from ward and parochial offices. The regulations, under which the publick exerciſe of the religion is tolerated, are, that no congregation for religious worſhip ſhall be had in any place, with the doors locked, barred, or bolted, during any time of ſuch meeting together; and that no congregation or aſſembly for religious worſhip ſhall be permitted, until the place of ſuch meeting ſhall be recorded at the ſeſſions.

As to the double land-tax, that being impoſed by the annual land-tax act, a repeal of it could not be effected by any proſpective act. It is repealed, by omitting from the ſubſequent annual land-tax acts, the clauſe impoſing it.]

# Pardon.

(A) By whom to be granted.

(B) In what Caſes, and for what Offences it may be granted.

(C) Where a Pardon is grantable of common Right.

(D) Of the Validity of a Pardon: And herein, by what Words Treaſon, Murder, Felony, and other Offences may be pardoned: and herein, of Pardons by Implication, and where the King ſhall be ſaid to be deceived in his Grant thereof.

(E) Whether a Pardon may be conditional.

(F) Who may take Advantage of a Pardon, and to whom it ſhall be ſaid to extend.

(G) In what Manner a Pardon is to be taken Advantage of: And herein,

1. In what Manner a general Pardon by Parliament is to be taken Advantage of.

2. In what Manner a particular Pardon under the Great Seal is to be taken Advantage of.

(H) The Effects and Conſequences of a Pardon, and to what the Party ſhall be reſtored.

## (A) By whom to be granted.

THE power of pardoning offences is inſeparably incident to the crown; and this high prerogative the king is intruſted with upon a ſpecial confidence, that he will ſpare thoſe only whoſe caſe, could it be foreſeen, the law itſelf may be preſumed willing to have excepted out of its general rules, which the wiſdom of man cannot poſſibly make ſo perfect as to ſuit every particular caſe. Show. 284.

But, it ſeems, that anciently the right of pardoning offences within certain diſtricts was claimed by the Lords of Marches and others, Co. Lit. 114. 3 Inſt. 233.

others, who had *jura regalia* by ancient grants from the crown, or by preſcription. But now by the 27 *H.* 8. *c.* 24. § 1. it is enacted, "That no perſon or perſons, of what eſtate or degree ſoever they "be, ſhall have power to pardon or remit any treaſons or felonies "whatſoever, nor any acceſſaries to the ſame, nor any outlawries "for ſuch offences, whether committed in *England* or *Wales*, or "the Marches of the ſame, but that the king ſhall have the whole "and ſole power and authority thereof united and knit to the "imperial crown of this realm, as of good right and equity it "appertaineth."

## (B) In what Caſes, and for what Offences it may be granted.

Plow. 487. Keilw. 134. 12 Co. 29, 30. 3 Inſt 237. Vaugh. 333.

IT is laid down in general, that the king may pardon any offence whatever, whether againſt the common or ſtatute law, ſo far as the publick is concerned in it, after it is over, and, conſequently, may prevent a popular action on a ſtatute, by pardoning the offence before the ſuit is commenced. But, it ſeems, that he cannot wholly pardon a publick nuiſance while it continues ſuch, becauſe ſuch pardon would take away the only means of compelling a redreſs of it. Yet, it is ſaid, that ſuch a pardon will ſave the party from any fine to the time of the pardon.

Dav. 75. 5 Co. 35. 12 Co. 29.

But, it ſeems agreed, that the king can by no previous licence, pardon, or diſpenſation, make an offence diſpuniſhable which is *malum in ſe*; as being either againſt the law of nature, or ſo far againſt the publick good as to be indictable at common law; and that a grant of this kind, tending to encourge the doing of evil, which it is the chief end of government to prevent, is plainly againſt reaſon and the common good, and therefore void.

2 Hawk. P. C. c. 37. § 28. (*a*) 3 H. 7. 15. pl. 30.

And hence it hath been inſiſted, that the king's grant to the Biſhop of *Saliſbury* and his ſucceſſors, having the cuſtody of a priſon, that they ſhould be quiet from all eſcapes, which hath been (*a*) adjudged to be a good grant, is not law; as being but a ſingle inſtance, and contrary to this rule; becauſe a grant of this kind, tending to make a gaoler leſs diligent in his duty, by taking off the legal puniſhment of his negligence, is plainly againſt the common good.

2 Hawk. P. C. c. 37. § 29. and ſeveral authorities there cited.

But, where a thing in its own nature lawful, is made unlawful by parliament, as the carrying bell-metal, *&c.* out of the realm, importing merchandizes in foreign ſhips, ſelling wines beyond a certain price, or without a licence, multiplying gold, *&c.*, coining money of a baſe allay, *&c.*, it was formerly taken as a general rule, that the king might diſpenſe with it, as to a particular time or place, or perſon, ſo far as the publick was concerned in it; unleſs ſuch diſpenſation could not but be attended with an inconvenience, as, the introducing a monopoly; or fruſtrating the end for which the law was made; as, the licenſing a particular perſon to import foreign cards or wines, *&c.*, in which caſes it was commonly taken to be void. Alſo, where a ſtatute gives a particular intereſt or

or right of action to the party grieved, as the ſtatutes of mortmain(*a*), thoſe againſt maintenance, forcible entries, carrying diſtreſſes out of the hundred, eſcapes, &c., it has been always agreed, that no charter from the king can bar the right of the party grounded on ſuch ſtatute (*b*). Alſo, where a ſtatute is expreſs, that the king's charter againſt the purport of it, though with the clauſe of *non obſtante*, ſhall be void; it ſeems to have been always generally agreed, that regularly no ſuch clauſe could diſpenſe with it.

[(*a*) By 7 & 8 W. 3. c. 38. ſuch licence may be granted by the king alone.
(*b*) Hence, it hath been holden, that an act of grace doth not diſcharge the forfeiture of twenty-five pounds to the city of London, for acting as a broker without licence. Ludlam v. Lopez, 1 Str. 529. Neither will it diſcharge penalties given by a popular ſtatute between the informer and the poor. Howel v. James, 2 Str. 1272.]

Alſo, it ſeems to be agreed, that no diſpenſation of any ſtatute, except the ſtatutes of mortmain, was of any force, without a clauſe of *non obſtante;* neither is ſuch clauſe of any effect at this day; for it is declared and enacted by 1 *W. & M. ſeſſ.* 2. *c.* 2. that no diſpenſation by *non obſtante* of or to any ſtatute, or to any part thereof, be allowed; but that the ſame ſhall be held void, except a diſpenſation be allowed in ſuch ſtatute. But it is provided, that no charter, grant, or pardon, granted before 23d of *October* 1699, ſhall be any ways invalidated by that act, but that the ſame ſhall be and remain of the ſame force, and no other, as if the ſaid act had never been made. 2 Hawk. P. C. c. 37. § 30, 31.

The king can by no charter whatſoever bar any right of entry or action, or any legal intereſt or benefit before veſted in the ſubject; and therefore it ſeems clear, that he cannot bar any action on a ſtatute by the party grieved, nor even a popular action commenced before his pardon, nor a recognizance for the peace before it is forfeited Plow. 487. 2 Roll. Abr. 178. Cro. Car. 199. Keilw. 134.

Neither can the king pardon an appeal, except only where it is carried on at his ſuit, after a nonſuit; and therefore, if a perſon attainted, on an appeal carried on at the ſuit of the party, get the king's pardon, he muſt ſue a *ſcire facias* againſt the appellant before the pardon ſhall be allowed. 2 Hawk. P. C. c. 37. § 35.

And if the appellant appear on the *ſcire facias*, he may pray execution notwithſtanding the pardon: but, if the ſheriff return a *ſcire feci*, or two *nihils*, and the appellant appear not on demand; or, if he return the appellant dead, the appellee ſhall be diſcharged. But ſome have holden, that, in this laſt caſe, a *ſcire facias* ſhall go againſt the heirs of the deceaſed. 2 Hawk. P. C. c. 37. § 36.

But there is no need of any *ſcire facias* againſt the lord by eſcheat, becauſe the pardon no way tends to reverſe the attainder whereon the title of eſcheat is founded. Hawk. P. C. c. 37. § 37.

If ſeveral perſons be outlawed on an appeal, and one get his pardon allowed on the non-appearance of the appellant, on a *ſcire facias*, it ſeems, that the reſt can take no advantage thereof, but muſt ſue their *ſcire facias*, &c. in the ſame manner as if there had been no ſuch default. Hawk. P. C. c. 37. § 38.

It hath been ſtrongly holden, that the king may pardon the burning of the hand on a conviction of manſlaughter on an appeal, But for this *vide* 2 Hawk.

as

P. C. c. 37. § 39. and 1 Str. 530. as being no part of the judgment at the ſuit of the party, but a collateral and exemplary puniſhment inflicted by ſtatute, and intended only by way of ſatisfaction to the publick juſtice, like the finding of ſureties by one convicted on the ſtatute againſt treſpaſſers in parks.

5 Co. 51. Latch, 190. Cro. Eliz. 684. Hob. 81. Cro. Jac. 335. 2 Hawk. P. C. c. 37. § 41. A pardon will not only diſcharge any ſuit in the ſpiritual court *ex officio*, but alſo any ſuit in ſuch court *ad inſtantiam partis pro reformatione morum*, or, *ſalute animæ*, as, for defamation or laying violent hands on a clerk, *&c.* And if the time, to which the pardon has relation, be prior to the award of the coſts to the party, or, as it is generally holden, if it be ſubſequent to the award, but prior to the taxation, it ſhall diſcharge them, but not if it be ſubſequent to the taxation. And the ſame rule holds as to coſts taxed to the party grieved on a contempt in a court of equity. But *quere* as to coſts taxed by the prothonotary on an attachment; for they are not given by the court of courſe, but the offender ſubmits only to pay them by way of compoſition.

Jon. 227. 2 Roll. Abr. 178. Cro. Jac. 159. 8 Co. 68, 69. If a perſon be impriſoned on an *excommunicato capiendo* for non-payment of coſts, and the king pardon all contempts, it is ſaid, that he ſhall be diſcharged without any *ſcire facias* againſt the party, and that the party muſt begin anew to compel a payment of the coſts; becauſe the impriſonment was grounded on the contempt, which is wholly pardoned.

5 Co. 51. Latch, 190. Cro. Car. 46-7. * There cannot now be any ſuit in the eccleſiaſtical courts, to compel marriage by reaſon of any contract, &c. 26 G. 2. c. 33. § 13. But no pardon will diſcharge a ſuit in the ſpiritual court, any more than in a temporal, for a matter of intereſt or property in the plaintiff; as for tithes, legacies, matrimonial * contracts and ſuch like. Alſo, it is agreed, that after coſts are taxed, in a ſuit in ſuch court at the proſecution of the party, whether for a matter of private intereſt, or *pro reformatione morum*, or *pro ſalute animæ*, or for defamation, *&c.*, they ſhall not be diſcharged by a ſubſequent pardon.

2 Roll. Abr. 304. Noy, 85. Latch, 155. If the offence be pardoned after coſts taxed, and then the defendant appeal, and the ſuperior court give new coſts for or againſt him, ſuch coſts ſhall not be avoided; becauſe the coſts in the firſt ſuit being taxed before the pardon, and therefore not avoided by it, the appeal was proper for determining, whether they were well given or not, and, conſequently, coſts were as properly given on ſuch appeal as in any other caſe. But, if the offence be pardoned, pending an appeal, and the pardon relate to a time precedent to the award of the coſts, and then the appellant deſert his appeal, and the court award coſts againſt him in reſpect of ſuch deſertion, it ſeems, that he may have a prohibition; becauſe the pardon, having diſcharged the coſts of the firſt ſuit, made the appeal to be of no purpoſe.

By the 12 & 13 *W.* 3. *c.* 2. § 3. "No pardon under the great "ſeal ſhall be pleaded to an impeachment by the Commons in "parliament."

4 Bl. Com. 392. [But after the impeachment is ſolemnly heard and determined, it is not underſtood, that the king's royal grace is farther reſtrained or

or abridged; for after the impeachment and attainder of the ſix rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's pardon.]

## (C) Where a Pardon is grantable of common Right.

BY the ſtatute of *Glouceſter*, *c.* 9. it is enacted, "That if it be "found by the country, that a perſon tried for the death of a "man did it in his defence, or by misfortune, then, by the report "of the juſtices to the king, the king ſhall take him to his grace, "if it pleaſe him." 2 Inſt. 316.

But, it ſeems to be ſettled at this day agreeably to the ancient common law, in affirmance whereof this ſtatute was made, that in ſuch a caſe, or where one indicted of *homicide ſe defendendo* confeſſes the indictment, if the party cauſe the record to come into Chancery, the Chancellour will of courſe make him a pardon without ſpeaking to the king, and that by ſuch pardon the forfeiture of goods may be ſaved; for theſe words, *if it ſhall pleaſe the king*, ſhall be taken as ſpoken only by way of reverence to him, and not intended to make ſuch a pardon diſcretionary. But, if the party be found to have fled, it is made a *quære*, if the pardon ſave the forfeiture for the flight; for that is not grounded on the homicide, but on the contempt of the law. 2 Hawk. P. C. c. 37. § 2.

If an approver convict all the appellees, whether by battle or verdict, the king *ex merito juſtitiæ* ought to pardon him as to his life, and alſo give him his wages from the time of the appeal to the time of the conviction. 3 Inſt. 129. 2 Hal. Hiſt. P. C. 233.

By the 4 & 5 *W. & M. c.* 8. it is enacted, "That if any perſon "or perſons out of priſon ſhall commit any robbery, and afterwards diſcover two or more who then had or afterwards ſhall "commit any robbery, ſo as two or more of them ſhall be convicted, any ſuch diſcoverer ſhall be entitled to a pardon for all "robberies committed before the diſcovery, which alſo ſhall bar "an appeal."

And by the 6 & 7 *W. & M. c.* 17. it is enacted, "That if any "perſon or perſons out of priſon ſhall be guilty of clipping, "coining, counterfeiting, waſhing, filing, or otherwiſe diminiſhing "the coin of this realm, and afterwards diſcover two or more "who then had or afterwards ſhall commit any of the ſaid "crimes, ſo as two or more of them ſhall be convicted, any ſuch "diſcoverer ſhall be entitled to a pardon for all his crimes committed before the diſcovery."

By the 10 & 11 *W.* 3. *c.* 23. (which excludes clergy from thoſe who ſhall in any ſhop, ware-houſe, coach-houſe or ſtable, privately ſteal any goods, &c., of the value of 5 *s.*, though ſuch ſhop, &c., be not broken open, and though no perſon be therein, or ſhall aſſiſt, hire, or command any perſon to commit ſuch offence,) "If any perſon or perſons ſhall commit any burglary, houſe-

" breaking, or felony, in ſtealing of any horſe or horſes, or any " money, wares, or goods from whom clergy is by that act taken " away, and being out of priſon ſhall diſcover two or more, who " then had or after ſhall commit any ſuch felony, and ſhall be " convicted thereof, or cauſe to be diſcovered and apprehended " two or more, who ſhall be convicted as aforeſaid, every ſuch " diſcoverer ſhall be entitled to a pardon for the felonies aforeſaid " committed before ſuch diſcovery," *&c.*

By the 5 *Ann c.* 31. it is enacted, " That every perſon who ſhall " be guilty of burglary, or of the felonious breaking and entering " a houſe in the day-time, and after ſhall diſcover two who ſhall " have committed ſuch felony, ſo as they be convict, *&c.*, ſhall " have 40*l.* and a pardon of all felonies, except murder," *&c.*

[It is enacted by 8 *Geo.* 1. *c.* 18. § 7. " That if any runner of " foreign goods ſhall within two months after his offence, and " before his conviction, diſcover two or more of his accomplices " therein to the commiſſioners of the cuſtoms or exciſe in *Eng-* " *land* or *Scotland*, ſo as they or two of them at leaſt be convicted " of ſuch offence (as deſcribed in the act), the offender or offenders " ſo diſcovering ſhall receive the ſum of 40*l.* for every ſuch " offender ſo diſcovered and convicted, ſo as the value of the " goods recovered by ſuch diſcovery ſhall exceed 50*l.*; and ſuch " perſon ſo diſcovering ſhall be clearly acquitted and diſcharged " of ſuch his or her offence." And the like is enacted by 9 *Geo.* 2. *c.* 35.

Cowp. 333. Perſons to whom the king has, by ſpecial proclamation in the *Gazette*, or otherwiſe, promiſed a pardon, are alſo entitled to it of legal right.]

## (D) Of the Validity of a Pardon: And herein, by what Words Treaſon, Murder, Felony, and other Offences may be pardoned: And herein, of Pardons by Implication, and where the King ſhall be ſaid to be deceived in his Grant thereof.

Yelv. 43. 47. Cro. Jac. 18. 34. 548. 2 Roll. Abr. 188. Dyer, 352. pl. 26. Raym. 13. Sid. 41. 3 Inſt. 238.

IT is laid down as a general rule, that wherever it appears by the recital of the pardon, that the king was miſinformed, or not rightly appriſed both of the heinouſneſs of the crime, and alſo, how far the party ſtands convicted upon record, the pardon is void, upon a preſumption, that it was gained from the king by impoſition.

2 Hawk. P. C. c. 37. § 8.

And upon this ground it ſeems agreed, that if a man attainted of felony get a pardon, which doth not mention the attainder, the pardon will be ineffectual. Alſo, it hath been holden, that the pardon of a perſon convicted by verdict of felony is void, unleſs it recite the indictment and conviction. Alſo, it hath been queſtioned, if the pardon of a perſon barely indicted of felony be good

good, without mentioning the indictment: but, it hath been adjudged, that ſuch a defect is ſalved by the words *ſive indictatus ſive non.*

It hath been holden, that anciently a pardon of all felonies included all treaſons as well as felonies; and it ſeems to be taken for granted in many books, that ſuch a general pardon is even at this day pleadable to any felony, except murder, rape, and piracy; and that the only reaſon why it may not alſo be pleaded to murder and rape is, becauſe 13 *R.* 2. *ſtat.* 2. *c.* 1. and 16 *R.* 2. *c.* 6. require an expreſs mention of them; and that the only reaſon why it is not pleadable to piracy is, becauſe it is a felony by the civil law only. 2 Hawk. P. C. c. 37. § 9. Hal. Hiſt. P. C. 466. 2 Hale's Hiſt. P. C. 45.

By the 27 *E.* 3. *c.* 2. it is enacted, "That in every pardon of "felony granted at any man's ſuggeſtion, the ſuggeſtion and the "name of him that makes it ſhall be compriſed; and if it be "found untrue, the charter ſhall be diſallowed; and the juſtices, "before whom the charter ſhall be alleged, ſhall inquire of the "ſame ſuggeſtion, and, if they find it untrue, ſhall diſallow the "charter."

No pardon of felony ſhall be carried beyond the expreſs purport of it; and therefore if the king, reciting an attainder of robbery, pardon the execution, he thereby neither pardons the felony itſelf, nor any other conſequence of it beſides the execution. 6 Co. 13. 2 Hawk. P. C. c. 37. § 12.

It is enacted by 2 *E.* 3. *c.* 2. *That charters of pardon of manſlaughters ſhall not be granted but where the king may do it by his oath, that is to ſay, where a man ſlayeth another in his own defence, or by misfortune;* neither is there any precedent in the regiſter of the pardon of any other homicide, but ſuch as is done either in ſelf-defence or by miſadventure, or by infants or madmen; and from hence ſome have diſputed the king's power of pardoning any other homicide. But this is contrary not only to the general tenor of the books, but alſo to the plain purport of 13 *R.* 2. *ſtat.* 2. *c.* 1. which, reciting that murders, treaſons, and rapes, had been frequently committed, becauſe pardons had been eaſily granted in ſuch caſes, enacteth, "That no pardon ſhall be allowed for mur-"der, or for the death of a man ſlain by await, aſſault, or malice "prepenſed, treaſon, or rape of a woman, unleſs the ſame mur-"der, *&c.* be ſpecified in the ſame charter; and if the charter "of the death of a man be alleged before any juſtices, in which "it is not ſpecified that the party was murdered or ſlain by await, "aſſault, or malice prepenſed, the ſame juſtices ſhall inquire by "a good inqueſt of the *viſne* where the dead was ſlain, if he "were murdered or ſlain by await, *&c.* and if they find that "he was murdered or ſlain by await, *&c.* the charter ſhall be "diſallowed." 2 Hawk. P. C. c. 37. § 14. and ſeveral authorities there cited.

It hath been formerly often adjudged, that murder might be pardoned under the general deſcription of a felonious killing, with a clauſe of *non obſtante;* but by *W. & M. ſeſſ.* 2. *c.* 2. it is declared, *That no diſpenſation by* non obſtante *of or to any ſtatute ſhall be allowed.* Sid. 366. Show. 283 Keling. 24. 3 Mod. 37.

2 Keb. 363. 415. Keling, 24. 2 Jon. 56.

But pardons of manſlaughter remain as they were at common law; and therefore the pardon of the felonious killing of J. S. may be pleaded to an indictment of manſlaughter in killing him: but where ſuch a pardon is pleaded to a coroner's inqueſt of manſlaughter, the court may refuſe to allow it, till the fact be found manſlaughter by a jury directed by a higher court.

Dyer, 50. pl. 4. 235. pl. 19. 6 Co. 13.

If a general act expreſsly pardon petit treaſons, and except murders, it cannot be avoided by indicting a perſon guilty of petit treaſon for murder only, omitting the word *proditorie*; for the leſs offence being included in the greater is pardoned by the pardon of it; and therefore ſuch an exception of murder is to be intended of ſuch murder only as is ſpecially ſo called, and doth not amount to petit treaſon.

Lev. 8. 120. Sid. 150. Keb. 66. 548.

Neither doth the exception of murder in a general act of pardon of all felonies extend to a *felo de ſe*; for though his offence be in ſtrictneſs murder, yet in common ſpeech, according to which ſtatutes are commonly expounded, it is generally underſtood as a diſtinct offence, the word *murder* ſeeming *primâ facie* to import the murder of another.

Plow. 401. Cole's caſe. Hal. Hiſt. P. C. 426. Dyer, 99. pl. 65.

It is ſaid, that a general act of pardon of all felonies, miſdemeſnours, and other things done before ſuch a day, pardons a homicide from a wound before the day, whereof the party died not till after; becauſe the ſtroke being pardoned, the effects of it are conſequently pardoned *.

* If the felony has its commencement before the pardon takes place, but not its completion, the pardon ſhall operate in favour of the priſoner, as it would have done had the felony been complete before the pardon. This is the true ſenſe of the doctrine in Cole's caſe. Nicholas's caſe, 1748, Foſt. 64.—But, if a man gives a ſtroke, or poiſon, (which, till death enſues upon it, is only a miſdemeanour) and a pardon is granted to all miſdemeanours, &c. but not of murder or poiſoning, and afterwards the party dies, the felony is not pardoned. *Id.*

Lev. 106. Sid. 211. 2 Mod. 52.

It is ſaid, that a pardon of all miſpriſions, treſpaſſes, offences, and contempts, will pardon a contempt in making a falſe return, and a ſtriking in *Weſtminſter-hall*, and barratry, and even a *præmunire*. Alſo, it is laid down in general, that it will pardon any crime which is not capital.

2 Hal. Hiſt. P. C. 252. cited from Dyer, 308. a.

If *A.* be indicted of piracy, and refuſing to plead have judgment of *peine fort & dure*, and by the general pardon piracies are excepted, but the judgment of *peine fort & dure* is pardoned by the general words of all contempts; *quære* whether he may be arraigned for any other piracy; but, by the better opinion, he may be arraigned of any other piracy committed before that award.

## (E) Whether a Pardon may be conditional.

Co. Lit. 274. b. 2 Hawk. P. C. c. 37. § 45.

IT ſeems agreed, that the king may extend his mercy on what terms he pleaſes, and, conſequently, may annex to his pardon any condition that he thinks fit, whether precedent or ſubſequent, on the performance whereof the validity of the pardon will depend.

Alſo,

Alſo, it hath been held, that in every pardon for a capital offence, where the party was obliged to give ſecurity, there is a condition in law annexed to ſuch pardon, ſo that if he forfeits ſuch recognizance, his pardon becomes void, and he may be taken and executed on the firſt judgment *. Moor, pl. 662.

* Perſons pardoned of felony may be bound to their good behaviour for ſeven years. 5 W. & M. c. 13. which *vide poſt*.

## (F) Who may take Advantage of a Pardon, and to whom it ſhall be ſaid to extend.

NOtwithſtanding all felonies are ſeveral, yet the felony of one man may be ſo far dependant on that of another, that the pardon of the one will neceſſarily enure to the benefit of the other; as, where the principal is allowed his pardon before his conviction, in which caſe the acceſſary may by a neceſſary conſequence take benefit of it; becauſe he cannot be arraigned till the principal is convicted. Cro. Eliz. 30, 31. Dyer, 34. pl. 21. 2 Hawk. P. C. c. 37. § 22.

Where a man is bound to the king as ſurety for another's debt, it is clear, that the diſcharge of the principal is a diſcharge of the ſurety; but where a man is bound to the king for another's performance of a future act, the diſcharging of the other from ſuch future act will not diſcharge the ſurety. But *quære* if both had been bound, and the ſubject no way intereſted in the matter. 2 Hawk. P. C. c. 37. § 23.

The pardon of *A.*, *B.*, and *C.* of all felonies by them done, without adding or any of them, is void; for it ſuppoſes them jointly guilty, and extends to none but joint felonies, whereas all felony is ſeveral in each offender, and cannot be joint. Dyer, 34. pl. 21. 2 Hawk. P. C. c. 37. § 24.

## (G) In what Manner a Pardon is to be taken Advantage of: And herein,

### 1. In what Manner a general Pardon by Parliament is to be taken Advantage of.

HEREIN we muſt firſt obſerve a difference between a pardon by parliament and that under the great ſeal; that as to pardon by (*a*) parliament, the ſame cannot be waived, becauſe no one by his admittance can give the court a power to puniſh him, where it judicially appears there is no law to do it; but a man may waive a pardon under the great ſeal, by pleading other matter, without taking any notice of it. 2 Hawk. P. C. c. 37. § 58, 59.

(*a*) That a coronation pardon cannot be taken advantage of, unleſs it be taken out and pleaded under the great ſeal. Keb. 707.

If the body of a general act of pardon either except divers perſons by name, or except all who come under a general deſcription, as, all who adhered to *J. S.*, the court is not bound (neither ought it, as ſome ſay,) to give any one the advantage of it, unleſs he plead it, and ſhew, in the firſt caſe, that he is not one of the perſons excepted, and in the other, that he is not included in ſuch 2 Hawk. P. C. c. 37. § 60. and ſeveral authorities there cited.

deſcription; neither will it be ſafe for him, if he be of the ſame name with one of thoſe excepted by name, to aver, that he is not one of the perſons excepted by name, without adding, that he is a different perſon from ſuch other of the ſame name. But, if the body of the ſtatute except one perſon only, or, if it be general as to all, and afterwards ſome be excepted in the proviſoes, it may be pleaded, as ſome ſay, without any averment that he who pleads it is not one of the perſons excepted, &c. and the exceptions ought to be ſhewn on the other ſide.

Noy, 100. Black v. Allen. Cro. Car. 449. Moor, 620.

Alſo, where a general act of pardon excepts certain kinds of crimes, there is no need to aver, that the crime whereof a perſon is indicted is not one of ſuch excepted crimes, but the court ought judicially to take notice, whether it be excepted or not.

Cro. Eliz. 125. 2 Jon. 26.

Alſo, where ſuch a ſtatute excepts only one particular perſon, it hath been ſaid, that there is no need of an averment that a perſon indicted is not ſuch perſon, but that the court is to take notice whether he be or not.

## 2. In what Manner a particular Pardon under the Great Seal is to be taken Advantage of.

Cro. Eliz. 153.

The party, as hath been obſerved, muſt inſiſt on the benefit of this kind of pardon; and therefore it hath been held to be error, to allow a man the benefit of a pardon under the great ſeal, unleſs he plead it.

2 Hawk. P. C. c. 37. § 65.

He who pleads ſuch a pardon ought to produce it (a) *ſub pede ſigilli*; becauſe it is preſumed to be in his cuſtody, and the property of it belongs to him. Yet, if a man pleads ſuch pardon without producing it, it ſeems, that the court may indulge him a farther day to put in a better plea.

(a) That it is ſufficient to plead and ſhew the exemplification of the pardon, &c. becauſe ſuch exemplification is expreſsly within the 13 Eliz. c. 6. 5 Co. 53. Carth. 138. cited.

3 Inſt. 240. Keilw. 58. Roll. Rep. 368. Dyer, 34.

If there be a variance between the pardon and record of conviction, &c. yet, if there be no repugnancy to intend that the ſame perſon is meant in both, it may be ſupplied by a proper averment; as, if he be called *J. S.* gentleman in the one, and *J. S.* yeoman in the other; or *B.* the father in the one, and *B.* the ſon of *W.* in the other; or, if the ſtroke which cauſed the death of *J. S.* &c. be ſuppoſed to have been given on the ſecond of *Auguſt* in the one, and on the third in the other: alſo, if ſuch variant pardon be pleaded without ſuch averment, the court may give the party a farther day to perfect his plea.

2 Hawk. P. C. c. 37. § 67.

It ſeems, that ſuch pardon cannot be pleaded after the general iſſue, unleſs it be of a date ſubſequent to the pleading of it; becauſe the making defence, without taking any notice of the pardon, ſeems to amount to a waiver of it. And *quære* if a pardon can be pleaded at the ſame time with the general iſſue.

2 Hawk. P. C. c. 37. § 68.

The party is not bound to lay the ſtreſs of his caſe on any particular clauſe of the pardon, but may take advantage of the whole.

After

After an amerciament in the King's Bench is eſtreated into the Exchequer, and the party hath inſiſted on a pardon there, and been denied any benefit of it, he may be brought by *habeas corpus cum cauſâ* to the King's Bench, becauſe the record remains there, and plead his pardon; and if it be adjudged ſufficient, have a *ſuperſedeas* to the barons. 2 Hawk. P. C. c. 37. § 69.

While the ſtatute 10 *E.* 3. *c.* 2. ſtood in force, no pardon of (*a*) felony could be allowed, without a writ of allowance, teſtifying, that the party had found ſureties according to that ſtatute. But this is now repealed by 5 & 6 *W.* 3. *c.* 13. which provides, "That the juſtices, before whom a pardon of felony ſhall be "pleaded, may in diſcretion remand or commit the party to pri- "ſon till he ſhall enter into a recognizance, with two ſufficient "ſureties, for the good behaviour for any time not exceeding "ſeven years; provided that, if ſuch perſon be an infant or feme "covert, it ſhall be ſufficient to find two ſureties, who ſhall enter "into a recognizance for his or her being of the good behaviour "as aforeſaid *. Plow. 502. Sid. 41. Raym. 13. Carth. 121. (*a*) But there never was any neceſſity for ſuch writ upon a pardon of treaſon. Cro. Eliz. 814. Noy, 31. * There has not been any inſtance ſince this ſtatute (as it is ſaid) of the court's requiring recognizance for the good behaviour of a perſon pardoned for murder. Rex v. Chetwynd, 2 Stra. 1203.

The judges may inſiſt on the uſual fee of gloves to themſelves and officers, before they allow a pardon. 2 Jon. 56. Sid 452. Keilw. 25.

Where a priſoner hath a pardon to plead, and any difficulty ariſe thereon, the court will of courſe aſſign him counſel †. 3 Inſt. 29. † On a pardon for a miſdemeanour, the defendant ſhall not be put to the bar, nor plead it on his knees. Rex v. Hales, 2 Stra. 816.——Defendant in an information for maihem ſhall have the benefit of an act of grace, though he did not inſiſt on it at his trial; but ſhall pay proſecutor full coſts. Rex v. Haines, 1 Wilſ. 214.——[The mode of taking advantage of a pardon upon the circuits and at the Old Bailey is, to procure the King's ſign manual or privy ſeal, ſignifying his Majeſty's intention to afford a pardon to the priſoner either abſolutely or conditionally as the caſe may be, and directing the juſtices of the gaol delivery to bail him, on his entering into a recognizance to appear and plead the next general pardon that ſhall come out. This mandate the juſtices obey; taking ſecurity, if the pardon is conditional, for the performance of the ſtipulations on which it is granted, and afterwards iſſuing their warrant to the gaoler for his diſcharge. 1 Bl. Rep. 479. 2 Bl. Rep. 797.]

## (H) The Effects and Conſequences of a Pardon, and to what the Party ſhall be reſtored.

IT ſeems agreed, that a pardon of treaſon or felony, even after an attainder, ſo far clears the party from the infamy and all other conſequences thereof, that he may have an action againſt any who ſhall afterwards call him traitor or felon; for the pardon makes him as it were a new man. Hob. 67. 81. Moor, 863. Roll. Abr. 87. Raym. 23.

Alſo, a pardon reſtores a man to his credit, ſo as to enable him to be a witneſs: but yet his credit muſt be left to the jury. 2 Hal. Hiſt. 278. *& vide* tit. Evidence.

And it hath been admitted, that the king's pardon of the burning of the hand on a conviction of manſlaughter hath the ſame effect, as to this purpoſe, as the burning would have had, which is agreed to reſtore the party to his credit. 2 Hawk. P. C. c. 37. § 49.

But, it hath been adjudged, that a pardon is of no manner of force, as to this purpoſe, till it have paſſed the great ſeal. 2 Hawk. P. C. c. 37. § 50.

Hob. 67. 82. It is ſaid, that the pardon of a felony will not make an arreſt for it by one who did not know of the pardon unlawful; becauſe ſuch arreſts, being for the publick good, are to be favoured, and therefore ſhall not be actionable by reaſon of ſuch a pardon, as ſcandalous words ſhall be, becauſe they deſerve no favour.

2 Hawk. P. C. c. 37. § 53. If a man be convicted or deprived, or otherwiſe puniſhed for an offence during a ſeſſion of parliament, and at the ſame ſeſſion an act paſs which pardons the offence, it ſeems agreed, that the conviction or deprivation, &c. are *ipſo facto* avoided; becauſe the act taking effect from the firſt day of the ſeſſion (*a*), it now appears, that the offence was pardoned at the time of the conviction, &c. Alſo it hath been adjudged, that where an act of parliament expreſsly pardons ſuch and ſuch crimes from a certain day before the ſeſſions, it thereby avoids all convictions and deprivations, and awards of coſts and amerciaments, &c. for ſuch crimes, whether ſuch convictions, &c. were before or after the ſeſſion; becauſe it appears to be the intent of the parliament that ſuch crimes ſhall no way be puniſhed, which cannot take effect, if ſuch convictions, &c. continue in force.

(*a*) But now the act takes effect only from the day it receives the royal aſſent, unleſs another period of commencement be provided by the act. St. 33 G. 3. c. 13.]

Lev. 8. 120. 2 Mod. 53. Saund. 362. 3 Mod. 101. But as no pardon from the king ſhall deveſt any intereſt veſted in the ſubject; ſo neither ſhall it, without words of reſtitution, even deveſt any thing from the king. Yet, a pardon prior to a conviction ſhall prevent all forfeitures of lands or goods.

Sid. 167. Saund. 362. Lev. 120. It hath been adjudged, that the releaſe of all judgments and executions in a general pardon extends to debts due to the king by aſſignment or forfeiture; and that it doth not reſtore them to him who aſſigned or forfeited them, but extinguiſhes them in the hands of the debtor.

Owen, 87. Hetl. 104. Co. Lit. 120. 3 Bulſt. 90, 91. 3 Inſt. 154. It ſeems agreed, that notwithſtanding the king's pardon to a ſimoniſt coming into church contrary to the purport of 31 *Eliz.* c. 6., or to an officer coming into his office by a corrupt bargain contrary to the purport of 5 & 6 *E.* 6. *c.* 16., may ſave ſuch clerk or officer from any criminal proſecution in reſpect of the corrupt bargain; yet, ſhall it not enable the clerk to hold the church, nor the officer to retain the office, becauſe they are abſolutely diſabled by ſtatute.

Co. Lit. 8. Hal. Hiſt. P. C. 358. A reſtitution of blood, in its true nature and extent, can only be by act of parliament; and therefore if a man attainted be pardoned by act of parliament, he is totally reſtored and inheritable to all perſons: but, if he be pardoned by charter, he may thenceforth purchaſe lands, but cannot inherit his former relations; for the king's charter cannot alter or take away the right of others, or reſtore the relation that was loſt.

Noy, 179. Co. Lit. 391. Hal. Hiſt. P. C. 358. If a man be attainted, and after pardoned by charter, the children born before ſuch pardon ſhall not inherit; but if they fail, the children born after ſuch pardon may inherit him; for the pardon makes him capable of new relations as well as of new purchaſes, though all the old legal benefits and relations are loſt.

Hal. Hiſt. P. C. 358. Reſtitutions by parliament are of two kinds; one a reſtitution only in blood, which only removes the corruption thereof, but reſtores not to the party attaint, or his heirs, the manors or honours loſt

loſt by the attainder, unleſs it ſpecially extend to it; the other is a general reſtitution, not only in blood, but to the lands, &c. of the party attaint.

A reſtitution in blood may be ſpecial and qualified; but, generally, a reſtitution in blood is conſtrued liberally and extenſively. Hal. Hiſt. P. C. 358.

*A.* hath iſſue *B.* a ſon, and is attaint of treaſon and dies; *B.* purchaſeth lands in fee-ſimple; *B.* by parliament is reſtored only in blood, and enabled as well as heir to *A.* as to all other collateral and lineal anceſtors, provided it ſhall not reſtore *B.* to any of the lands of *A.* forfeited by the attainder: *B.* dies without iſſue: it was ruled, that the lands of *B.* ſhall deſcend to the ſiſters of *A.*, as aunts and collateral heirs of *B.* 1*ſt*, Becauſe the corruption of blood by the attainder is removed by the reſtitution. 2*dly*, Although the words of the act of reſtitution be to reſtore *B.* only as heir to *A.*, &c. yet this doth not only remove the corruption, and reſtore him and his lineal heirs in blood, but alſo his collateral heirs, and removes that impediment which would have hindered the deſcent to them. 3 Inſt. 233. Hal. Hiſt. P. C. 358-9.

---

# Pauper.

(A) Of the Right to ſue *in formâ Pauperis*, and the Manner of Admittance.

(B) Whether a Defendant may be allowed to defend, as well as a Plaintiff to ſue *in formâ Pauperis*.

(C) In what Caſes to be ſo admitted.

(D) In what Caſes to be diſpaupered, and to pay Coſts.

---

## (A) Of the Right to ſue *in formâ Pauperis*, and the Manner of Admittance.

BY the 11 *Hen.* 7. *c.* 12. it is enacted in the words following, "Prayen the Commons in this preſent parliament aſſembled, "that where the king our ſovereign lord, of his moſt gracious diſ- "poſition, willeth and intendeth indifferent juſtice to be had and "miniſtered according to his common laws to all his true ſubjects,

" as well to the poor as rich, which poor ſubjects be not of ability " ne power to ſue according to the laws of this land, for the " redreſs of injuries and wrongs to them daily done, as well con- " cerning their perſons and their inheritance as other cauſes; for " remedy whereof, in the behalf of the poor perſons of this land " not able to ſue for their remedy after the courſe of the com- " mon law, be it ordained and enacted, that every poor perſon " or perſons, which have or hereafter ſhall have cauſe of action " or actions againſt any perſon or perſons within this realm, ſhall " have, by the diſcretion of the chancellour of this realm for the " time being, writ or writs original and writs of *ſubpœna*, accord- " ing to the nature of their cauſes, therefore nothing paying to " your highneſs for the ſeals of the ſame, nor to any perſon for " the writing of the ſame writs to be hereafter ſued; and that the " ſaid chancellour for the time being ſhall aſſign ſuch of the " clerks, which ſhall do and uſe the making and writing of the " ſame writs, to write the ſame ready to be ſealed; and alſo " learned counſel and attornies for the ſame, without any reward " taking therefore; and after the ſaid writ or writs be returned, if " it be before the king in his bench, the juſtices there ſhall aſſign " to the ſame poor perſon or perſons' counſel learned, by their " diſcretions, which ſhall give their counſel, nothing taking for " the ſame; and likewiſe the juſtices ſhall appoint attorney and " attornies for the ſame poor perſon or perſons, and all other " officers requiſite and neceſſary to be had for the ſpeed of the " ſaid ſuits to be had and made, which ſhall do their duties with- " out any reward for their counſels, help, and buſineſs in the ſame; " and the ſame law and order ſhall be obſerved and kept of all " ſuch ſuits to be made afore the king's Juſtice of his Common " Place and Barons of his Exchequer, and all other Juſtices in the " court of record where any ſuch ſuit ſhall be."

Lil. Reg. 633.

Before a perſon is admitted to ſue *in formâ pauperis*, he muſt have a counſel's hand to his petition, certifying the judge to whom the petition is directed, that he conceives the petitioner hath good cauſe of action (*a*): he muſt alſo annex an affidavit (*b*) to his petition, that he is not worth 5*l.* all his debts paid, except wearing apparel and his right to the matter in queſtion.

[(*a*) The ſame is neceſſary to entitle proſecutors to proſecute *in formâ pauperis*. 3 Burr. 1308. (*b*) This affidavit muſt be made by the party himſelf, not by a third perſon. Wilkinſon v. Belſher, 2 Br. Ch. Rep. 272.]

2 Salk. 507. pl. 2.

On a motion to diſpauper a perſon who was plaintiff in an action becauſe he had a living of 40*l. per annum*; *Turton* and *Gould*, Juſtices, were againſt it, becauſe he ſwore he was in debt more than it was worth; but *Holt*, C. J. differed from them; for his being indebted, or his eſtate being mortgaged, is no reaſon; it is enough that he has a conſiderable eſtate in poſſeſſion.

Lil. Reg. 633.

A perſon admitted to ſue *in formâ pauperis* can only ſue in that cauſe for which he is admitted; ſo that if any other cauſe ariſes, he muſt ſue *de novo* to be admitted, *& ſic toties quoties*.

Gibſon v. M'Carty, Ca. temp. Hardw. 311.

[The admiſſion in one court is not binding on the officers of another court; and therefore if an iſſue out of Chancery where the plaintiff

plaintiff had been admitted in *formâ pauperis*, comes to be tried in *K. B.*, he muſt be admitted there alſo.

The admiſſion to ſue *in formâ pauperis* may be either at the commencement of the ſuit, or afterwards *pendente lite*. Say. Coſts, 90. 3 Wilſ. 24. Andr. 306.

A perſon ſuing in *formâ pauperis* is not entitled to the iſſue-money.] Codron v. Hayman, 5 Term Rep. 509.

## (B) Whether a Defendant may be allowed to defend, as well as a Defendant to ſue *in formâ Pauperis*.

IT ſeems that, after the ſtatutes which introduced coſts, neither plaintiffs nor defendants could ſue or defend *in formâ pauperis*; for that would be a means of depriving the other party of the coſts given him by ſtatute; and as the above-mentioned ſtatute 11 *H.* 7. *c.* 12. enables perſons only to ſue as paupers; and as the ſtatute 23 *H.* 8. *c.* 15. hereafter ſet forth, excepts only plaintiffs who are paupers from paying coſts, it ſeems, that a defendant cannot be admitted in a civil action to defend as a pauper. But it hath been (*a*) adjudged, that a perſon may be admitted to defend an indictment *in formâ pauperis* for a miſdemeanour, ſuch as a conſpiracy, keeping a diſorderly houſe, *&c.*, for in ſuch proceedings there being no coſts, the judges have a diſcretionary power of admitting or refuſing them by the common law. (*a*) Paſch. 9 G. 2. King v. Wright. 2 Stra. 1042.

Alſo by the 2 *Geo.* 2. *c.* 28. § 8. it is enacted, "That in caſe "any perſon, arreſted and impriſoned by virtue of any writ of "*capias* or information relating to the cuſtoms, ſhall make affida-"vit before the judge or judges of ſuch court where ſuch action "or information ſhall be brought, or before any other perſon com-"miſſioned by ſuch court to take affidavits, that he is not worth, "over and above his wearing apparel, the ſum of 5*l.* (which "affidavit the ſaid judge or judges of ſuch court, and ſuch perſon "ſo commiſſioned, is and are hereby authoriſed and required to "take), and ſuch perſon ſhall thereupon petition ſuch court "to be admitted to defend himſelf againſt ſuch action or "information *in formâ pauperis*, that then the judges of ſuch "court ſhall according to their diſcretions admit ſuch perſon "to defend himſelf againſt ſuch action or information in "the ſame manner, and with the ſame privileges, as the judges "of ſuch court are by law directed and authoriſed to admit poor "ſubjects to commence actions for the recovery of their right; "and for that end and purpoſe it ſhall be lawful for the judges of "ſuch courts to aſſign counſel learned in the law, and to appoint "an attorney and clerk of ſuch court to adviſe and carry on any "legal defence that ſuch perſon can make againſt ſuch action or "information; which ſaid counſel, attorney and clerk ſo aſſigned "and appointed, is and are hereby required to give his and their "advice and aſſiſtance to ſuch perſon, and to do their duties, with-"out fee or reward."

[A de-

Rex v. Pearſon, 2 Burr. 1039.

[A defendant upon an attachment for a contempt will not be admitted to defend *in formâ pauperis*.

Rex v. Morgan, 2 Str. 1214.

A perſon convicted of perjury, and outlawed for forgery, was admitted, no cauſe being ſhewn to the contrary, to plead the king's pardon *in formâ pauperis*.]

## (C) In what Caſes to be ſo admitted.

Lil. Reg. 633. *per* Wild.

IT is ſaid, that none ought to be admitted to ſue *in formâ pauperis* in an action on the caſe for words.

Mod. 268. *per* North. * *Sed qu.* If this is not diſcretionary in the court, and more eſpecially if the plaintiff will conſent to pay the coſts?

Alſo it is ſaid, that a perſon who ſues *in formâ pauperis* ought not to have a new trial granted him; becauſe having had once the benefit of the king's juſtice he ought to acquieſce in it*.

Mod. 268. *per* North.

And it is ſaid, that paupers ought not to be admitted to remove cauſes out of inferior courts, but ought to ſatisfy themſelves with the juriſdiction within which their actions properly lie.

## (D) In what Caſes to be diſpaupered, and to pay Coſts.

Ord. Cur. 94.

BY the orders of the courts, if the party admitted to ſue *in formâ pauperis* give any fee or reward to his counſel or attorney, or make any contract or agreement with them, he ſhall from thenceforth be diſpaupered, and not be afterwards admitted again in that ſuit to proſecute *in formâ pauperis*.

Ord. Cur. 95.

Alſo, if it ſhall be made appear to the court, that any perſon proſecuting *in formâ pauperis* hath ſold or contracted for the benefit of the ſuit, or any part thereof, while the ſame depends, ſuch cauſe ſhall be from thenceforth totally diſmiſſed the court.

2 Salk. 506. pl. 1.

It is ſaid, that if a pauper gives notice of trial, and does not proceed, he ſhall be diſpaupered.

(*a*) Though lands deſcend to him after cauſe tried, yet he ſhall not pay coſts. Mod. Rep. in Law and Eq. 344.

In the ſtatute 23 *H.* 8. *c.* 15. there is a proviſion, "That "whoever ſues *in formâ pauperis* ſhall (*a*) not pay coſts, but ſhall "ſuffer ſuch other puniſhment as the judge of the court ſhall "think fit."

2 Salk. 506. pl. 1. Style, 386. (*b*) But though the uſual courſe in ſuch caſes is to tax the coſts, and, if not paid, to whip the plaintiff; yet, upon conſideration of the circumſtances of the caſe, it is in the diſcretion of the court to ſpare both. Sid. 261. And *per* Holt, C. J. on motion to whip a pauper who had been nonſuited, there is no officer for that purpoſe, nor did he ever know it done. 2 Salk. 506. pl. 1. [In Solomon v. Agnel, Forteſc. 320. it was holden, that a pauper, though diſpaupered ſhould not pay coſts; and if taken in execution for coſts, he ſhould be diſcharged on motion.]

But, notwithſtanding this ſtatute, if he be diſpaupered or nonſuited, the (*b*) uſual practice is to tax the coſts, and for non-payment to order him to be whipped.

*A.* brought

*A.* brought a bill *in formâ pauperis*, to which the defendant put in a plea and demurrer, which were both over-ruled; and it was inſiſted upon, that he ſhould have no coſts, being at none: but my Lord *Somers*, after long debate and inquiry of all the ancient counſel and clerks, who agreed that he ſhould have coſts, ordered him his coſts (*a*) like other ſuitors; for though he is at no coſts, or but ſmall coſts, yet the counſel and clerks do not give their labour to the defendant, but to the pauper. Abr. Eq. 125.

(*a*) But *vide* Preced. Chan. 219. where a pauper having a decree to recover with coſts, it was held on motion *per curiam* to be unreaſonable, that any one ſhould have more coſts than he was out of pocket; and thereupon ordered the plaintiff and his ſolicitor to make oath before the Maſter, and what they ſwore they had paid, or were to pay, was to be allowed, but no farther.——Coſts cannot be given againſt a pauper leſſor of the plaintiff, for not going on to trial; if vexatious, he may be diſpaupered. Nokes v. Watts, Fort. 319. 3 Wilſ. 24. S. C. 1 Str. 420. S. C. *contr.* [Unleſs the pauper's conduct appears to have been vexatious, the court will not ſtay the proceedings in a ſecond action, until the coſts are paid of a nonſuit in a prior one for the ſame cauſe. Winter v. Slow, 2 Str. 878. Brittain v. Grenville, *Id.* 1121. 3 Wilſ. 24., but where the coſts of a former nonſuit in treſpaſs were not paid, the court, though no circumſtances of vexation were ſtated, ſtaid the proceedings, notwithſtanding the plaintiff was a priſoner at the time of bringing the ſecond action, and ſued *in formâ pauperis*. Weſton v. Withers, 2 Term Rep. 511.]—If a pauper is nonſuited, brings a ſecond action, and recovers, the coſts of the firſt ſhall not be deducted out of the recovery in the ſecond. Butler v. Inneys, 2 Stra. 891.—If pauper gives ſeveral notices, and does not go on to trial, the court will not reſtrain him from going on to trial till he has paid coſts of former notices, but they will make an order to diſpauper him *niſi*. Taylor v. Lowe, 2 Str. 983. [A perſon ſuing in equity *in formâ pauperis* ſhall not amend his bill by leaving out ſome of the defendants, Wilkinſon v. Belſher, 2 Br. Ch. Rep. 272., or diſmiſs it as againſt ſome of them without payment of coſts, Pearſon v. Belſher, 3 Br. Ch. Rep. 87.; nor it ſeems, will a party be protected by an order to ſue *in formâ pauperis* from the coſts of proceedings previous to the order. Moſel. 103.]

# Perjury.

PERJURY by the common law ſeemeth to be a wilful falſe oath by one who, being lawfully required to depoſe the truth in any proceeding in a court of juſtice, ſwears abſolutely in a matter of ſome conſequence to the point in queſtion, whether he be believed or not. Hawk. P.C. c. 69.

Subornation of perjury by the common law is an offence in procuring a man to take a falſe oath amounting to perjury, who actually takes ſuch oath. But it ſeems clear, that if the perſon, incited to take ſuch an oath, do not actually take it, the perſon by whom he was ſo incited is not guilty of ſubornation of perjury; yet it is certain, that he is liable to be puniſhed, not only by fine, but alſo by infamous corporal puniſhment. Roll. Abr. 41. 57. Yelv. 72. Cro. Jac. 158. 2 Keb. 399. 3 Mod. 122. Hawk. P.C. c. 69. § 10.

For the better underſtanding the nature of perjury, we ſhall conſider,

(A) What

(A) What it is by the Common Law, and how reſtrained and puniſhed.

(B) How reſtrained and puniſhed by Statute.

[(C) How charged and aſſigned.]

---

## (A) What it is by the Common Law, and how reſtrained and puniſhed.

5 Mod. 350. *1ſt*, IT is neceſſary, to conſtitute the offence perjury, that the falſe oath be taken wilfully, *viz.* with ſome degree of deliberation, and not merely owing to ſurpriſe or inadvertency, or a miſtake of a true ſtate of the queſtion.

Hawk. P.C. c. 69. § 3. and ſeveral authorities there cited. *2dly*, The oath muſt be taken either in a judicial proceeding, or in ſome other publick proceeding of the like nature, wherein the king's honour or intereſt are concerned; as, before commiſſioners appointed by the king to inquire of the forfeitures of his tenants, or of defective titles wanting the ſupply of the king's patents. But it is not material, whether the court, in which a falſe oath is taken, be a court of record or not, or, whether it be a court of common law or a court of equity, or civil law, *&c.*, or, whether the oath be taken in the face of the court, or out of it before perſons authorized to examine a matter depending in it; as, before the ſheriff on a writ of inquiry, *&c.*, or, whether it be taken in relation to the merits of a cauſe, or in a collateral matter; as, where one, who offers himſelf to be bail for another, ſwears that his ſubſtance is greater than it is, *&c.* But neither a falſe oath in a mere private matter, as, in making a bargain, *&c.* nor the breach of a promiſſory oath, whether publick or private, are puniſhable as perjury.

Hawk. P.C. c. 69. § 4. *3dly*, The oath ought to be taken before perſons lawfully authorized to adminiſter it; for if it be taken before perſons acting merely in a private capacity, or before perſons pretending to a legal authority of adminiſtering ſuch oath, but having in truth no ſuch authority, it is not puniſhable as perjury. Yet, a falſe oath taken before commiſſioners, whoſe commiſſion at the time is in ſtrictneſs determined by the demiſe of the king, is perjury, if taken before ſuch time as the commiſſioners had notice of ſuch demiſe; for it would be of the utmoſt ill conſequence in ſuch caſe to make their proceedings wholly void.

Hawk. P.C. c. 69. § 5. *4thly*, The oath ought to be taken by a perſon ſworn to depoſe the truth; and therefore a falſe verdict comes not under the notion of a perjury, becauſe the jurors ſwear not to depoſe the truth, but only to judge truly of the depoſitions of others. But a man may be as well perjured by an oath in his own cauſe, as in an anſwer

anſwer in Chancery, or in an anſwer to interrogatories concerning a contempt, or in an affidavit, &c. as by an oath taken by him as witneſs in another cauſe.

5*thly*, It is not material, whether the thing ſworn be in itſelf true or falſe, where the perſon who ſwears it in truth knows nothing of it. Hawk. P.C. c. 39. § 6.

6*thly*, The oath muſt be taken abſolutely and directly; and therefore if a man only ſwears as he thinks, remembers, or believes, he cannot be guilty of perjury. Hawk. P.C. c. 39. § 7.

7*thly*, The thing ſworn ought to be ſome way material; for if it be wholly foreign from the purpoſe, or altogether immaterial, and neither any way pertinent to the matter in queſtion, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give the readier credit to the ſubſtantial part of the evidence, it cannot amount to perjury, becauſe it is wholly idle and inſignificant; as, where a witneſs introduces his evidence, with an impertinent preamble of a ſtory concerning previous facts, no way relating to what is material, and is guilty of a falſity as to ſuch facts. But it ſeems a reaſonable opinion (*a*), that a witneſs may be guilty of perjury in reſpect to a falſe oath concerning a mere circumſtance, if ſuch oath have a plain tendency to corroborate the more material part of the evidence; as, if in treſpaſs for ſpoiling the plaintiff's cloſe with the defendant's ſheep, a witneſs ſwears that he ſaw ſuch a number of the defendant's ſheep in the cloſe; and being aſked how he knew them to be the defendant's, ſwears, that he knew them by ſuch a mark, which he knew to be the defendant's, where in truth the defendant never uſed any ſuch mark. Hawk. P.C. c. 39. § 8.

[(*a*) It is not neceſſary that it appear to what degree the point in which the man is perjured was material to the iſſue; for if it is but circumſtantially material, it will be ſufficient. 1 Ld. Raym. 258. Still leſs is it neceſſary that the evidence be material for the plaintiff to recover upon; for an evidence may be very material, and yet it may not be full enough to prove directly the point in queſtion. 2 Ld. Raym. 889.]

8*thly*, It does not ſeem material, whether the falſe oath were credited or not, or whether the party, in whoſe prejudice it was taken, were in the event any ways damaged by it; for the proſecution is not grounded on the damage to the party, but on the abuſe of publick juſtice. Hawk. P.C. c. 39. § 9.

## (B) How reſtrained and puniſhed by Statute.

BY the 5 *Eliz. c.* 9. it is enacted, "That whoever ſhall unlawfully and corruptly procure any witneſs or witneſſes by "letters, rewards, promiſes, or by any other ſiniſter and unlawful labour or means whatſoever, to commit any wilful and "corrupt perjury in any matter or cauſe whatſoever depending in "ſuit or variance by any writ, action, bill, complaint, or information in anywiſe concerning any lands, tenements, or hereditaments, or goods, chattels, debts, or damages in any of the "queen's courts of Chancery, *Whitehall*, or elſewhere, within any "of the queen's dominions of *England* or *Wales*, or the Marches "of

" of the ſame, where any perſon or perſons ſhall have authority,
" by virtue of the queen's commiſſion, patent, or writ, to hold
" plea of land, or to examine, hear, or determine any title of
" lands, or any matter or witneſſes concerning the title, right, or
" intereſt of any lands or tenements, or hereditaments, or in any
" of the king's courts of record, or in any leet, view of frank-
" pledge, or law, ancient demeſne court, hundred court, court
" baron, or in the court or courts of the ſtannary in the counties
" of *Devon* or *Cornwall*; or ſhall unlawfully and corruptly pro-
" cure or ſuborn any witneſs or witneſſes, who ſhall be ſworn to
" teſtify *in perpetuam rei memoriam*, ſhall for ſuch offence, being
" thereof lawfully convicted or attainted, forfeit the ſum of 40 *l.*
" And if any ſuch offender, ſo being convicted or attainted, ſhall
" not have any goods or chattels, lands or tenements, to the value
" of 40 *l.*, that then every ſuch perſon ſhall ſuffer impriſonment
" by the ſpace of one half year, without bail or mainpriſe, and
" ſtand upon the pillory the ſpace of one whole hour in ſome
" market town next adjoining to the place where the offence was
" committed, in open market there, or in the market town itſelf
" where the offence was committed."

[The judgment for the pillory need not ſpecify the time when it is to be executed. Rex v. Atkinſon, Dom. Proc. July 1, 1785.]

And § 5. it is further enacted, " That no perſon, being ſo
" convicted or attainted, ſhall from thenceforth be received as a
" witneſs in any court of record in any of the king's dominions of
" *England*, *Wales*, or the marches of the ſame, till ſuch judg-
" ment againſt him ſhall be reverſed by attaint, or otherwiſe, and
" that upon every ſuch reverſal the party grieved ſhall recover
" damages againſt the party who did procure the ſaid judgment
" ſo reverſed to be firſt given."

And § 6. it is farther enacted, " That if any perſon or perſons
" ſhall either by the ſubornation, unlawful procurement, ſiniſter
" perſuaſion, or means of any other, or by their own act, conſent,
" or agreement, wilfully and corruptly commit any manner of wil-
" ful perjury by his or their depoſition in any of the courts before
" mentioned, or being examined *in perpetuam rei memoriam*, that
" then every ſuch offender being duly convicted or attainted ſhall
" forfeit 20 *l.* and have impriſonment by the ſpace of ſix months,
" without bail or mainpriſe, and the oath of ſuch offender ſhall
" not from thenceforth be received in any court of record in
" *England* or *Wales*, until ſuch judgment ſhall be reverſed, *&c.*
" on which reverſal the party grieved ſhall recover damages in the
" manner before mentioned."

And § 7. it is farther enacted, " That if ſuch offender ſhall not
" have goods or chattels to the value of 20 *l.* that then ſuch per-
" ſon ſhall be ſet on the pillory in ſome market-place within the
" ſhire, city, or borough where the offence ſhall be committed, by
" the ſheriff or his miniſters, if it ſhall fortune to be without any
" city or town corporate; and if it happen to be within any ſuch
" city or town corporate, then by the head officer of ſuch city,
" *&c.* where he ſhall have both ears nailed."

And § 8 & 9. it is farther enacted, " That one moiety of the
" ſaid forfeitures ſhall be to the king, and the other moiety to
" ſuch

" ſuch perſon as ſhall be grieved, hindered, or moleſted by reaſon " of any of the offences before mentioned, that will ſue for the " ſame, *&c.* and that as well the judge and judges of every ſuch " of the ſaid courts where any ſuch ſuit ſhall be, and whereupon " any ſuch perjury ſhall be committed, as alſo the juſtices of aſſiſe " and gaol-delivery, and juſtices of peace at their quarter ſeſſions " both within the liberties and without, may inquire of, hear, and " determine all offences againſt the ſaid act."

But it is provided § 11. " That the ſaid act ſhall no way extend " to any ſpiritual or eccleſiaſtical court, but that every ſuch " offender, as ſhall offend in term as aforeſaid, ſhall be puniſhed " by ſuch uſual and ordinary laws as are uſed in the ſaid courts."

Provided alſo § 13. " That the ſaid ſtatute ſhall not reſtrain the " authority of any judge having (*a*) abſolute power to puniſh per- " jury before the making thereof, but that every ſuch judge may " proceed in the puniſhment of all offences puniſhable before the " making of the ſaid ſtatute, in ſuch wiſe as they might have done " and uſed to do to all purpoſes, ſo that they ſet not on the " offender leſs puniſhment than is contained in the ſaid act."

(*a*) And there the court of King's Bench, &c. proceeding upon an indictment or information of perjury,

or ſubornation of perjury at common law, may not only ſet a diſcretionary fine on the offender, but alſo condemn him to the pillory, without making any inquiry concerning the value of his lands or goods. Hawk. P. C. c. 69. § 16.

In the conſtruction of this ſtatute the following opinions have been holden:

That every indictment or action on this ſtatute muſt exactly purſue the words of it; and therefore if it allege, that the defendant depoſed ſuch a matter *falſo & deceptive*, or *falſo & corrupte*, or *falſo & voluntarie*, without ſaying *voluntarie & corrupte*, it is not good, though it conclude, that *ſic voluntarium & corruptum commiſit perjurium contra formam ſtatuti*, &c. Alſo, it is (*b*) ſaid to be neceſſary expreſsly to ſhew, that the defendant was ſworn; and that it is not ſufficient to ſay, that *tacto per ſe ſacro Evangelio depoſuit*.

Cro. Eliz. 147. Hed. 12. Savil, 43. 2 Leon. 211. 3 Leon. 230. Show. 190. Holt, 534. pl. 1. Skin. 403. pl. 39. (*b*) Cro. Eliz. 105.

But there is no need to ſhew, whether the party took the falſe oath through the ſubornation of another, or of his own act, though the words of the ſtatute are, *If perſons by ſubornation*, &c., *or their own act*, &c., *ſhall commit wilful perjury*, for there being no medium between the branches of this diſtinction, they ſeem to be put in *ex abundanti*, and to expreſs no more than the law would have implied, and therefore operate nothing.

3 Bulſt. 147.

It hath been adjudged, that a man cannot be guilty of perjury within this ſtatute, in any caſe wherein he may not poſſibly be guilty of ſubornation of perjury within it; for it is reaſonable to give the whole ſtatute the ſame conſtruction; neither can it be well intended, that the makers of the ſtatute meant to extend its (*c*) purview farther as to perjury, which they ſeem to eſteem the leſs crime, than to ſubornation of perjury, which they ſeem to eſteem the greater; and therefore ſince the clauſe concerning ſubornation of perjury, mentioning only matters depending by writ,

5 Co. 99. Cro. Jac. 120. 3 Inſt. 164. 2 Leon. 201. Yelv. 120. Cro. Eliz. 148. 2 Roll. Abr. 77. (*c*) See obſerv. on ſtat. 71.

writ, bill, plaint, or information, concerning hereditaments, goods, debts, or damages, *&c.*, extends not to perjury on an indictment or criminal information; the clauſe concerning perjury, though penned in more general words, has been adjudged to come under the like reſtriction. Alſo, ſince the clauſe concerning ſubornation of perjury relates only to perjury by witneſſes, that concerning perjury ſhall extend only to the like perjury; and therefore not to perjury in an anſwer in Chancery; or in ſwearing the peace againſt a man; or in a preſentment by a homager in a court-baron; or in a wager of law; or in ſwearing before commiſſioners of inquiry of the king's title to lands; and, by the opinions of ſome, a falſe affidavit againſt a man in a court of juſtice is not within the ſtatute. But if ſuch affidavit be by a third perſon, and relate to a cauſe depending in ſuit before the court, and either of the parties in variance be grieved, hindered, or moleſted, in reſpect of ſuch cauſe, by reaſon of the perjury, it may ſtrongly be argued that it is within the purview of the ſtatute. Alſo, it ſeems the better opinion, that a falſe oath before the ſheriff on a writ of inquiry of damages is within the ſtatute.

*Hawk. P.C. c. 69. § 22. and ſeveral authorities there cited.*

It hath been collected from the clauſe which gives an action to the party grieved, that no falſe oath is within the ſtatute, which doth not give ſome perſon a juſt cauſe of complaint; and therefore, that if the thing ſworn be true, though it be not known by him that ſwears it to be ſo, the oath is not within the ſtatute, becauſe it gives no juſt cauſe of complaint to the other party, who would take advantage of another's want of evidence to prove the truth. Alſo, upon the ſame ground, no falſe oath can be within the ſtatute, unleſs the party againſt whom it was ſworn ſuffered ſome diſadvantage by it; and therefore, in every proſecution on the ſtatute, you muſt ſet forth the record wherein you ſuppoſe the perjury to have been committed, and muſt prove at the trial, that there is ſuch a record, either by actually producing it, or an atteſted copy; and in the pleadings you muſt not only ſet forth the point wherein the falſe oath was taken, but muſt alſo ſhew how it conduced to the proof or diſproof of the matter in queſtion; and if an action on the ſtatute be brought by more than one, you muſt ſhew how the perjury was prejudicial to each of the plaintiffs. But, it ſeems, that a perjury, which tends only to aggravate or extenuate the damages, is as much within the ſtatute as a perjury that goes directly to the point in iſſue; and a perjury, in a cauſe wherein an erroneous judgment is given, is a good ground of a proſecution upon the ſtatute till the judgment be reverſed.

*2 Hal. Hiſt. P. C. 191-2.*

If perjury be committed, that is within this ſtatute, but concludes not *contra formam ſtatuti*; yet it is a good indictment at common law, but not to bring the offender within the corporal puniſhment of the ſtatute.

By the *2 G. 2. c. 25. § 2.* the more effectually to deter perſons from committing wilful and corrupt perjury, or ſubornation of perjury, it is enacted, "That, beſides the puniſhment already to "be inflicted by law for ſo great crimes, it ſhall and may be law-"ful

" ful for the court or judge before whom any perſon ſhall be " convicted of wilful and corrupt perjury, or ſubornation of per- " jury, according to the laws now in being, to order ſuch perſon " to be ſent to ſome houſe of correction within the ſame county, " for a time not exceeding ſeven years, there to be kept to hard " labour during all the ſaid time, or otherwiſe to be tranſported " to ſome of his Majeſty's plantations beyond the ſeas, for a term " not exceeding ſeven years, as the court ſhall think moſt proper; " and therefore judgment ſhall be given, that the perſon convicted " ſhall be committed or tranſported accordingly, over and beſide " ſuch puniſhment as ſhall be adjudged to be inflicted on ſuch " perſon agreeable to the laws now in being; and if tranſporta- " tion be directed, the ſame ſhall be executed in ſuch manner as " is or ſhall be provided by law for the tranſportation of felons; " and if any perſon ſo committed or tranſported ſhall voluntarily " eſcape or break priſon, or return from tranſportation before the " expiration of the time for which he ſhall be ordered to be tranſ- " ported, as aforeſaid, ſuch perſon being lawfully convicted ſhall " ſuffer death as a felon without benefit of clergy, and ſhall be " tried for ſuch felony in the county where he ſo eſcaped, or " where he ſhall be apprehended."

[By 12 *G.* 1. *c.* 29. § 4. " If any perſon who ſhall be convicted " of wilful and corrupt perjury, or ſubornation of perjury, ſhall " act or practiſe as an attorney or ſolicitor, or agent in any ſuit " or action, in any court of law or equity in *England*, the judge " or judges of the court where ſuch ſuit or action ſhall be brought, " ſhall, upon complaint or information thereof, examine the mat- " ter in a ſummary way in open court, and if it ſhall appear, to " the ſatisfaction of ſuch judge or judges, that the party hath " offended contrary to this act, ſuch judge or judges ſhall cauſe " ſuch offender to be tranſported for ſeven years."

By 8 *G.* 1. *c.* 6. " If any perſon, making ſuch affirmation or de- " claration as is appointed by this act, ſhall be lawfully convicted " of wilful, falſe, and corrupt affirming and declaring any matter " or thing, which, if ſworn in the common or uſual form, would " have amounted to wilful and corrupt perjury; every perſon ſo " offending ſhall incur ſuch and the ſame pains, penalties, and " forfeitures as are inflicted or enacted by the laws againſt per- " ſons convicted of wilful and corrupt perjury."

By 31 *G.* 2. *c.* 10. § 24. " Whoever ſhall willingly and know- " ingly take a falſe oath, or procure any perſon to take a falſe " oath, to obtain the probate of any will or wills, or to obtain " letters of adminiſtration in order to obtain the payment of any " wages, pay, or other allowances of money, or prize-money, due, " or that were ſuppoſed to be due, to any officer, ſeaman, or other " perſon entitled, or ſuppoſed to be entitled, to any wages, pay, " or other allowances of money, or prize-money, for ſervice due " on board of any ſhip or veſſel of his Majeſty, *&c.* or the exe- " cutor, adminiſtrator, wife, relation, or creditor of any ſuch " officer or ſeaman, or other perſon who has really ſerved, or was " ſuppoſed to have ſerved, on board any ſhip or veſſel of his Ma-

" jeſty, &c. ſhall be deemed guilty of felony, and ſuffer death " without benefit of clergy."

And by 28 G. 2. c. 13. § 14. for the relief of inſolvent debtors, " if any ſheriff or other officer perjure himſelf in taking the oaths " directed by the act, he ſhall forfeit 500 *l.* And if the offence " be committed by a priſoner or other perſon enabled and intend- " ing to take the benefit of the act, it is felony without benefit of " clergy."

The better to prevent great offenders from eſcaping puniſhment by reaſon of the expence attending proſecutions, it is enacted by 23 G. 2. c. 11. § 3. " That it ſhall be lawful for any of his Ma- " jeſty's juſtices of aſſiſe, or *niſi prius*, or general gaol-delivery, " or any of the great ſeſſions of *Wales*, or of the counties pala- " tine, and they are hereby authorized (ſitting the court, or with- " in twenty-four hours after) to direct any perſon, examined as a " witneſs upon any trial before him or them, to be proſecuted for " the ſaid offence of perjury, in caſe there ſhall appear to him or " them a reaſonable cauſe for ſuch proſecution; and that it ſhall " appear to him or them proper ſo to do; and to aſſign the party " injured, or other perſon undertaking ſuch proſecution, counſel, " who ſhall, and are hereby required to do their duty without any " fee, gratuity, or reward for the ſame." Such proſecution is alſo exempt from tax or duty and fees of court, and the clerk of the aſſiſe is ordered to give the proſecutor a certificate of the ſame, being directed, with the names of the counſel aſſigned; which certificate is to be deemed ſufficient proof of ſuch proſecution having been directed, but no ſuch direction or certificate is to be given in evidence upon the trial of the perſon againſt whom the proſecution is directed.]

## [(C) How charged and aſſigned.

BY 23 G. 2. c. 11. " In every information or indictment for wil- " ful and corrupt perjury, it ſhall be ſufficient to ſet forth the " ſubſtance of the offence charged upon the defendant, and by " what court, or before whom the oath was taken, (averring (a) " ſuch court, or perſon or perſons, to have a competent authority " to adminiſter the ſame,) together with the proper averment or " averments to falſify the matter or matters wherein the perjury " or perjuries is or are aſſigned; without ſetting forth the bill, " anſwer, information, indictment, declaration, or any part of any " record or proceeding, either in law or equity, other than as " aforeſaid; and without ſetting forth the commiſſion (b) or autho- " rity of the court, or perſon or perſons before whom the perjury " was aſſigned."

(a) Before the paſſing of this act, this averment ſeems not to have been made. Dougl. 156.

(b) Rex v. Dowlin, 5 Term Rep. 317. If, however, the proſecutor undertakes to ſet out in the indictment more of the proceedings than he need under this act, he muſt ſet them forth correctly. *Ibid.*

And by § 2. " In every information or indictment for ſuborna- " tion of perjury, or for corrupt bargaining or contracting with " others to commit wilful and corrupt perjury, it ſhall be ſuffi- " cient

" cient to ſet forth the ſubſtance of the offence charged upon the " defendant, without ſetting forth the bill, anſwer, information, " indictment, declaration, or any part of any record or proceed- " ing either in law or equity, and without ſetting forth the com- " miſſion or authority of the court, or perſon or perſons before " whom the perjury was committed, or was agreed or promiſed " to be committed."

The fact in the aſſidavit in which the defendant was charged to have perjured himſelf, was, that he never did, at any time during his tranſactions with the commiſſioners of the victualling-office, charge more than the uſual ſum of ſixpence *per* quarter, beyond the price he actually paid *for* any malt or grain purchaſed by him for the ſaid commiſſioners as their corn-factor: the aſſignment in the indictment to falſify this alleged that the defendant did charge more than ſixpence *per* quarter *for and in reſpect of* ſuch malt and grain ſo purchaſed. It was objected, that the words *in reſpect of* may include lighterage, freight, and many collateral and incidental expences attending the corn and grain jointly with the charge for the corn or grain, and bearing that ſenſe, the defendant was not guilty of perjury. This objection however was over-ruled. Rex v. Atkinſon, Dom. Proc. July 1, 1785.

A complaint having been made *ore tenus* by a ſolicitor, before the Chancellour, in the court of Chancery, of an arreſt in returning home after the hearing of a cauſe, the indictment ſtating that, " *at* " *and upon the hearing of the ſaid complaint*," the defendant depoſed, &c. it was holden a ſufficient averment, that the complaint was heard. Rex v. Aylett, 1 Term Rep. 70. Dom. Proc. July 6, 1786.

It is ſufficient, if the aſſignments of perjury falſify the meaning attributed by the verdict to the matter ſworn. *Ibid.*

Where it was ſtated, that *at ſuch a court* J. K. *was in due form of law tried upon a certain indictment then and there depending againſt him for murder, and that at and upon the ſaid trial it then and there became and was made a material* queſtion—Whether, &c. it was adjudged, that theſe were ſufficient averments, that the perjury was committed on the trial of *J. K.* for the murder, and that the queſtion on which the perjury was aſſigned was material on that trial. For it is not neceſſary to ſet forth ſo much of the proceedings of the former trial as will ſhew the materiality of the queſtion on which the perjury is aſſigned: it is ſufficient to allege generally, that that queſtion became a material queſtion. Rex v. Dowlin, 5 Term Rep. 318.

In perjury in an anſwer in Chancery, it is not neceſſary to prove the identity of the perſon who ſwore the oath: it is enough if the hand-writing be proved, and that the jurat was ſubſcribed by the Maſter as being ſworn before him. Rex v. Morris, 2 Burr. 1189.

In general, the court will oblige the defendant to plead or demur to even a defective indictment; and they are very cautious in granting a *certiorari* to remove it (*a*). And Lord *Thurlowe* refuſed permiſſion to amend the anſwer in Chancery, where an indictment for perjury had only been threatened, though the party, having no intereſt, could not be ſuppoſed to make the falſe oath intentionally. For it is the province of the grand jury to judge of the intention (*b*).] 2 Hawk. P. C. c. 25. § 146. (*a*) *Id.* c. 27. § 28. (*b*) Earl Verney v. Macnamara, 1 Br. Ch. Rep. 419.

# Piracy.

2 Wooddef. 422. The word "pirate" was formerly uſed in a better ſenſe, than that in which it is now received. It ſignified the perſon to whoſe care the mole, or pier of a haven, which in Latin was called *perâ*, was intruſted. It was uſed too ſometimes, according to Spelman, for a ſea-captain, or ſoldier.

[PIRACY is incurred by depredations on or near the ſea, without authority from any prince or ſtate. For if theſe violations of property be perpetrated by any national authority, they are not acts of piracy. Thus, when a *Briſtol* merchant ſhip, in the reign of *Charles* the Second, was taken by the *Algerines*, and afterwards driven on the coaſt of *Ireland*, with ſome *Turks* and renegadoes on board, Sir *Leoline Jenkins*, then Judge of the Admiralty, certified to the king in the following words (*a*): "As for "the *Moors* and *Turks*, that are ſo by birth, and were found on "board this ſhip, it is my humble opinion, that ſince the govern- "ment of *Algiers* is owned as well by ſeveral treaties of peace "and declarations of war, as by the eſtabliſhment of trade, and "even of conſuls and reſidents amongſt them, by ſo many princes "and ſtates, and particularly by your Majeſty, they cannot, as I "humbly conceive, be proceeded againſt as pirates or ſea-rovers, "acting without commiſſion, but are to have the privileges of "enemies in an open war, and muſt be received to their ranſom "by exchange or otherwiſe, the ordering of which doth in this "caſe belong to the Lord High Admiral."

Aſſer, in the life of King Alfred, tells us, *Rex Ælfredus juſſit cymbas et galeas*, i. e. *longas naves fabricari per regnum, impoſitiſque piratis in illis vias maris cuſtodiendas commiſit.*

(*a*) 2 Sir L. Jenk. 791.

2 Sir L. Jenk. 754.

So, when one *Cheline* attacked a *Dutch* ſhip near the port of *Dublin*, and carried her away, having two *Britiſh* ſubjects on board, though it was a crime againſt our ſovereign as a neutral power, under whoſe protection the ſhip lay, yet, it was holden not to be puniſhable as piracy; for the captor had a commiſſion of war in due form againſt the enemies of the *French* king.

Jenk. 165. Godb. 193. 3 Bulſtr. 29. Cro. Eliz. 685.

It is eſtabliſhed by many authorities, that goods taken by pirates remain the property of the original owners, although ſold here, unleſs the ſale be in market overt.

Indeed the contrary is aſſerted (2 Burr. 694, 5.); but the reaſon aſſigned, (viz. that there can be no condemnation to entitle the pirate,) ſhews, he acquired no property, and therefore could tranſmit none. See 2 Wooddef. 431.

(*b*) 27 E. 3. ſtat. 2. c. 13.

Such goods therefore the king cannot grant; for by an expreſs ſtatute (*b*), the merchant robbed on the ſeas ſhall be received to prove that the goods or chattels belong to him by his chart or cocket, or by other lawful proof of merchants, &c. and then the ſaid goods ſhall be delivered without any ſuit at the common law; which act is general, be the party robbed privy or a ſtranger.

(*c*) 4 Inſt. 154. 3 Bulſtr. 28.

But, it was holden (*c*) by all the judges in the reign of *Richard* the third, that any foreigner, who ſues on this ſtatute, muſt prove his

his own ſovereign and the ſovereign of the captor to have been in mutual amity, and alſo his own ſovereign to have been in amity with our king, at the time of the capture. For in our municipal law books it is generally and indiſcriminately aſſerted, that piracy cannot be committed by the ſubjects of ſtates at enmity.

The goods of pirates, not taken from others, belong, after attainder, to the crown or its grantee; and thoſe of which others have been deſpoiled will be forfeited in the ſame manner, if the owners come not within a reaſonable time to vindicate their property. And until they do ſo, the king may ſeize them, and if they be *bona peritura*, he may ſell them, and upon proof, reſtore the value. But by ſtat. 22 & 23 *Car.* 2. *c.* 11. § 11. if the company belonging to any *Engliſh* merchant ſhip take any ſhip, which firſt aſſaulted them, the officers and mariners ſhall receive ſuch ſhare of the condemned ſhip and goods as is uſually practiſed in private men of war. 3 Bulſtr. 148. 12 Co. 73.

About the time of the treaty of *Nimeguen*, the captain of a *French* merchant ſhip, having put into a port in *Ireland*, was accuſed by his crew of robberies on the ſeas, and fled. His ſhip and goods were confiſcated, as having belonged to pirates. The *French* ambaſſador preſented memorials, requiring the cauſe to be remanded to the natural judge, as was pretended, in *France*. But the king and his council finally adjudged, that he was ſufficiently founded in point of juriſdiction to confiſcate the ſhip and goods, and to try capitally the perſon himſelf, had he been in hold, the matter of *renvoy* being a thing quite diſuſed among princes; and as every man by the uſage of our *European* nations is *juſticiable* in the place where the crime is committed, ſo are pirates, being reputed out of the protection of all laws and privileges, and to be tried in what ports ſoever they are taken.] 2 Sir L. Jenk. 714.

Piracies and depredations at ſea are capital offences, by the civil law. Piracy is ſaid to have been puniſhable at common law, before the 25 *E.* 3. *ſtat.* 5. *c.* 2. as petit treaſon, if committed by a ſubject, and, as felony, if committed by a foreigner. But, it ſeems agreed, that after that ſtatute, by which all treaſon is confined to the particulars therein ſet down, it was cognizable only by the civil law. Staunf. P. C. 10. 3 Inſt. 112. 2 Hal. Hiſt. P. C. 369. 370. Hawk. P. C. c. 37. § 2.

But this proving very inconvenient, becauſe by that law no offender ſhall have judgment of death without his own confeſſion, or direct proof by eye-witneſſes, it was enacted by 28 *H.* 8. *c.* 15. "That all felonies and robberies, *&c.* upon the ſea, or in any "haven, river, creek, or place where the admiral or admirals "have or pretend to have power, authority, or juriſdiction, ſhall "be inquired, tried, heard, determined, and judged in ſuch "ſhires and places in the realm as ſhall be limited by the king's "commiſſion or commiſſions to be directed for the ſame, in like "form and condition as if any ſuch offence or offences had been "committed or done in or upon the land; and ſuch commiſſions "ſhall be had under the king's great ſeal, directed to the admiral "or admirals, or to his or their lieutenant deputy and deputies,

" and to three or four such other substantial persons as shall be " named or appointed by the Lord Chancellour of *England* for the " time being, from time to time and as oft as need shall require, " to hear and determine such offences after the common course " of the laws of this land used for felonies, and robberies, &c. " done and committed upon the land within this realm."

And it is farther enacted by the said statute, " That if any " person or persons happen to be indicted for any such offence " done or hereafter to be done upon the seas, or in any other " place above limited, that then such order, process, judgment, " and execution shall be used, had, done, and made to and against " every such person and persons, so being indicted, as against " felons, &c. for any felony, &c. upon the land, by the laws of " the land is accustomed."

And it is farther enacted by the said statute, " That such as " shall be convict of any such offence by verdict, confession, or " process by authority of any such commission, shall have and " suffer such pains of death, losses of lands, goods, and chattels, as " if they had been attainted and convicted of such offence done " upon the land, and also that they shall be excluded from the " benefit of the clergy."

In the construction of this act the following opinions have been holden:

3 Inst. 112. 2 Hal. Hist. P. C. 370.

That it does not alter the nature of the offence, so as to make that, which was before a felony only by the civil law, now become felony by the common law; for the offence must still be alleged as done upon the sea, and is no way cognizable by the common law, but only by virtue of this statute; which, by ordaining that in some respects it shall have the like trial and punishment as are used for felony at common law, shall not be carried so far as to make it also agree with it in other particulars which are not mentioned; and from hence (*a*) it follows that this offence remains as before, of a special nature, and that it shall not be included in a general pardon of all felonies.

(*a*) Moor, 756. 3 Inst. 112. Co. Lit. 391. 2 Hal. Hist. P. C. 370.

3 Inst. 112. Hawk. P.C. c. 37. § 7.

From the same ground also it follows, that no persons shall in respect of this statute be construed to be or punished as accessories to piracy before or after, as they might have been, if it had been made a felony by the statute, whereby all those would incidentally have been made accessories in the like cases in which they would have been accessories to a felony at common law; and from hence it follows, that accessories to piracy, being neither expresly named in the statute, nor by construction included in it, remain as they were before, and were triable by the civil law, if their offence were committed on the sea; but if on the land, by no law, until 11 & 12 *W.* 3. *c.* 7. for 2 & 3 *Ed.* 6. *c.* 24. which provides against accessories in one county to a felony in another, extends not to accessories to an offence committed in no county, but on the sea: but, by the said statute of 11 & 12 *W.* 3. *c.* 7. they are triable in like manner as the principals are by the statute of 28 *H.* 8. *c.* 15.

From

From the ſame ground alſo it follows, that an attainder for this offence corrupts not the blood, inaſmuch as the ſtatute only ſays, that the offender ſhall ſuffer ſuch pains of death, &c. as if he were attainted of a felony at common law, but ſays not that the blood ſhall be corrupted. 3 Inſt. 112. Hawk. P.C. c. 37. § 8.

Yet it has been reſolved, that an offender ſtanding mute on an arraignment, by force of this ſtatute, ſhall have judgment of *paine fort & dure;* for the words of the ſtatute are, *That a commiſſion ſhall be directed,* &c. *to hear and determine ſuch offences after the common courſe of the laws of the land.* 3 Inſt. 114. Dyer, 241. pl. 49. 308. pl. 73.

It has been holden, that the indictment for this offence muſt allege the fact to be done on the ſea, and muſt have both the words *felonicè* and *piraticè;* and that no offence is puniſhable by virtue of this act as piracy, which would not have been felony if done on the land, and, conſequently, that the taking of an enemy's ſhip by an enemy is not within the ſtatute. 3 Inſt. 112. Roll. Rep. 175. Hawk. P.C. c. 37. § 10.

It is agreed, that this ſtatute extends not to offences done in creeks or ports within the body of a county, becauſe they are and always were cognizable by the common law. Moor, 756. Roll. Rep. 175. Hawk. P.C. c. 37. § 11.

By the 11 & 12 *W.* 3. *c.* 7. it is enacted, "That all piracies, "felonies, and robberies committed in or upon the ſea, or in any "place where the admiral has juriſdiction, may be tried and de- "termined at ſea, or upon the land in any of his Majeſty's iſlands "or plantations, &c. to be appointed by the king's commiſſion "under the great ſeal, or the ſeal of the Admiralty, directed to "any of the admirals, &c., and ſuch perſons and officers by name "or for the time being, as his Majeſty ſhall think fit, who ſhall "have power jointly or ſeverally, by warrant under hand and "ſeal of any of them, to commit any perſon againſt whom in- "formation of any ſuch offences ſhall be given upon oath, and to "call a court of Admiralty, which ſhall conſiſt of ſeven perſons "at the leaſt, and ſhall proceed in the trial of the ſaid offenders "according to ſuch directions as are ſet forth at large in the ſaid "ſtatute." 11 & 12 W. 3. c. 7. Made perpetual by 6 Geo. c. 19. § 3.

And it is farther enacted by the ſaid ſtatute, § 8. "That if any "of his Majeſty's natural-born ſubjects or denizens of this king- "dom ſhall commit any piracy or robbery, or any act of hoſtility, "againſt other his Majeſty's ſubjects upon the ſea, under colour "of any commiſſion from any foreign prince or ſtate or pretence "of authority from any perſon whatſoever, ſuch offender and of- "fenders, and every of them, ſhall be deemed, adjudged, and "taken to be pirates, felons, and robbers, and they and every of "them, being duly convicted thereof according to this act, or the "aforeſaid act of 28 *H.* 8. *c.* 15., ſhall have and ſuffer ſuch pains "of death, loſs of lands, goods, and chattels, as pirates, felons, "and robbers upon the ſeas ought to have and ſuffer."

And it is farther enacted by the ſaid ſtatute, "That if any "commander or maſter of any ſhip, or any ſeaman or mariner, "ſhall in any place, where the admiral hath juriſdiction, betray "his

" his truſt and turn pirate, enemy, or rebel, and piratically and fe-
" loniouſly run away with his or their ſhip or ſhips, or any barge,
" boat, ordnance, ammunition, goods, or merchandize, or yield
" them up voluntarily to any pirate, or bring any ſeducing meſ-
" ſage from any pirate, enemy, or rebel, or conſult, combine, or
" confederate with, or attempt or endeavour to corrupt, any com-
" mander, maſter, officer, or mariner, to yield up or run away
" with any ſhip, goods, or merchandize, or turn pirate, or go
" over with pirates, or if any perſon ſhall lay violent hands on his
" commander, whereby to hinder him from fighting in defence
" of his ſhip and goods committed to his truſt, or that ſhall con-
" fine his maſter, or make, or endeavour to make, a revolt in his
" ſhip, ſhall be adjudged to be a pirate, felon, and robber; and
" being convicted thereof, according to the directions of this act,
" ſhall have and ſuffer pains of death, loſs of lands, goods, and
" chattels, as pirates, felons, and robbers upon the ſeas ought to
" have and ſuffer.

And it is farther enacted by the ſaid ſtatute, " That all and
" every perſon and perſons whatſoever, who ſhall either on the
" land or upon the ſeas wittingly and knowingly ſet forth any
" pirate, or aid and aſſiſt, or maintain, procure, command, coun-
" ſel, or adviſe any perſon or perſons whatſoever to do or com-
" mit any piracies or robberies upon the ſeas, and ſuch perſon
" and perſons ſhall thereupon do or commit any ſuch piracy or
" robbery, then all and every ſuch perſon or perſons whatſoever
" ſo as aforeſaid ſetting forth any pirate, or aiding or aſſiſting,
" maintaining, procuring, commanding, counſelling, or adviſing
" the ſame, either on the land or upon the ſea, ſhall be adjudged
" to be acceſſory to ſuch piracy and robbery done and committed.
" *And farther*, that after any piracy or robbery is or ſhall be com-
" mitted by any pirate or robber whatſoever, every perſon or per-
" ſons, who, knowing that ſuch pirate or robber has done or
" committed ſuch piracy and robbery, ſhall, upon the land or
" upon the ſea, receive, entertain, or conceal any ſuch pirate or
" robber, or receive or take into his cuſtody any ſhip, veſſel,
" goods or chattels which have been by any ſuch pirate or robber
" piratically and feloniouſly taken, ſhall be by this ſtatute likewiſe
" adjudged to be acceſſory to ſuch piracy and robbery, and that
" all ſuch acceſſories to ſuch piracies and robberies ſhall be in-
" quired of, heard, and determined, and adjudged according to
" the common courſe of the law, according to the ſaid ſtatute of
" 28 *H.* 8. *c.* 15. as the principals of ſuch piracies and robberies
" may be, and no otherwiſe; and being thereupon attainted ſhall
" ſuffer pains of death, loſs of lands, goods and chattels, and in
" like manner as the principals of ſuch piracies, robberies, and
" felonies ought to ſuffer according to the ſaid ſtatute of 28 *H.* 8.
" *c.* 15. which is declared to be in full force; any thing in this
" act to the contrary notwithſtanding."

4 G. 1. c. 11. And by 4 *G.* 1. *c.* 11. " All perſons, who ſhall commit any of-
" fence for which they ought to be adjudged pirates, felons, or
" robbers,

" robbers, by 11 & 12 *W.* 3. *c.* 7., may be tried and judged for " every ſuch offence, according to the form of 28 *H.* 8. *c.* 15., and " ſhall be excluded from their clergy."

By the 8 *G.* 1. *c.* 24. for the more effectual ſuppreſſing of piracy, it is declared and enacted, " That if any commander or " maſter of any ſhip or veſſel, or any other perſon or perſons, " ſhall anywiſe trade with any pirate by truck, barter, exchange, " or in any other manner, or ſhall furniſh any pirate, felon, or " robber upon the ſeas with any ammunition, proviſion, or ſtores " of any kind, or ſhall fit out any ſhip or veſſel knowingly, and " with a deſign to trade with, or ſupply or correſpond with any " pirate, felon, or robber upon the ſeas; or if any perſon or per- " ſons ſhall anywiſe conſult, combine, confederate, or correſpond " with any pirate, felon, or robber on the ſeas, knowing them to " be guilty of any ſuch piracy, felony, or robbery; ſuch offender " and offenders, and every of them, ſhall in each and every of the " ſaid caſes be deemed, adjudged, and taken to be guilty of piracy, " felony, and robbery, and he and they ſhall and may be inquired " of, tried, heard, and adjudged of and for all or any of the mat- " ters aforeſaid, according to the ſtatute made 28 *H.* 8. *c.* 15. for " pirates, and the ſtatute made 11 & 12 *W.* 3. *c.* 7., and he and " they, being convicted of all or any of the matters aforeſaid, " ſhall ſuffer ſuch pains of death, loſs of lands, goods, and chat- " tels, as pirates, felons, and robbers upon the ſeas ought to ſuf- " fer; and in caſe any perſon or perſons belonging to any ſhip or " veſſel whatſoever, upon meeting any merchant ſhip or veſſel on " the high ſeas, or in any port, haven, or creek whatſoever, ſhall " forcibly board or enter into ſuch ſhip or veſſel, and, though " they do not ſeize and carry off ſuch ſhip or veſſel, ſhall throw " overboard or deſtroy any part of the goods or merchandizes be- " longing to ſuch ſhip or veſſel, the perſon and perſons, who ſhall " be guilty thereof, ſhall in all reſpects be deemed and puniſhed " as pirates as aforeſaid."

8 G. 1. c. 24. Made perpetual by 2 G. 2. c. 28. § 7.

And § 2. it is farther enacted, " That every ſhip or veſſel, " which ſhall be fitted out with a deſign to trade with, or ſupply " or correſpond with any pirate, and all and every goods and " merchandizes put on board the ſame for any intent or purpoſe " to trade with any pirate, felon, or robber on the ſeas, ſhall be " *ipſo facto* forfeited; one moiety thereof to the uſe of the king's " Majeſty, his heirs and ſucceſſors, the other moiety to the per- " ſon or perſons who ſhall firſt make diſcovery, and give inform- " ation of ſuch intent or deſign; and ſuch perſon or perſons, " who ſhall firſt make ſuch diſcovery, ſhall and may ſue for " and recover the ſaid ſhip or veſſel, and all and every the goods " and merchandizes on board the ſame, in the High Court of " Admiralty."

And § 3. " Whereas there are ſome defects in laws for bring- " ing perſons who are acceſſories to piracy and robbery upon the " ſeas to condign puniſhment, if the principal who committed ſuch

" piracy

" piracy and robbery is not or cannot be apprehended and brought " to juſtice; be it therefore enacted, That all and every per- " ſon and perſons whatſoever, who by the ſaid ſtatute made " 11 & 21 *W.* 3. *c.* 7. are declared to be acceſſory or acceſſories " to any piracy or robbery therein mentioned, are hereby declared " and ſhall be deemed and taken to be principal pirates, felons, " and robbers, and ſhall and may be inquired of, heard, deter- " mined, and adjudged in the ſame manner as perſons guilty of " piracy and robbery may and ought to be inquired of, tried, " heard, determined, and adjudged by the ſaid ſtatute 11 & 12 *W.* 3. " *c.* 7.; and being thereupon attainted and convicted ſhall ſuffer " ſuch pains of death, loſs of lands, goods, and chattels, and in " like manner, as pirates and robbers ought by the ſaid act to " ſuffer."

And § 4. it is farther enacted, " That all and every offender or " offenders convicted of piracy, felony, or robbery, by virtue of " this act, ſhall not be admitted to have the benefit of clergy, but " be utterly excluded of and from the ſame."

And § 5. " To the end that a farther encouragement may be " given to all ſeamen and mariners to fight and defend their ſhips " from pirates, it is farther enacted, " That in caſe any ſeaman " or mariner on board any merchant ſhip or veſſel, or any other " ſhip or veſſel, ſhall be maimed in fight againſt any pirate, every " ſuch ſeaman and mariner, upon due proof of his being maimed " in ſuch fight, ſhall not only have and receive the rewards ap- " pointed by 23 *Car.* 2. *c.* 11. but ſhall alſo be admitted into and " provided for in *Greenwich* Hoſpital, preferably to any other ſea- " man, who is diſabled from ſervice or getting a livelihood merely " by his age."

And by § 6. " If any commander, maſter, or other officers, or " any ſeaman or mariner of any merchant ſhip or veſſel, which " carries guns and arms, ſhall not, when they are attacked by any " pirate, or by any ſhip or veſſel on which ſuch pirate is on board, " fight and endeavour to defend themſelves and their ſaid ſhip and " veſſel from being taken by the ſaid pirate, or ſhall utter any words " to diſcourage the other mariners from defending the ſaid ſhip, and " by reaſon thereof the ſaid ſhip or veſſel ſhall fall into the hands " of ſuch pirate, then, and in every ſuch caſe, every ſuch com- " mander or other officer, and every ſeaman and mariner, who " ſhall not fight and endeavour to defend and ſave the ſaid ſhip " or veſſel, or who ſhall utter any ſuch words as aforeſaid, ſhall " loſe and forfeit all and every part of the wages due to him and " them reſpectively by the owner and owners of the ſaid ſhip or " veſſel, and ſhall not be permitted to ſue for or recover the ſame, " or any part thereof, in any court either of law or equity, and " as a farther puniſhment ſhall ſuffer ſix months' impriſon- " ment."

And § 7. " For prevention of ſeamen or mariners from deſert- " ing merchant ſhips or veſſels abroad in the plantations, or in " any

" any other parts beyond the ſeas, which is the chief occaſion of " their turning pirates, and of great detriment to trade and navi- " gation, and is chiefly occaſioned by the owner or owners of " ſhips or veſſels paying wages to the ſeamen or mariners when " abroad, it is enacted, That no maſter or owner of any mer- " chant ſhip or veſſel ſhall pay or advance, or cauſe to be paid or " advanced, to any ſeaman or mariner, during the time he ſhall be " in parts beyond the ſeas, any money or effects on account of " wages, exceeding one moiety of the wages which ſhall be due " at the time of ſuch payment, until ſuch ſhip or veſſel ſhall re- " turn to *Great Britain* or *Ireland*, or to the plantations, or to ſome " other of his Majeſty's dominions whereto they belong, and from " whence they were firſt fitted out; and if any ſuch maſter or " owner of ſuch merchant ſhip or veſſel ſhall pay or advance, or " cauſe to be paid or advanced, any wages to any ſeaman or ma- " riner above the ſaid moiety, ſuch maſter or owner ſhall forfeit " and pay double the money he ſhall ſo pay and advance, to be " recovered in the High Court of Admiralty by any perſon who " ſhall firſt diſcover and inform of the ſame."

[By 18 *G.* 2. *c.* 30. " All perſons, being natural-born ſubjects or " denizens of his Majeſty, who during any wars have committed " any hoſtilities upon the ſea, or in any haven, river, creek, or " place, where the admiral or admirals have power, authority, or " juriſdiction, againſt his Majeſty's ſubjects, by virtue or under " any colour of any commiſſion from any his Majeſty's enemies upon " the ſea, or any the places where the admiral hath juriſdiction as " aforeſaid, may be tried as pirates, felons, and robbers in the ſaid " court of Admiralty, on ſhip board, or upon the land, in the ſame " manner as perſons guilty of piracy, felony, and robbery are di- " rected to be tried; and on conviction ſhall ſuffer as any other " pirates, *&c.* ought by virtue of 11 & 12 *W.* 3. *c.* 7. or any other " act: Provided that any perſon who ſhall be tried and acquitted, " or convicted, according to this act, for any of the ſaid crimes, " ſhall not be liable to be proſecuted for the ſame crime or fact, " as high treaſon. But this act ſhall not prevent any perſons who " ſhall not be tried according to it, from being tried for high trea- " ſon by 28 *H.* 8. *c.* 5."

And by 32 *G.* 2. *c.* 25. § 12. " In caſe any commander of any " private ſhip of war duly commiſſioned according to the direc- " tions of this act, or the 29 *G.* 2. *c.* 34. ſhall agree with the com- " mander or other perſon of or belonging to any neutral or other " ſhip or ſhips, veſſel or veſſels, except thoſe of his Majeſty's declared " enemies, for the ranſom of any ſuch neutral or other ſhip, *&c.* " or the reſpective cargo or cargoes thereof, or any part thereof, " after the ſame ſhall have been taken as prize, and ſhall, in pur- " ſuance of any ſuch agreement or agreements, actually quit, ſet " at liberty, or diſcharge any ſuch prize or prizes, inſtead of " bringing the ſame into ſome port or ports belonging to his Ma- " jeſty's dominions, every ſuch offender ſhall be deemed guilty of " piracy,

By 22 G. 3. c. 25. all contracts for ranſoming any private veſſel, &c. captured by the king's enemies, are void, and the offender liable to a penalty of 500*l.*

" piracy, felony, and robbery, and on conviction (in the manner " the act deſcribes) ſhall ſuffer ſuch pains of death, &c. as pirates, " felons, and robbers upon the ſeas ought to ſuffer according to " the laws now in being. But the commander of any private ſhip " of war, upon the capture of any neutral veſſel, which by any " law or treaty ſhall be liable only to the forfeiture of ſuch con- " traband goods as ſhall be on board thereof, may receive ſuch " goods in caſe the commander is willing to deliver them, and " thereupon quit, ſet at liberty, or diſcharge ſuch neutral ſhip or " veſſel."

By 30 *G.* 2. *c.* 25. § 20. and 33 *G.* 3. *c.* 66. § 70. a ſeſſion of oyer and terminer, and gaol-delivery, for the trial of offences committed on the high ſeas, ſhall be holden twice at the leaſt in every year at the Seſſions-houſe in the *Old Bailey*, or at ſuch other place as the Lords of the Admiralty ſhall appoint. And the commiſſioners named in the commiſſions of oyer and terminer for the trial of ſuch offences, as alſo any juſtices of the peace, may take informations touching offences committed upon the ſeas, and cauſe the parties to be apprehended and committed: They may alſo oblige any perſons they think neceſſary to enter into recognizances to appear, proſecute, and give evidence at the ſeſſions, and upon their refuſal to do ſo, may commit them; which recognizances and informations are to be tranſmitted to the regiſtrar of the court of Admiralty.]

---

# [Piſchary.]

Blount's Law Dict. verb. Piſchary.

A PISCHARY is ſaid to be a right or liberty of fiſhing in the ſoil of another.

But a man may have *liberam piſcheriam* in his own ſoil. Skin. 678.

2 Salk. 637.

Our law books make mention of three ſorts of fiſhery, *libera*, *ſeparalis*, *communis*.

Seymour v. Lord Courtenay, 5 Burr. 2814.

In order to conſtitute a *ſeveral* fiſhery, it is neceſſary, that the party claiming it ſhould ſo far have the right of fiſhing independently on all others, as that no perſon ſhould have a *co-extenſive* right with him in the ſubject claimed; for where any perſon has ſuch co-extenſive right, there, it is only a *free* fiſhery. But a partial, independent right in another, or a limited liberty, is not inconſiſtent with a right to a *ſeveral* fiſhery.

Whether

Whether ownerſhip of the ſoil is eſſential to a *ſeveral fiſhery* is a point upon which there hath been a great diverſity of opinion, and which is not yet finally ſettled. 5 Burr. 2814. Dougl. 56. That it is neceſſarily included in a ſeveral fiſhery, ſee 2 Bl. Com. 39. 2 Salk. 637. Dav. 55 b. 17 E. 4. 6. 18 E. 4. 4. 10 H. 7. 24. 26. 28. Plo. Com. 154. That it is not, Co. Lit. 4. b. 112. a. Bract. 108. b. Br. tit. Tenures, pl. 75. Fitzh. Sci. Fa. 100. Godb. 117. 20 Vin. Abr. 201. The latter ſeemeth to be the better opinion, for the utmoſt that can be deduced from the caſes cited in ſupport of the former is, that a ſeveral fiſhery ſhall be preſumed to include the ſoil, until the contrary is proved. See Co. Lit. 112. a. note 7. laſt edition.

A free fiſhery is conſidered by Sir *Wm. Blackſtone* as an excluſive right of fiſhing in a publick river, and is referred by him to the head of franchiſes. But this doctrine is, at leaſt, queſtionable, our law books (*a*) extending this kind of fiſhery to *all* ſtreams indiſcriminately, whether *private* or *publick*. The ſame learned writer too ſaith, that a *free fiſhery* imports an excluſive right, and ſo differeth from *common of piſchary*; that in a *free fiſhery*, a man hath a property in the fiſh before they are caught; in a *common of piſchary* not till afterwards. But this doctrine, though ſupported by ſome (*b*) authorities, is impugned by others. Lord *Coke* (*c*) conſiders common of fiſhery and free fiſhery as the ſame thing. For, he ſaith, that a man may preſcribe to have *ſeparalem piſchariam* in ſuch a water, and the owner of the ſoil ſhall not fiſh there; but if he claim to have *communiam piſchariæ*, or *liberam piſchariam*, the owner of the ſoil ſhall fiſh there. And *Eyre*, J. ſaid, (*d*) that the word *libera, ex vi termini*, implied *common*. And that a man cannot declare in treſpaſs for taking his fiſh in a *free fiſhery* was expreſsly holden in two caſes (*e*), and the judgment for that reaſon reverſed. The right to the property of the fiſh in a free fiſhery, till caught, was negatived by the court incidentally in a ſtill earlier caſe (*f*). Lord *Mansfield*, in the caſe of *Seymour* v. Lord *Courtenay*, ſaith, that where any perſon hath a *co-extenſive* right with another it is a *free* fiſhery (*g*). 2 Bl. Com. 39. (*a*) F. N. B. 88. G. Fitzh. Abr. Aſſ. 422. 4 E. 4. 28. 17 E. 4. 6. b. 7. a. 7 H. 7. 13. b. Cro. Car. 554. 1 Ventr. 122. Skin. 677. Carth. 285. (*b*) Reg. 95. b. 43 E. 3. 24. 2 Salk. 637. Carth. 285. (*c*) Co. Lit. 112. a. (*d*) 2 Salk. 637. Carth. 285. (*e*) Upton v. Dawkins, 3 Mod. 97. Comb. 11. S. C. Peake v. Turner, cited in Carth. 286. in marg. (*f*) Child v. Greenhill, Cro. Car. 554. (*g*) 5 Burr. 2816.

If a man juſtifies for uſing a piſchary, he ought to ſhew whether it be common, free, or ſeveral. So, whether it be appurtenant to a manor or meſſuage, *&c.* for it is an intereſt, and not a mere liberty or eaſement. Hardr. 407.

A fiſhery, without more, is a tenement within the ſtatute 9 & 10 *W.* 3. *c.* 11. ſo as to entitle a perſon renting it to a ſettlement, for the court will intend that the ſoil paſſed with it. It is indeed doubtful, whether it is material for this purpoſe, that the ſoil ſhould paſs. Rex v. Old Alresford, 1 Term Rep. 358. In this caſe, one learned judge is reported to lay it down broadly, that a fiſhery is a *tenement*; that treſpaſs will lie for an injury to it; and it may be recovered in ejectment.

In rivers not navigable, the proprietors of the land have the right of fiſhery on their reſpective ſides; and it generally extends *ad filum medium aquæ*. But in navigable rivers, the proprietors of the land on each ſide have it not; the fiſhery is common, it is, *primâ facie*, Carter v. Muſcot, 4 Burr. 2162. Lord Fitzwalter's caſe, 1 Mod.

105. Dav. 55. Mayor, &c. of Oxford v. Richardſon, 4 Term Rep. 439.

*facie*, in the king, and is publick. But the crown may grant a ſeveral fiſhery in a navigable river, where the ſea flows and reflows, or in an arm of the ſea; and on the other hand, there may be a free fiſhery, or a co-extenſive right of fiſhing with the owners of the ſoil, in a river not navigable. In the one caſe, the preſumption is in favour of the appropriate right, in the other caſe, the preſumption lies the contrary way. In theſe, as in all other caſes of preſumption, the preſumption will ſtand, till the contrary is *proved*.

By the ſtatute of 5 *Geo.* 3. *c.* 14. perſons convicted of ſtealing, taking, or deſtroying any fiſh in any river, or ſtream, pond, pool, or other water, in any park or paddock, or in any garden, orchard, or yard, adjoining or belonging to any dwelling-houſe, or aiding or aſſiſting therein, or receiving or buying the fiſh knowing them to be ſtolen or taken, ſhall be tranſported for ſeven years. The proſecution, however, muſt be within ſix months after the offence committed; and any offender convicting an accomplice is entitled to a pardon.

By § 3. every perſon convicted of taking or deſtroying, or attempting to take or deſtroy any fiſh in any river or ſtream, *&c.*, not being in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling-houſe, but ſhall be in any other incloſed ground which ſhall be private property, ſhall forfeit the ſum of five pounds to the owner of ſuch river or ſtream, *&c.* But this clauſe, it is expreſsly provided, § 5. ſhall not extend to any perſon who ſhall have a juſt right or claim to take, kill, or carry away any ſuch fiſh.

Kinnerſley v. Orpe, Dougl. 517.

It is obvious, therefore, that a perſon who fiſhes in a fiſhery belonging to another, but to which he has a claim, for the purpoſe of giving occaſion to an action in order to try the right, is not liable to a penalty under this act.]

# Pleas and Pleadings.

PLEADING in general ſignifies the allegations of parties to ſuits when they are put into a proper and legal form; which are diſtinguiſhed, in reſpect to the parties who plead them, by the names of bars, replications, rejoinders, ſurrejoinders, rebutters, ſurrebutters, *&c.* And though the matter in the declaration or count does not properly come under the name of pleading, yet, being often comprehended in the extended ſenſe of the word, we have conſidered it under this head.

Pleading in ſtrictneſs is no more than ſetting forth that fact which in law ſhews the juſtneſs of the demand made by the plaintiff, or the diſcharge and defence made by the defendant. And herein, no greater certainty is required, than is ſufficient to bring on a trial without inveigling judge or jury. It ſeems, that, originally, pleadings were ſo formed, and were very plain and conciſe; but in progreſs of time pleaders, yea, and judges, became too curious in them, ſo that the art and dexterity of pleading, which in its (*a*) uſe, nature, and deſign was only to render the fact plain and intelligible, and, to bring the matter to judgment with convenient certainty, began to degenerate from its primitive ſimplicity and true uſe, and end in a piece of nicety and curioſity; which, how it hath improved therein in later times, the length of the pleadings, the many unneceſſary repetitions, and the many miſcarriages of cauſes upon ſmall and trivial objections, do but too ſufficiently teſtify.

(*a*) Recommended by Littleton as the moſt honourable, laudable, and profitable thing in the laws of England. Lit. § 534. and by Lord Coke, Co. Lit. 17. a. 168. 303. 2 Co. Tooker's caſe, and Hob. 162. 292. 295. —And it ſeems, that anciently fines were impoſed *pro ſtulte loquio*, or *ſtulte dicto*, which were mulcts laid on pleaders by the courts for barbarous and diſorderly pleading. 2 Inſt. 123.

Pleas were anciently (*b*) *ore tenus*, and afterwards minuted down by the prothonotaries, and entered of record in the *Latin* tongue, that being a dead language, and leaſt ſubject to variation, to remain as muniments and precedents of the law: that the pleadings ſhould be in *Latin* is expreſsly enacted by the 36 *E.* 3. *c.* 15. which ſtatute was made to aboliſh a law introduced by *William* the Conqueror, which ordained, that the pleadings in the courts of juſtice ſhould be in *French*.

10 Co. 132.

(*b*) And being ſo is the reaſon that a plea, whilſt in paper, may be amended. *Vide* title Amendment.

But now by 4 *G.* 2. *c.* 26. it is enacted, "That all writs, proceſs, pleadings, rules, indictments, records, and all proceedings in any courts of juſtice within *England*, and in the court of Exchequer in *Scotland*, ſhall be in the *Engliſh* tongue, and be written in ſuch common hand as acts of parliament are uſually engroſſed in, the lines and words to be written at leaſt as cloſe as the ſaid acts uſually are, and not abbreviated; and all perſons

" offending againſt this act ſhall forfeit 50*l.* to any perſon who " will ſue for the ſame."

[See a ſimilar reſervation in the above act of 36 E. 3.]

But by 6 *G.* 2. *c.* 14. it is provided, " That the above penalty " ſhall not be extended to the expreſſing the names of writs, or " technical words in the ſame language, as hath been uſed, nor " to abbreviations uſed in the *Engliſh* language."

In pleading, there are ſeveral general rules laid down in our books; as,

Co. Lit. 303. Plow. 65. 81. Cro. Jac. 362.

That good matter muſt be pleaded in right form, apt time, and due order, but that that, which is but inducement or conveyance to the ſubſtance, need not be ſo certainly alleged, as that which is the giſt of the plea.

Co. Lit. 303. 7 Co. 40. Dyer, 16.

That that which is apparent to the court, and appears from a neceſſary implication in the record, need not be averred.

Co. Lit. 303. Hob. 234. Latch. 186.

That every man's plea ſhall be taken moſt ſtrongly againſt himſelf, as every body is preſumed to make the moſt of his own caſe.

2 Mod. 5.

That what the parties have agreed in pleading ſhall be admitted, though the jury find otherwiſe.

Vaugh. 58. 60. *per* Ld. Vaughan.

That when a man will recover a thing from another, it is not enough for him to deſtroy ſuch perſon's title, but he muſt prove his own a better, according to the rule, *melior eſt conditio poſſidentis.*

Co Lit. 285. 303.

That every man ſhall plead ſuch pleas as are pertinent and proper for him, according to the quality of his caſe, eſtate, or intereſt.

Hob. 164. *per* Ld. Hobart.

That the law requires in every plea two things, the one, that it be in matter ſufficient, the other, that it be deduced and expreſſed according to the forms of law; and if either the one or the other of theſe be wanting, it is cauſe of demurrer.

Dyer, 66. Godb. 253. Leon. 78.

That every plea in bar, being a confeſſion and avoidance of the plaintiff's action, muſt be ſubſtantive and certain, with an avoidance of the plaintiff's demands, which he may traverſe, and thereon go to iſſue; becauſe the declaration of the plaintiff ſtands confeſſed, as far as it is not avoided by the defendant.

7 Co. 25. a. 8 Co. 120. b. Co. Lit. 303. (*a*) Duplicity in the declaration cured by pleading over.

That if a count, avowry, which is in nature of a count, replication, &c. want (*a*) form, or (*b*) omit circumſtance of time, place, &c. they may be made good by the plea of the adverſe party; but, if they want ſubſtance, they cannot be made good: ſo, in ſuch caſes, the bar may be made good by the (*c*) replication, and the replication by the rejoinder, &c.

2 Vent. 222. (*b*) A ſuit depending muſt ſhew in what court, but cured by pleading over. 1 Lev. 195. —— Not alleging *profut patet per recordum* cured by pleading over. 3 Lev. 11. In debt for rent, if no place be aſſigned where the leaſe was made, the defendant in his plea confeſſing the leaſe makes the declaration good. Hob. 82. (*c*) Fault in the plea cured by the replication. Carth. 66. —— And that if a man pleads over, he ſhall never take advantage of any ſlip committed in the pleading of the other ſide, which he could not take advantage of upon a general demurrer. 2 Salk. 519. pl. 18. *Per* Holt, Ch. J.

Co. Lit. 303. *Vide poſtea.*

That all pleas muſt be alleged directly, and not by way of rehearſal; nor is it ſufficient, that what ought to be expreſsly pleaded may be deduced by argument from what is pleaded.

That

That in matters triable by our law, all things iſſuable ought to be ſpecially alleged in order to have a convenient trial; but in (a) matters ſpiritual the law is otherwiſe; becauſe there is no peril in the trial; and therefore, if certain enough to ground a certificate, it is ſufficient. 3 Leon. 300. Laid down as a rule by Lord Anderſon, cited in Show. P. C. 94.

(a) Sentences in the ſpiritual courts may be alleged ſummarily; as, that a divorce was betwixt ſuch parties for ſuch a cauſe, and before ſuch a judge; but the judge muſt be named, that the court may write to him; that this is ſufficient, it being to no purpoſe to allege them particularly, becauſe the forms of theſe courts are different from thoſe of the common law; and our judges preſume that they are obſerved by the judges of thoſe courts. Co. Lit. 303.

That ſurpluſage does not vitiate, unleſs it be contrariant to the matter pleaded before. *Vide poſtea.*

That where one is authoriſed to do a thing by common law, ſtatute, cuſtom, grant, or commiſſion, he ought to ſhew, that he hath purſued the ſubſtance of it accordingly. Co. Lit. 303.

That general eſtates in fee-ſimple may be generally alleged; as, that *J. S.* was ſeiſed in fee; but the commencement of particular eſtates muſt be ſhewn, becauſe they could not originally commence without a conveyance, which muſt be ſhewn, unleſs they be alleged by way of inducement only. Co. Lit. 121. a. 303. But for this, and the pleading a *Que Eſtate*, *vide* Bro. tit. Que Eſtate. 18 Ed. 4. 10. Dyer, 238. b. Cro. Eliz. 22. Cro. Car. 190. 428. Cro. Jac. 673. Yelv. 76. Lev. 190. Sid. 297. 2 Keb. 87. 96. Skin. 303. pl. 7. 2 Mod. 55. Raym. 389. 2 Salk. 562. Carth. 9. 208. 432. 444.

That pleas ought to conclude properly; thoſe to the writ to conclude to the writ, thoſe in bar, to the action; eſtoppels muſt rely on the eſtoppel. Co. Lit. 303.

But for the better underſtanding of theſe matters, we muſt more particularly conſider,

(A) The ſeveral Parts, and the Order of Pleading.

(B) The Declaration: And herein,

1. The Nature thereof; and therein, of adding ſeveral Counts in the ſame Declaration.
2. Who may join or be joined in the ſame Declaration.
3. What Matters may be joined in the ſame Declaration.
4. Of the Declaration's agreeing with the Writ.
5. Of the Sufficiency and Certainty required in the Declaration; and therein, of Matters of Inducement, and that which is the Giſt of the Action: And herein,

1. Where by the Declaration it muſt appear that the Plaintiff hath a Right.
2. Where the Plaintiff muſt ſhew that he hath performed what was requiſite on his Part.
3. Where general Allegations in the Declaration are ſufficient; and therein, of Miſrecitals and Omiſſions.

4. Where the Averments muſt be poſitive and expreſs in the Declaration.
5. Of the Certainty required in the Deſcription of the Thing declared for.
6. Of the Declaration's being good in Part, and void in Part.

(C) Of Imparlance: And herein,

1. Of the Nature thereof, and the ſeveral Kinds.
2. What the Defendant muſt do before any Imparlance.
3. What he is to plead after a general Imparlance.
4. What may be pleaded after a ſpecial Imparlance.
5. In what Caſes the Courts exerciſe a diſcretionary Power in granting or refuſing an Imparlance.

(D) Of making Defence: And herein, of the Difference between full and half Defence.

(E) The ſeveral Kinds of Pleas: And herein,

1. Of Pleas to the Juriſdiction: And therein,
   1. To what Courts to be pleaded, and of the Difference between a Plea to the Juriſdiction and a Claim of Conuſance.
   2. The Manner and Time of pleading to the Juriſdiction.

(F) Of Pleas in Abatement.

(G) Of Pleas in Bar and in Chief: And herein,

1. Of the General Iſſue, and how formed.
2. Immaterial and informal Iſſues, and where aided.
3. Of ſpecial Pleas; and therein, of Pleas amounting to the General Iſſue, and of Matters which may be pleaded or given in Evidence.
4. Of ſham Pleas, and the Conſequence of falſe Pleading.

(H) Traverſe: And herein,

1. The Nature thereof.
2. In what Caſes a Traverſe is permitted.
3. In what Caſes a Traverſe is neceſſary.
4. Whether there may be a Traverſe upon a Traverſe.
5. To what Point the Traverſe ſhall be taken; and therein, what Matters are traverſable, and of the Manner of taking thereof.

(I) Pleas

(I) Pleas in Bar, their Sufficiency and Certainty: And herein,

1. That the Plea muſt be proper, and adapted to the Action.
2. That the Plea muſt be good in Subſtance; and therein, of Matter of Inducement, and that which is the Giſt of the Defence.
3. Of general Pleading to avoid Prolixity; and therein, of affirmative and negative Pleas.
4. Of Surpluſage and Repugnancy in Pleading.
5. That the Pleading ought to be direct and not argumentative.
6. Negative Pregnant.
7. What Things muſt be pleaded according to their Operation in Law.
8. Of Colour in Pleading.
9. Of pleading Non-tenure and Diſclaiming.
10. Pleading *Hors de ſon fee*.
11. Eſtoppels in Pleading.
12. Pleading with a *Profert*, and demanding Oyer: And herein,
    1. In what Caſes there muſt be a *Profert* or *Monſtrans de fait*.
    2. Of demanding Oyer.
13. Pleading a Recovery in a former Action.

(K) Duplicity in Pleading: And herein,

1. The Reaſon why Duplicity is a Fault, and the Manner of taking Advantage thereof.
2. What ſhall be ſaid Duplicity in Pleading.
3. Of pleading double by Leave of the Court.

(L) Departure in Pleading.

(M) Repleader: And herein,

1. Of the Nature of a Repleader, and Manner of awarding it.
2. A Repleader in what Caſes to be awarded.
3. Repleader at what Time to be awarded.

(N) Demurrer: And herein,

1. The Definition and Nature of a Demurrer.
2. The Manner and Form of demurring; and therein, of joining in Demurrer, and waiving thereof.

3. What Facts are admitted by a Demurrer.
4. How far a Judgment on a Demurrer is peremptory.
5. Of the Difference between a general and ſpecial Demurrer.
6. What Things are good on a general Demurrer, that would be otherwiſe on a ſpecial one.
7. Demurrer to Evidence.

(O) Plea at what Time to be put in, and the Ceremony requiſite therein.

(P) Continuance and Diſcontinuance in Pleading.

(Q) Pleas *Puis darrien continuance.*

---

## (A) Of the ſeveral Parts, and the Order of Pleading.

Doct. pl. 84. Co. Lit. 17. a. Plow 84. *Vide* the next title.

THE firſt thing in pleading is the plaintiff's count or declaration, in which he ſets forth the cauſes of his complaint particularly, and thereby explains his writ; and this he muſt do in ſuch a manner, as to make it appear to the court there is ſufficient foundation for his bringing the action; and all eſſentials, or whatever is of the ſubſtance of the action, muſt be alleged, that the court may be enabled to give judgment for him in caſe a verdict ſhould be found in his favour.

The next thing is the defendant's plea or bar: Pleas are variouſly diſtinguiſhed; the more general diviſion of them is that of being dilatory or peremptory; or they are, *1ſt*, Pleas in abatement; *2dly*, Such as ſuſpend the action; or, *3dly*, Such as bar the plaintiff for ever. And as the plaintiff's declaration muſt ſet forth all eſſentials neceſſary to maintain it; ſo the defendant's bar muſt be ſubſtantially good and certain, with an avoidance of the plaintiff's demands, which the plaintiff may traverſe, and thereon go to iſſue.

The replication is the plaintiff's anſwer to the defendant's plea, which fortifies and ſupports his declaration; the rejoinder is the defendant's anſwer thereto; ſo, of ſurrejoinders, rebutters, ſurrebutters, *&c.* in which the material thing is, that they purſue what hath been at firſt alleged and inſiſted upon, otherwiſe it will be a departure in pleading; as, if a matter be pleaded at common law, this cannot be maintained by a cuſtom; as, in covenant on an indenture of apprenticeſhip to ſerve ſeven years, the breach aſſigned was, that he did not ſerve, *&c.* the defendant pleaded infancy; the plaintiff replied the cuſtom of *London*, and adjudged a departure. So, an action at common law cannot be made good in the replication by an act of parliament. But, if one pleads a ſtatute, and the other ſays it is repealed, he may reply, that it is revived by another, for this fortifies the firſt matter.

*Vide* under the diviſion Departure in Pleading.

In

In debt upon a bond, conditioned to ſave a pariſh harmleſs concerning a baſtard child which the obligor was forced to father, he pleads *non damnificatus*; they reply, that the child was ready to ſtarve, and that therefore they put it out to nurſe, which coſt them 4*l.*: Defendant rejoins, that he was ready to pay the money and ſave the pariſh harmleſs; upon this they demurred, and had judgment, becauſe the rejoinder is a departure; for the defendant ought to have taken iſſue on the child's being ready to ſtarve; for if the plaintiffs had once cauſe of expence about the child, and were thereupon actually damnified, the defendant's being ready to pay the money will not ſave the condition of the bond. Paſch. 22 Car. 2. in B. R. 2 Sand. 80. Sid. 444. Mod. 43. 2 Keb. 612. 619. S. C. Richards v. Hodges.

When the plaintiff replies, ſurrejoins, &c. and it thereby appears, that he has no cauſe of action, he ſhall never have judgment, though the bar or rejoinder be inſufficient, nor can any admittance of the adverſe party make it good, for the court ought to judge on the whole record; as, in debt on a bond for performance of covenants, the defendant pleads performance generally, where ſome of the covenants are in the negative, whereby his plea is inſufficient; if the plaintiff reply, and ſhew a breach, which of his own ſhewing is no breach, judgment ſhall be given againſt him; for on the whole record it appears he has no cauſe of action. 8 Co. 133. b.

But, if the bar be inſufficient in ſubſtance, or amount to a confeſſion of the point of the action, and the plaintiff in his replication ſhew no matter againſt himſelf but matter explanatory, or perhaps not material, the declaration being good, the plaintiff ſhall have judgment for the inſufficiency of the bar, without any regard to the replication; as, if the defendant plead a grant by letters patent in bar which are not ſufficient, and the plaintiff in his replication ſhew another clauſe in the ſaid letters patent, which is not material, the defendant demur, the plaintiff ſhall have judgment. 8 Co. 133. b. 9 Co. 110. Hob. 14. 199. Lev. 31. 3 Lev. 244.

If the plaintiff make a title in his replication, but do not plead as he ought, eſpecially in point of trial, the rejoinder admitting this, and tendering iſſue upon another matter, makes it good. Lev. 195.

The order of pleading is, 1. To the juriſdiction of the court. 2. To the perſon of the plaintiff, and next of the defendant. 3. To the count or declaration. 4. To the writ. 5. To the action of the writ. 6. To the action itſelf in bar thereof. Co. Lit. 303.

This has been ſettled as the moſt natural order of pleading, becauſe by this order each ſubſequent plea admits the former; as, where the defendant pleads to the perſon of the plaintiff, he admits the juriſdiction of the court; for it would be nugatory to plead any thing in that court that has no juriſdiction in the caſe: when he pleads to the count, he allows that the plaintiff is able to come into that court to emplead him, and that he may there be properly empleaded: but in pleading to the count he does not admit the writ to be good, yet if the count be vitious, the writ is conſequently deſtroyed; for though the writ in itſelf may be good, yet it is ill purſued: but, in pleading to the writ, he admits Co. Lit. 303. Hob. 71, 72. Latch, 178. 5 Mod. 146.

mits the count to be ſufficient in form, if the writ be good; ſince it is not to any purpoſe to object to the form of ſuch writ, if the form of the count be thereupon inſufficient: but, if the count be in ſubſtance variant, the defendant may ſhew it at any time in arreſt of judgment; beauſe the court has no authority to proceed in a matter of ſubſtance different from the original writ.

If a man pleads to the action of the writ he allows both the form of the count and of the writ; for he admits, that if the form of the writ and count were adapted to the plaintiff's caſe, that ſuch form is good and ſufficient; ſince to object to the action not agreeing with the plaintiff's caſe does admit, that, if it be ruled by the court that it does, the plaintiff has before the court a count in form ſufficient.

If the defendant pleads in bar to the action, he admits the form of the writ and count, for he anſwers to the right in demand, and puts that right in iſſue, and thereby admits, that there is a ſufficient form to put it in iſſue, and therefore though a man pleads *non aſſumpſit modo & forma*, yet the *modo & forma* does not traverſe the form of the writ or count, but the ſubſtance of the promiſe; which is the true reaſon why another promiſe may be given in evidence different in time and place from that mentioned in the declaration, though not different in ſubſtance.

## (B) The Declaration: And herein,

### 1. The Nature thereof; and therein of adding ſeveral counts in the ſame Declaration.

Plow. 84. Lil. Reg. 414.

THE (*a*) declaration is an explanation of the plaintiff's writ, in which he expreſſes at large his complaint, ſetting forth the nature and quality of his caſe more fully than in the writ; and as it is the foundation of his ſuit, the law requires that it contain certainty and (*b*) truth, that the defendant may be able to make a proper anſwer thereto, and the court be enabled to give a right judgment thereon.

(*a*) In Engliſh it is called *declaration*, *count* from the French, and *narratio* in Latin. Co. Lit. 17. a. 304. Doct. pl. 83. ——and is the ſame with what the civilians call a libel. Co. Lit. 17. a. (*b*) Muſt eſtabliſh a title in the plaintiff, as well as deſtroy the defendant's; for the rule is, *melior eſt conditio poſſidentis.* Vaugh. 58. 60.

(*c*) And from this it hath been ſaid, the practice of annexing affidavits to bills in Chancery hath been introduced. —— But this method in declarations is now diſuſed. Doct. pl. 85. —— And ſo is the practice of annexing affidavits to bills in Chancery, unleſs, perhaps, in a few very particular caſes, required by ſtatute.

The plaintiff having ſet forth the cauſes of complaint particularly, the concluſion of his declaration is, *et inde producit ſectam*, which was proffering to the court the teſtimony of the witneſſes or followers; for according to *Fleta*, the (*c*) ancient law was, *quod nullus liber homo ponatur ad legem nec ad juramentum per ſimplicem loquelam ſine teſtibus fidelibus ad hoc ductis*, &c.

An

An *audita querela* and a *ſcire facias* are in the nature of a declaration, for they ſet forth at large the cauſe of the plaintiff's action as a declaration doth. Lil. Reg. 411. 7 Co. 25.

The gift, and every thing that is of the eſſence of the plaintiff's action, muſt be ſet forth in the declaration; and herein we may lay it down as a general rule, that that ſeems properly to be the eſſence of the action without which the court could have no ſufficient grounds to give judgment; and this is to be determined in every action according to its nature. Doct. pl. 85.

If the declaration be not a ſufficient foundation to give judgment, this may be moved in (*a*) arreſt of judgment after verdict, becauſe judgment cannot be given when it appears, that, though the fact be found for the plaintiff, yet he has not ſufficient cauſe of action.

(*a*) But miſtakes in the declaration cannot be taken advantage of on a plea in abatement, but the defendant muſt demur. Salk. 212.——But if the declaration varies from the writ, the defendant may plead in abatement; for he has abated his own writ by proſecuting it in a different manner. Cro. Eliz. 722. Cro. Jac. 654. Jon. 304.

The declaration may be general or ſpecial; as, in debt upon an obligation, the plaintiff may declare on the penalty generally, or may ſet forth the condition at his election. Doct. pl. 84.

If there are three in execution jointly at the ſuit of *A.* and all eſcape, in debt for the eſcape, the plaintiff may declare for the eſcape of all, and it will not be double, though the eſcape of any of them will be (*b*) ſufficient to entitle him to the action. Keilw. 68.

(*b*) If one declares for an eſcape in a cauſe of action to 40*s.*, and proves 30*s.*, this is ſufficient; *per* Hale. But in the book there is a *quære de hoc*, being trial. 2 Lev. 85.

If in an *indebitatus aſſumpſit* the plaintiff declares for 100*l.* received to the plaintiff's uſe, and alſo upon an *inſimul computaſſet* for another 100*l.* the ſame day, and the defendant pleads that the ſaid ſeveral ſums of 100*l.* are for one and the ſame cauſe of action, and likewiſe that the ſum demanded is ſatisfied; this on demurrer will be good; for though it is frequent to lay a declaration for a debt ſeveral ways in an *aſſumpſit*, and it is not a good plea to ſay that the ſeveral ſums are but only for the ſum firſt mentioned, and ſo go on no further; yet when the defendant pleads over, that the very ſum demanded is ſatisfied, it is a good plea: and if the two ſeveral hundred pounds were two diſtinct ſums, the plaintiff might have replied ſo, and taken iſſue thereupon *. Raym. 449. Sheldon v. Clipſham. * If the money was actually paid, *non aſſumpſit* would have been the proper plea; for, having fulfilled the promiſe, it is as if it had never exiſted.

In an action for money won at play there were two counts, one ſetting forth a ſpecial agreement to play at ſuch a game, and mutual promiſes of payment, which was right; the other was, that in conſideration that the plaintiff won ſuch a ſum of the defendant at play, he promiſed to pay it, which was adjudged ill, in that an *indebitatus* will not lie for money won at play. It was likewiſe held, that any thing in the firſt count which was right could not (*c*) help any defect in the ſecond; for though they both were put in one declaration, yet they were as diſtinct as if they had been in two ſeveral actions †. 6 Mod. 128. Smith v. Aiery, adjudged, 2 Ld. Raym. 1034. 3 Salk. 14. pl. 1. 175. pl. 1. Holt, 329. pl. 4.

(*c*) That a judgment cannot be arreſted as to one count, and affirmed as to another. Salk. 24. & *vide* 7 Mod. 148. 2 Ld. Raym. 841.

——† This

——† This was a case after verdict, for on a demurrer to the whole declaration, the court might have given judgment for plaintiff on one count, and for defendant on the other.

Salk. 213. pl. 3. Weft v. Troles. The plaintiff declared, that whereas the defendant 6 *Maii* 1695, for 120 weeks diet then past, had promised to pay him 7 *s. per* week, and that the plaintiff *postea*, *ff.* 6 *Maii* 1695, having found the defendant diet 120 weeks then past, the defendant promised to pay the worth, and that it was worth 7 *s. per* week; upon *non assumpsit*, and verdict *pro querente*, it was moved in arrest of judgment, that the weeks in the *quantum meruit* are not said to be *alia* than those laid in the special promise, so that the defendant is twice charged with the same thing; *sed non allocatur;* for they do not appear necessarily to be the same, and without necessity the court will not intend them so.

Lil. Reg. 408. The plaintiff after plea pleaded, or after the end of the second term, shall not add a new count to his declaration (as an *indebitatus assumpsit*, or the like) under pretence of amending his declaration.

2. Who may join or be joined in the same Declaration.

See upon this division, tit. "Actions in general (C)," Vol. I. p. 51.

3. What Matters may be joined in the same Declaration.

Brown v. Dixon, 1 Term Rep. 276. [The old opinions upon this subject may be found in the first volume of this work, under title "Actions in general (C)." It would be unnecessary to introduce them again here, especially as the rule is now settled, that any causes of action, which can be comprised in counts, that admit of the same general plea, and are followed by the same judgment, may be joined in the same declaration.]

Carth. 113. Drake v. Cooper, adjudged. In trespass *quare vi & armis* the defendants entered his close, containing 100 acres, *&c.* (in which a fair time out of mind had been kept on *Michaelmas* day) *& adtunc & ibidem fregerunt & divulser.* divers booths, *&c.*, *ibidem erect.* by the plaintiff for exposing wares and merchandizes to sale there, brought by persons thither resorting, *nec non eo quod* (these defendants) *adtunc & ibidem impediverunt & disturbaverunt* the plaintiff in erecting other new booths, *&c.* for the sale of merchandize; by reason whereof the plaintiff lost all the profits of piccage and stallage. Upon not guilty pleaded, the plaintiff had a verdict, and on a motion in arrest of judgment it was objected to the declaration, that the latter part thereof, *viz.* the disturbance in building new booths, sounds altogether in case and not in trespass, and is therefore incompatible with the first part of the declaration, which is trespass *vi & armis*, and that these several matters require several judgments; the first a *capiatur*, but the last a *misericordia* only, and therefore could not be joined in one declaration. *Sed per cur.* The disturbance, *&c.*, is laid only in consequence of the first trespass, *&c.*, and it is of the same effect as a *per quod* in a declaration, which is often used in

in actions of treſpaſs *vi & armis*, to let in the conſequential damages, *&c.*, and one plea goes to the whole; for if the defendant had pleaded a licence from the plaintiff to enter the cloſe, that would have been a good juſtification of the treſpaſs.

### 4. Of the Declaration's agreeing with the Writ.

The count or declaration is an expoſition of the plaintiff's writ, and muſt regularly agree therewith; and herein the general rule is, that every thing that comes within the compaſs of the writ may be comprehended within the declaration, but the declaration cannot be extended beyond the writ; for original writs, iſſuing out of *Chancery*, are the grounds and foundations of the proceedings of the courts into which they are returnable; and ſuch proceedings muſt be conformable to the authority given them; whatever therefore may be compriſed in the writ, however multifarious, may be compriſed in one declaration; but whatever cannot be contained in one writ, cannot be comprehended in the declaration. Doct. pl. 84. Lil. Reg. 411.

The writ may be general, according to law, but the declaration ſpecial; as, where a ſtatute gives an action, but does not preſcribe any form of the writ, the writ framed by the common law will ſerve, and the ſpecial matter may be ſet forth in the declaration. Doct. pl. 84.

So, if lands are given to a woman *quamdiu ſola fuerit*, or to a man *quamdiu ſe bene geſſerit*, in waſte, the writ ſhall be general *quod tenet pro termino vitæ*, and the count ſpecial. Doct. pl. 85.

[Upon general proceſs (*a*), the plaintiff may declare *qui tam*, or as executor or adminiſtrator, *&c.* But this rule will not hold *è converſo*; for where the proceſs was to anſwer the plaintiff *qui tam*, &c. (*b*), and the declaration was in his own name only, omitting the *qui tam* part, the court held the variance to be fatal, and ſet aſide the proceedings. And the like was done, where the proceſs was to anſwer the plaintiffs (*c*) as aſſignees of a bankrupt, and the declaration was in their own right; for the plaintiffs cannot declare generally, on proceſs ſued out in a ſpecial character. And as ſuch variance between the original writ and declaration may be taken advantage of by plea in abatement, ſo, where the action is by bill, the court will interfere upon motions (*d*).]

(*a*) Weavers' Company v. Forreſt, B. R. 2 Str. 1232. Lloyd v. Williams, C. B. 2 Bl. Rep. 722. 3 Wilſ. 141. (*b*) Canning v. Davis, B. R. 4 Burr. 2417. Canning v. Davis, C. B. Barnes, 494. (*c*) Meggs v. Ford, E. 25 G. 3. Imp. Pr. K. B. 172. (*d*) Turing v. Jones, 5 Term Rep. 402.——It appears, however, to have been the opinion of Yates, J. in the caſe of Canning v. Davis, 4 Burr. 2417. that though the plaintiff ſtyle himſelf *executor*, or give himſelf any other ſuperfluous deſcription in the proceſs, and declare otherwiſe, yet this will not hurt, for the demand is ſtill the ſame.

If a man bring an original in treſpaſs againſt one, and declare againſt him with a *ſimul cum*, he abates his own writ; but the defendant cannot take advantage of it without demanding *oyer*. If the writ be againſt two, the plaintiff may declare againſt one of them with a *ſimul cum* *. Comb. 260. *per* Holt, C. J.

* But now, on trial, the court will expect ſome evidence of an attempt to ſerve with proceſs, to take off his evidence.

If lands be demiſed for term of half a year or a quarter of a year, *&c.*, and the leſſee commit waſte, the leſſor ſhall have a writ of Lit. § 67. Co. Lit. 54. b.

of waſte againſt him, and the writ ſhall ſay, *quod tenet ad terminum annorum*, but the declaration muſt be ſpecial, according to the caſe.

Co. Lit. 344. a. So, if a clerk that is donative be diſturbed in a *quare impedit* by the patron, for this diſturbance to his church donative the writ ſhall ſay, *quod permittat eum præſentare ad eccleſiam*, &c., and the declaration ſhall be ſpecial.

Caſes L. and Eq. 210. (*a*) If a declaration begins *Queritur in placito tranſgreſſionis pro eo quod*, &c. yet may it be a declaration in caſe, notwithſtanding the recital of the bill be *in placito tranſgreſſionis*, for that will ſerve indifferently for treſpaſs or caſe. Cro. Car. 325. Tyffin v. Wingfield.——But for this *vide* Hob. 180. Allen, 84. Cro. Car. 254. 2 Roll. Rep. 49. Vent. 19. Where the (*a*) title is of one ſort of action, there, the declaration can never change it to another; but it may make a fatal variance between the writ and the declaration.

## 5. Of the Sufficiency and Certainty required in the Declaration; and therein, of Matters of Inducement, and that which is the Giſt of the Action: And herein,

### 1. Where by the Declaration it muſt appear that the Plaintiff hath a Right.

Hob. 199. Palm. 524. (*b*) Diverſity where ſuch matter is diſcloſed by the defendant. It is a general rule in pleading, that the declaration muſt ſhew a title in the plaintiff; and that it is regularly true, that if the (*b*) plaintiff will himſelf diſcover to the court any thing, whereby it may appear that he had no cauſe of action (*c*) when he commenced it, his writ ſhall abate.

Cro. Eliz. 111. Leon. 87. 2 Leon. 20. (*c*) Where the *teſte* of original was before the day of payment, in the condition of the bond, upon which action was brought; and this, though after verdict, was adjudged error. Cro. Eliz. 325. Moor, 598. Buckley v. Williamſon, *& vide* Cro. Eliz. 565. ——So in caſe for ſcandalous words, the day was alleged before the words ſpoken. Roll. Abr. 792. ‡ —— ‡ The day is not material, if laid before ſuing out writ, if in C. P. or by original in B. R. or before the firſt day of the term, whereof the declaration is, if by bill.——So, in *aſſumpſit*, where it appeared by the declaration, that the action was brought before the cauſe. Cro. Jac. 574-5.——In ejectment, by the declaration it appears, that the defendant was ejected after the leaſe made: it is ſufficient, though no certain day is alleged in which he was ejected, for the day is not material, being before the action brought. Cro. Jac. 311.——In ejectment, the plaintiff declared, upon a leaſe made 12 *Jun. habend. a dicto duodecimo die Jun.*, *virtute cujus* he entered, and that *poſtea ſcilicet eod.* 12*o die Jun.* the defendant ejected him; and becauſe the plaintiff by his own ſhewing entered as a diſſeiſor, and the defendant ejected him before he had title, after a verdict and judgment for the plaintiff in *Ireland*, upon a writ of error here it was reverſed. 3 Mod. 198. Evans v. Croker, *& vide* Comb. 83. Like Point ‖.——‖ But the words ſubſequent to *poſtea* might have been rejected as ſurpluſage. Adams v. Gooſe, Cro. Jac. 96. Bull. N. P. 106.——Where the declaration being of the term generally ſhall refer to the firſt day.——That ſome day muſt be alleged before the action brought. 5 Mod. 287. And note; if the cauſe of action ariſes on ſome day within the term of which the declaration is delivered, the declaration muſt be of ſome day in the term after the cauſe of action accrued. [And in ſuch caſe, if the ſuit is by bill, there muſt be a ſpecial memorandum of the day ſubſequent to the cauſe of action. However, where the cauſe of action was ſtated to have accrued on the firſt day of term, the court, on demurrer, held, that the declaration might be entitled of the term generally; for the delivery of the declaration is the act of the party, and in ancient times it could not have been delivered before the ſitting of the court; ſo that the cauſe of action might well have accrued before the actual delivery of the declaration. Pugh v. Robinſon, 1 Term Rep. 116.——The declaration by bill ſhould, regularly, be entitled of the day on which the writ is returnable; for the bill, of which it is a copy, cannot be filed till bail is put in, which cannot be till the return of the writ. Southouſe v. Allen, Ca. temp. Hardw. 141. But *qu.* as to the time of putting in bail, and ſee Tidd's Pr. 187.—Where there are ſeveral defendants, who put in bail of different terms, the declaration ſhould be entitled of the term, when the laſt bail was put in. Stork v. Herbert, 1 Wilſ. 242. But in a later caſe it hath been holden, that a declaration though filed and delivered, cannot be entitled, of a ſubſequent term to that in which the writ is returnable. Smith v. Muller, 3 Term Rep. 624.—Where a declaration is improperly entitled, the plaintiff may have it corrected on an affidavit of the fact. Symonds v. Parmenter,

Parmenter, 1 Wilſ. 78. It may be ſet right too at the inſtance of the defendant, if neceſſary for his defence. Southouſe v. Allen, Ca. temp. Hardw. 141. Smith v. Key, 1 Str 638. Smith v. Raydon, cited 1 Wilſ. 39. ſeems S. C. Thompſon v. Martha's, 1 Wilſ. 304. Wilkes v. Earl of Halifax, 2 Wilſ. 256.]

Hence it hath been adjudged on the ſtatute of hue and cry, that it is not ſufficient for the plaintiff to declare that the goods were in his cuſtody, but he muſt allege that they belonged to him; but that in the caſe of a carrier, he may maintain an action againſt the hundred, ſetting forth the cuſtom by which he is chargeable. 2 Saund. 379.

So, in an action upon the caſe, the plaintiff cannot declare, *quod cum* the defendant was indebted to him ſuch a ſum, the defendant in conſideration thereof *ſuper ſe aſſumpſit* to pay, *&c.*, without ſhewing the cauſe of the debt. 10 Co. 77. a. But for this *vide* Hob. 5. Godb. 186. Cro. Jac. 207. 213. 642. Hob. 18. Moor, 854. pl. 1167. Hetl. 106. Roll. Rep. 391. Bulſt. 67. 3 Bulſt. 207. Cro. Jac. 397. Hard. 132. ——But 171. *per* Croke and Chamberlain, there is a diverſity where the promiſe is to pay at a day to come, and where not; for a promiſe to pay at a day to come implies a forbearance in the mean time; and *vide* Roll. Rep. 396. ——And that ſuch a declaration is not made good by verdict. Cro. Car. 6. 31. Sid. 182. Brownl. 14. Poph. 31. Jenk. 293. ——Where the plaintiff declared, that the defendant was indebted to the teſtator of the plaintiff in 20 *l. quas illi ſolvere debuit ſecundum agreamentum inter eos habit.*; the judgment was ſtaid after verdict, for that the agreement might be by deed. 2 Lev. 162.

But, if, in an *aſſumpſit*, the plaintiff declares, that whereas the defendant was indebted to him in 30 *l.*, the defendant, in conſideration that the plaintiff had given day to the defendant until, *&c.*, did aſſume and promiſe to pay, *&c.*; this is a good declaration, without ſhewing for what the defendant was indebted, for the debt is not in queſtion; and though it be true, there muſt be a debt to make this a good conſideration, yet that is allowed in the promiſe being actual. Hob. 18. Woolaſton v. Webb, adjudged after verdict; & *vide* like point Cro. Jac. 397. 548. 593. Moor, 853. pl. 1167. 3 Bulſt. 206, 207. Roll. Rep. 379, 380. Godb. 13. Hob. 216. Roll. Abr. 19.

So, if, in an *aſſumpſit*, the plaintiff declares, that whereas the defendant had received 24 *l.* of ſeveral perſons, to the uſe of the plaintiff, in conſideration thereof the defendant did aſſume and promiſe to pay, *&c.* This is a good declaration, without ſhewing of what perſons in particular he received the money, becauſe the conſideration is executed, and not traverſable. Moor, 854. pl. 1168.

If in an *aſſumpſit* the plaintiff declares, that the defendant, in conſideration of, *&c.*, *inter alia* did aſſume to pay, *&c.* This has been held no good declaration; becauſe he ought to ſet forth the whole promiſe, which is entire. Allen, 5. & *vide* March, 100.

But in an *aſſumpſit* the plaintiff declares, *quod cum* there were ſeveral reckonings and accounts between the plaintiff and defendant, and at ſuch a day, *&c.*, *inſimul computaverunt* for all debts, reckonings, and demands; and the defendant upon the ſaid account was found to be in arrear the ſum of 20 *l.*, in conſideration whereof the defendant promiſed to pay, *&c.*, this is a good declaration, without ſhewing it was *pro mercimoniis*, or otherwiſe, wherefore he ſhould have an account; for an account may be for divers cauſes, and ſeveral matters and things may be included and compriſed therein, which *in pede computi* are reduced to a ſum certain; Cro. Car. 116. Hetl. 106. 883. S. C. and Poph. 177. Latch, 141. Palm. 442. Yelv. 70. Roll. Rep. 396. S. P.

certain; and thereupon being indebted to the plaintiff, it is ſufficient to ground an action.

2 Lev. 153. Fawk v. Pinſack.

In *aſſumpſit* the plaintiff declared, that the defendant was indebted 20 *l. pro præmio* upon a policy of inſurance upon ſuch a ſhip, and the defendant demurred ſpecially, becauſe he did not ſhew the conſideration certainly what the *præmium* was, or how it became due: *ſed non allocatur;* for this is as good as an *indebitatus pro quodam ſalario*, which has been adjudged good.

Carth. 276. adjudged, Vent. 44. S. P. Sid. 425. S. P. 2 Keb. 552. S. P. Mod. 8. S. P.

In *aſſumpſit* the plaintiff declared *pro opere & labore* generally, without ſetting forth what ſort or manner of work or labour it was; and though it was objected, that it ſhould be ſet forth particularly, ſo that it may appear to the court to be lawful work; yet the court held it well enough; and that the only reaſon why the plaintiff is obliged to ſhew wherein the defendant is indebted is, that it may appear to the court that it is not a debt on (*a*) record or ſpecialty, but only upon ſimple contract; and any general words by which that may be made to appear are ſufficient.

(*a*) For damages recovered in an *aſſumpſit* will be no bar to an action of debt grounded on a record or ſpecialty. Cro. Car. 6. Leon. 155. Cro. Eliz. 242.

Show. 17. Cary v. Bacchus.

If the bailiff of a liberty declares, that the franchiſe and liberty of returning and executing all writs, bills, and receipts out of the king's courts belongs to him; and that the defendant, without his licence, and againſt his conſent, executed a *fieri facias* within the ſaid liberty; this is a good declaration, without ſetting forth any title, or that he enjoyed the ſaid liberty by grant or preſcription. Adjudged upon demurrer to ſuch a declaration; for the court held, that if the defendant had taken iſſue, it would have been incumbent on the plaintiff to prove a title.

2 Jon. 157. Hart v. Baſſet, Carth. 85. S. C. cited.

So, in an action for ſtopping an uſual and convenient way to his, the plaintiff's, lands, the declaration was held good without ſhewing a title.

Carth. 84. Show. 64. 3 Mod. 41. 3 Lev. 133. S. C. Skin. 65. pl. 10. 175. pl. 5. Hebleth-waite v. Palms.

So, in an action on the caſe for diverting a watercourſe, the plaintiff declared, that the defendant *malitioſè*, &c. *infregit* a certain mill dam, *& perindè* did divert the watercourſe *ab antiquo & ſolito curſu erga* the corn mill of the plaintiff, by reaſon whereof he loſt the profits of his ſaid mill; but did not ſet forth that that water uſed to turn his mill, or that he had any other profit thereof, or that the watercourſe was *antiquus aquæ curſus*, &c. Yet the declaration was held good; the court being of opinion, that the (*b*) poſſeſſion alone was ſufficient to maintain an action againſt a wrong-doer, and that this was of the ſame nature with an action of treſpaſs. But *Holt*, C. J. ſaid, that if the cauſe had been tried before him, the plaintiff ſhould have proved his mill to be an ancient mill, otherwiſe he ſhould have been nonſuit.

(*b*) Where in ſeveral caſes poſſeſſion without property is ſufficient to maintain an action, *vide* Palm. 200. 4 Co. Lutterell's caſe, and title Treſpaſs.

Lev. 179. Sid. 279. 2 Keb. 8. S. C. & Cro. Eliz. 859. S. P.

In *aſſumpſit* it was, in conſideration he permitted the defendant to take the profits of ſuch lands for ſeven years laſt paſt, at his inſtance and requeſt, the defendant promiſed to pay him as much

as

as they were worth; and it was moved in arreſt, &c. that the plaintiff had not ſet forth a title here as he ſhould have done; but *per cur.* it is well enough; and to maintain ſuch an action as this upon evidence, an actual promiſe muſt be proved.

An action upon the caſe was brought for ſtopping a way which the defendant had from ſuch a place over *Black Acre*, where the nuiſance is, unto ſuch a field by name; and it was ruled to be good, without ſhewing what intereſt he had in that field, for it ſhall be intended to be a common field; but otherwiſe, had it been *uſque ad talem clauſum*, there, he ought to ſhew what intereſt he has in the cloſe. Noy, 86.

In an action upon the caſe, ſuppoſing that he was ſeiſed in fee of the manor of *H.*, and of a fair to be held there every Aſcenſion-day, and that the defendant diſturbed him to take toll, &c. the defendant pleaded not guilty, and found againſt him: it was moved in arreſt of judgment, that the declaration was not good, becauſe he does not ſhew a title to the fair by grant or preſcription, and therefore no cauſe of action; but *per cur.* not neceſſary, becauſe only a conveyance to the action, and is not any claim thereof as to the right, as in a *quo warranto*, and the declaration, without ſpecial title therein compriſed, is good. Cro. Jac. 43. 123. Dent v. Oliver, adjudged. [Bennington v. Taylor, 2 Lutw. 1517. Chaſin v. Betſworth, 3 Lev. 190. S. P.]

[An action on the caſe was brought, ſetting forth, that the plaintiff was poſſeſſed of a tenement, and a cloſe of paſture, and a rood of land, &c. in *S. M.*, and that he had right of common in *Mendip* foreſt for his cattle, &c., as thereunto belonging; that the defendant digged and made coney-boroughs in the ſaid foreſt, and ſet nets and gins there, by which his ſheep were damnified; and he was deprived of common, &c. It was objected, that the declaration was not good, for that it reſted merely upon poſſeſſion, and did not ſhew any title to the common, either by grant or preſcription. But the declaration was adjudged to be proper, 1. Becauſe it is an action grounded upon the poſſeſſion againſt a wrong-doer; to which a title would be only an inducement. 2. Title to the common need not be alleged, becauſe it did not appear whether the defendant was owner of the ſoil, or a ſtranger. It is true, if it had been upon ſpecial pleading, as, in treſpaſs for diſtraining his cattle, and the defendant had pleaded, that he was owner of the ſoil, and ſo juſtified the taking, the plaintiff in ſuch caſe muſt have replied (*a*), and ſhewn a title by grant, or preſcription, or ſome conveyance. And laſtly, This matter is not traverſable; for upon the general iſſue a right of common muſt be proved and given in evidence, otherwiſe the plaintiff cannot maintain his action, but *what right* is not material. Strode v. Byrt, 4 Mod. 418. Com. Rep. 7. Skin. 621. S. C. Dorney v. Caſhford, 1 Ld. Raym. 266. S. P. Bean v. Bloom, 3 Will. 456. S. P.

(*a*) So, Vernon v. Goodrich, 1 Str. 6.

So, in an action for diſturbing the plaintiff in the enjoyment of a pew in a church, poſſeſſion and laying it to be appurtenant to a meſſuage (*b*) are ſufficient againſt a mere ſtranger, without laying or proving the plaintiff repaired the pew, or ſhewing any title or conſideration whatever. As againſt the ordinary indeed, who hath *primâ facie* the diſpoſal of all the ſeats in the church, a title muſt be ſhewn in the declaration, and proved. Kenrick v. Taylor, 1 Will. 326.

(*b*) In all caſes, it ſeems neceſſary to claim the pew in the declaration as appurtenant to a meſſuage. Stocks v. Booth, 1 Term Rep. 428.

If

Waring v. Griffiths, 1 Burr. 440.

If a plaintiff have a preſcriptive right of burial in a church, he need not againſt a wrong-doer ſet forth the whole of it: it hath indeed been doubted, whether he may not in ſuch caſe rely merely upon his poſſeſſion

*Vide* the caſes *ſupra*.

But, where a perſon claims a ſervitude upon another's property, it is ſaid in ſeveral caſes that he muſt, againſt the owner of ſuch property, ſet forth and prove the whole of his title. However, later caſes ſeem to have gone otherwiſe.

Sands v. Treſuſis, Cro. Car. 575.

The plaintiff declared, that he was ſeiſed in fee of a mill, and had a watercourſe running in the defendant's land to the ſaid mill, and that the defendant had ſtopped it. This was holden well upon demurrer, without ſhewing any title to the watercourſe.

Winford v. Wollaſton, 3 Lev. 266. Warren v. Sainthill, 2 Ventr. 280. S. P. Blockley v. Slater, 1 Lutw. 119. S. P.

The plaintiff declared, that he was for four years laſt paſt ſeiſed in fee of a parcel of land adjoining to the defendant's meadow, *et ſic inde ſeiſitus per totum tempus prædictum habere, frui et uti debuit quandam viam per quandam januam* of the defendant in the meadow of the defendant *uſque* a cloſe of the plaintiff, and that the defendant ſtopped the gate *cum ſerâ & catenâ;* and upon motion in arreſt of judgment, the declaration was holden to be good, though no title was ſhewn to the way, though the defendant was terre-tenant, and though the charge was againſt common right, and ſuch a charge as could not commence but by grant.

2 Ld. Raym. 804.

In the caſe of the King v. *Bucknall*, Lord *Holt* ſaid, "Where a "man is obliged to make fences againſt another, it is enough to "ſay *omnes occupatores* ought to repair, *&c.*, becauſe that lays a "charge upon the right of another, which, it may be, he cannot "particularly know."

Anon. 1 Ventr. 264.

In an action for not repairing a fence, the allegation was, that the tenants and occupiers of ſuch a parcel of land adjoining the plaintiff's, had time out of mind maintained it, *&c.* It was moved in arreſt of judgment, that the preſcription is laid in occupiers, and yet their eſtates are not ſhewn; and that hath been judged naught in 1 *Cro.* 155. and 2 *Cro.* 665. But the court ſaid, "It is "true there have been opinions both ways, but it is good thus "laid, for the plaintiff is a ſtranger, and preſumed ignorant of "the eſtate; but otherwiſe it is, if the defendant had preſcribed."

Tenant v. Goldwin, 1 Salk. 360. 2 Ld. Raym. 1089. 6 Mod. 311.

So, in an action on the caſe for not repairing a wall, "*debuit* "*reparare*" hath been adjudged ſufficient.

Rider v. Smith, 3 Term Rep. 766. Yelv. 48.

So, in an action for not repairing a private road leading through the defendant's cloſe, that the defendant as occupier is bound to repair.]

In debt upon a leaſe, the defendant may declare *quod dimiſit*, and need not allege a ſeiſin in himſelf when he made the leaſe.

Polyblank v. Hawkins, Dougl. 329.

[In covenant on a leaſe, the plaintiff in ſtating his title ſet forth, that one *S.*, who was ſeiſed in fee, made the leaſe in queſtion, and that on his death the reverſion deſcended to the wife of the plaintiff, as the heir-at-law of *S.*, whereupon he (the plaintiff) became ſeiſed *of the reverſion, as of freehold, in right of his ſaid wife.* On demurrer, the declaration was holden to be ill, for, from his own ſhewing, there was a ſeiſin in fee *in both* in right of the wife.

In

In general, however, in covenant, the plaintiff need not ſet out any title, but begin generally *quod cum dimiſiſſet:* and therefore where a plaintiff had merely ſet out his title imperfectly, as, by omitting the perſon under whom he claimed, it was holden, that this was ſurpluſage, and could be rejected.] Aleberry v. Walby, 1 Str. 229.

In debt againſt leſſee for years for the arrearages of rent reſerved upon the leaſe, he needs not declare that the leſſee entered, for the contract is the ground of the action. 4 Leon. 18.

[In an action againſt a perſon who farms the poſt-horſe duties, under the ſtatute of 27 *G.* 3. *c.* 26. for neglect of duty, the plaintiff muſt aver ſpecifically, that the defendant is the perſon appointed under and by virtue of the act of parliament upon whom the duty is thrown. It is not a ſufficient title to ſtate that the defendant is a collector of the rates and duties *recited* in a certain act, *&c.*] Short v. Pruen, 6 Term Rep. 163.

2. Where the Plaintiff muſt ſhew that he hath performed what was requiſite on his Part.

It is laid down as a general rule, that in all caſes where an intereſt or eſtate commences upon condition, be the condition or act to be performed by the plaintiff, defendant, or any other, and be it in the affirmative or negative, there, the plaintiff ought to ſhew it in his declaration, and aver the performance of it; for the intereſt or eſtate commences in him upon the performance of the condition, and not before. But, when the intereſt or the eſtate paſſes preſently, and veſts in the grantee, and is to be defeated by matter *ex poſt facto*, or condition ſubſequent to the condition to be performed in the affirmative or negative, or to be performed by the defendant or any other; there, the plaintiff may count generally, without ſhewing any performance; and this ſhall be pleaded by him who is to take advantage of it. 7 Co. 10. Lil. Reg. 418.

As, if an annuity of 10 *l. per ann.* be granted to a man when he ſhall be promoted to a benefice, in his demand of it he muſt ſhew that he is promoted; but, if it be granted until he be promoted, there he ſhall have a writ of annuity; and he need not ſay that he is not yet promoted, becauſe the annuity precedes, and the promotion is ſubſequent. Co. 10. Doct. pl. 85.

If, by the ſame deed, each party is to do ſomething advantageous to the other, and on ſuch deed there is not a mutual remedy, the plaintiff in his declaration muſt aver, that he hath performed what was to have been done by him. Sand. 319, 320.

[So, where two acts are to be done at the ſame time, neither party can maintain an action, without ſhewing a performance, or an offer to perform, on his part: for where the performance of the plaintiff is prevented by the neglect or default of the defendant, that is equal to a performance. Kingſton v. Preſton, Dougl. 688. note. Jones v. Barclay, Dougl. 684. Blackwell v. Nash, 1 Str. 535. Goodiſſon v. Nunn, 4 Term Rep. 761. Hotham v. Eaſt India Company, 1 Term Rep. 638. 645.



FH
MVSEVM
BRITANNICVM

Boone v. Eyre, cited 1 H. Bl. 273. note. Duke of St. Alban's v. Shore, *Id.* 270.

And where mutual covenants go to the whole of the conſideration on both ſides, they are in that caſe mutual conditions, and a performance muſt be averred. But it is otherwiſe where they go only to a part, and where recompence may be had in damages.]

Campbell v. Jones, 6 Term Rep. 572.

2 Mod. 309. 5 Co. 10. Cro. Jac. 645. 3 Lev. 41. Show. 391. Comb. 265. *Vide* title Covenant.

And where there are reciprocal covenants, on which each party may bring his action, it is held, that in aſſigning a breach the plaintiff need not ſhew a performance on his part; and on this reaſon, that each hath a remedy, it is held, that reciprocal covenants cannot be pleaded one in bar of another.

Sand. 319. Pordage v. Cole, 2 Lev. 74. Sid. 423. Raym. 183. 2 Keb. 542. S. C. [Trench v. Trewin, 1 Ld. Raym. 125. S. P.]

Thus, a writing was drawn in theſe words: *It is agreed that* A. *ſhall pay to* B. 700 *l. for his land and houſe*, &c., *the money to be paid before* Midſummer; *in witneſs*, &c. It was ſealed by both parties; the money not being paid at the day, *B.* without making or tendering any conveyance of his land, brings an action of debt upon the bill; and reſolved, that it was well brought; and in this caſe it was ſaid, that *A.* might have an action of covenant againſt *B.* for not conveying the land.

Hob. 88. Nichols v. Rainbred, and Hob. 106. S. P. That where there are

*J. S.* brought an *aſſumpſit* againſt *J. D.*, declaring, that in conſideration *J. S.* promiſed to deliver the defendant to his own uſe a cow, the defendant promiſed to deliver him 50 *s.* Adjudged, that the plaintiff need not aver the delivery of the cow, becauſe it was (*a*) promiſe for promiſe.

mutual promiſes, the plaintiff need not aver a performance on his part. Yelv. 134. Mod. 62. Roll. Rep. 336. Vent. 41. Hard. 102. March, 75. Cro. Eliz. 703. Lev. 20, 293. Cro. Eliz. 137. Leon. 186. (*a*) That both promiſes ought to be made at the ſame time, otherwiſe they will be *nuda pacta*. Hob. 88. Cro. Eliz. 137. Leon. 186.

Martinda'e v. Fiſher. 1 Will. 88.

[If the plaintiff declares, that in conſideration he had agreed to deliver cloth to the defendant, the defendant agreed to pay him ſo much in caſe *A.*'s horſe beat *B.*'s, which he avers he did, he need not aver the delivery of the cloth. *Secùs*, if it were in conſideration that plaintiff would deliver cloth, defendant would pay; for in that caſe the delivery muſt be averred.

Luxton v. Robinſon, Dougl. 620.

In *aſſumpſit* on an agreement to forfeit a depoſit of five guineas, and alſo to pay another ſum of 10*l.* if the defendant did not accept poſſeſſion of certain premiſes from the plaintiff, and alſo pay for certain fixtures therein, at a fair appraiſement by two appraiſers; it was adjudged on a ſpecial demurrer, that the declaration was ill, becauſe the plaintiff had not ſhewn his right to the premiſes, ſo that he could have delivered poſſeſſion according to the agreement. As each was to name an appraiſer, he ought alſo to have ſhewn that he had done ſo.]

2 Sand. 107.

In debt on an obligation for payment of money, ſo ſoon as ſeveral bills of coſts are ſettled, it ought to appear by the declaration that the bills were ſettled, or that there was ſome default in the defendant by which means they could not.

3. Where

3. Where general Allegations in the Declaration are ſufficient; and therein, of Miſrecitals and Omiſſions.

Although the plaintiff muſt ſet forth in his declaration every material thing, without which he could not be entitled to his action; yet, herein the law requires no greater certainty, than the nature of the thing is capable of; and therefore, if a contract be made in general terms, the declaration upon ſuch contract may be in the ſame terms: as, if the plaintiff declare, that whereas the defendant was poſſeſſed of the ſixth part of a ſhip, and it was agreed, the defendant ſhould by writing ſell his intereſt to the plaintiff for 600 *l.*, and that the plaintiff ſhould pay 20 *l.* in hand, and the reſidue *ſuper executionem* of the ſaid writing; and that in conſideration the plaintiff had paid the 20 *l.*, and aſſumed to perform the agreement on his part, the defendant did aſſume to perform it on his part; *præd. tamen* the defendant had not performed the agreement on his part: this being on a mutual promiſe, the breach is well aſſigned in the words of the promiſe. 3 Lev. 319. Keech v. Knight.

So, if in an *aſſumpſit* the plaintiff declares, that in conſideration the plaintiff would find and provide for a ſick man all ſuch neceſſaries as he ſhould want, the defendant aſſumed and promiſed to pay, &c., and avers, that he found him neceſſaries amounting to ſuch a ſum, &c. This is a good declaration, without ſhewing in particular what thoſe neceſſaries were, being in the words of the contract; and the adding the particulars would make the record too prolix. 3 Bulſt. 31. Crips v. Bainton, Roll. Rep. 173. S. C.

In *aſſumpſit* for labour and medicines in curing the defendant of a diſtemper, &c. who pleaded *infra ætatem viginti & unius annorum;* the plaintiff replied, it was for neceſſaries generally; and upon demurrer to this replication it was objected, that the plaintiff had not aſſigned in certain how, or in what manner, the medicines were neceſſary; but it was adjudged that the replication in this general form was good. Carth. 110, 111. Huggins v. Wiſeman, 3 Lev. 170. S. P. 3 Mod. 69, 70. & *vide* Cro. Jac. 486. *cont.*

In debt upon an obligation, conditioned to ſatisfy for all goods that an apprentice ſhall waſte, in his replication the plaintiff aſſigned for breach, that he had waſted *diverſa bona ad valentiam* 100 *l.* And adjudged upon demurrer that it was good, without ſhewing what the goods were, for the penalty of the obligation is to be recovered upon any breach; but *per cur.*, it would be otherwiſe in (*a*) covenant where there is to be a recompence for the damages. Lev. 94. French v. Pierce. (*a*) In an action of covenant ſeveral breaches may be aſſigned; otherwiſe, in debt upon an obligation conditioned to perform covenants. Cro. Car 176. & *vide* title Covenant, and the ſtatute 8 & 9 W. 3. c. 10. *whereby it is enacted, that in actions on bonds for non-performance of covenants, plaintiffs may aſſign as many breaches as they think fit*.

In an action of covenant, the agreement was to pay rents at ſeveral days during the term; plaintiff aſſigns breach, that he did not pay the ſeveral rents at the ſeveral days during the term: this was urged to be double, uncertain, and naught; but the court held, that in covenant the plaintiff may aſſign the breach as general as the covenant, though it includes 20 matters; and that here it Lev. 78. Keb. 371. 468. 490. Conyers v. Smith.

might be intended that no one rent was paid upon any one day during the term.

Salk. 139. pl. 5. Ld. Raym. 478. Farrow v. Chevalier.

In covenant by a maſter againſt his ſervant, on a covenant not to buy or ſell without the maſter's leave within two years; the breach aſſigned was, that he had *diverſis diebus & vicibus*, between ſuch a day and ſuch a day, ſold to *H.* and to ſeveral other perſons unknown, goods to the value of 100*l.* After verdict for the plaintiff, it was moved in arreſt of judgment, that the breach was uncertain as to time and perſons; but the court held it certain enough, and that in covenant it is ſufficient to aſſign a general breach.

Cro. Jac. 298.

If a breach of covenant is ſufficiently alleged, the plaintiff need not conclude *& ſic non tenuit conventionem in hac*, &c., for that is but repetition.

9 Co. 60. between Bradſhaw v. Salmon. Cro. Jac. 304. S. C. adjudged; and that the defendant muſt ſhew that he was

If *A.* leaſes to *B.* for years, and covenants that he hath full power and lawful authority to leaſe, *&c.*, and in an action upon this covenant *B.* ſays, he had (*a*) not full power and lawful authority to leaſe, *&c.*, the breach is well aſſigned, for he hath well purſued the words of the covenant *negative*; and what eſtate he had lies more in the notice of the leſſor than of the leſſee; and therefore he ought to ſhew what eſtate he had at the time of making the leaſe, that it may appear that he had full power.

ſeiſed in fee, and then the plaintiff muſt ſhew a ſpecial title in ſome body elſe; but the covenant being general, the general aſſignment of a breach *primâ facie* is good. (*a*) That he was not lawfully ſeiſed in fee of an indefeaſible eſtate. Cro. Jac. 369. Raym. 14, 15.

Jon. 218. Symons v. Smith. Cro. Car. 176. S. C. adjudged, & *vide* Hard. 132, 133.

If *A.* covenants to permit *B.*, his heirs and aſſigns, to take and enjoy the rents, iſſues and profits of certain lands, and in an action upon this covenant the plaintiff aſſigns for breach, that *A.* took the profits, & (*b*) *non permiſit B.* to enjoy, *&c.* This breach is well aſſigned; for the taking the profits by *A.*, is a ſpecial diſturbance.

(*b*) But *non permiſit* only is too general. 8 Co. 89. b. 91. b. *& vide* And. 137. 2 Vent. 278.

Sherwood v. Noone, 1 Leon. 250.

[Where the defendant covenanted, that he would not take wood without the aſſent *or* aſſignment of the leſſor or his aſſigns, it was holden not to be ſufficient to allege in the declaration that the defendant took wood *without the aſſignment* of the leſſor or his aſſigns; for it might be with *their aſſent*, and ſo no breach.

Alcberry v. Walby, 1 Str. 229.

But, where the covenant was, "to pay or cauſe to be paid," that the defendant had not paid, was holden to be a ſufficient aſſignment of the breach, without adding "or cauſed to be paid," for if the defendant had cauſed to be paid, he had paid.

Foſter v. Pierſon, 4 Term Rep. 617.

In aſſigning a breach of covenant for quiet enjoyment, the plaintiff alleged, that at the time of the demiſe to him, *A. B.* had lawful right and title to the premiſes, and having ſuch lawful right and title entered, *&c.*, and evicted him, *&c.*, and adjudged ſufficient, though he did not ſhew what title *A. B.* had, or, that he evicted the plaintiff by legal proceſs.]

Mod. 223. Boſcawin v. Cook, adjudged upon

If *A.* grants a rent to *B.* and his heirs for the life of *C.*, to the uſe of *C.*, and covenants with *B.* to pay the rent *ad opus & uſum* of *C.*, and in an action upon this covenant *B.* aſſigns the breach in

in not paying the rent to him, *ad opus & usum* of *C.* this breach is well assigned in the words of the covenant, though a negative pregnant. a special demurrer. 2 Mod. 138. S. C. adjudged, and said, that if it was paid to *C.*, which is a performance in substance, the defendant ought to have pleaded it; otherwise it shall not be intended.

In trover for a bond the plaintiff need not shew the date; for the bond being lost or converted, he may not know the date; and if he should mistake it, it would be a failure of his suit. Cro. Car. 262. Wilson v. Chambers, adjudged, after a verdict for the plaintiff, and affirmed upon a writ of error. Cro. Jac. 638. S. P. adjudged upon demurrer. Hard. 111. Like point in trover for letters patent. Brown. Ent. 356. a like precedent. *Vide* Ent. 265. a like precedent.

If in an action upon the case against a lighterman, the plaintiff declares the defendant so negligently governed his lighter, that it took water, and spoiled the goods of the plaintiff *ad damnum*, &c., the declaration is good, without a more special allegation how they were spoiled. Palm. 523. Symons v. Darknol.

So, it hath been held, that a declaration against a lighterman is good, though not alleged in the declaration that he is a common lighterman; as also against a carrier, without alleging that he is a common carrier. Palm. 523. Sid. 245. S. P. yet said to be the best way to recite it.

A statute which does not give the action, but is only in affirmance of the common law, need not be recited; as on the statute of *Marlbridge* (52 *H.* 3.) the plaintiff may declare, that his father was seised in fee of certain lands, and died seised; and that the lands descended to him; and the defendant had occupied them as guardian in socage, without any recital of the statute. Cro. Car. 219.

[If a plaintiff in his declaration undertake to recite a statute, which statute is the ground of his action, and he misrecite it, the variance is fatal. Rann v. Green, Cowp. 472.

In an action of covenant it is not only unnecessary, but likewise improper to set forth the whole of the deed. So much only as is necessary to entitle the plaintiff to his action ought to be shewn; nor need that part be recited literally, but may be set forth according to its substance and effect; though it is usual and advisable to deviate as little as may be from the expressions in the instrument.] Dougl. 657. Cowp. 665. 727.

In an action of debt for an escape of one in execution, it is not sufficient to shew only that a *capias ad satisfaciendum* issued, by virtue of which he was taken, &c., but the plaintiff must shew how he recovered judgment, and thereupon a *capias ad satisfaciendum* issued, &c., for as to the judgment the defendant may plead *nul tiel record*; and though, if there was no judgment, the sheriff was bound to execute the writ, and perhaps might be fined for the escape, yet, if there was no judgment, there was no debt or duty to the plaintiff. Sand. 38, 39. Jones v. Pope. Lev. 191. 2 Keb. 93. Sid. 305. S. C.——That the cause for which arrested must be shewn and proved, 2 Lev. 85.——But for what is necessary to be shewn in the declaration, *vide* Carth. 149. Lutw. 110, 111. 2 Show. 17. pl. 10. Salk. 272. pl. 3. 5 Mod. 414.

If in an action for the escape of *B.*, against the warden of the *Fleet*, the plaintiff declares, that *B.* was committed in execution to him, he must conclude *prout patet per recordum*; for that is triable 3 Lev. 393. Norden v. Fox, & *vide* 1 Lut. 111.

and 6 Mod. 8, 9. that where a by the record, though ſaid to be helped by the defendant's pleading, that he ſuffered him to eſcape with the leave of the plaintiff.

matter of record is the foundation or ground of the ſuit of the plaintiff, or of the ſubſtance of the plea, there, it ought to be certainly and truly alleged; *aliter*, where it is but conveyance; as in eſcape, the not concluding *prout patet per recordum*, not being the gift of the action, is aided.

Noy, 72. *Vide* tit. Eſcape. In an action for an eſcape on meſne proceſs, the plaintiff muſt not only ſhew, that *ad largum ire permiſit*, but alſo that *non comperuit ad diem*; becauſe the party being bailable, the ſheriff might lawfully ſuffer him to go at large; though in ſuch action upon an eſcape after execution, it is ſufficient to ſhew that *ad largum ire permiſit*.

Moor, 834. 2 Bulſt. 236. Roll. Rep. 47. In action for the eſcape of one committed by commiſſioners of bankrupt, for refuſing to anſwer interrogatories, the plaintiff ſet forth, that upon the petition of him and other creditors, the Lord Chancellour by commiſſion *dedit poteſtatem plenam* to the commiſſioners *vigore ſtatuti* to examine, &c., and that the commiſſioners offered him interrogatories, &c. And though it was objected that the office of the chancellour is miniſterial only, and that it is the ſtatutes which give the power, and it was not ſhewn what the interrogatories were; yet the declaration was adjudged good; for it is *per commiſſionem dedit*, &c. *vigore ſtatuti*; and it ſhall be intended that the interrogatories are lawful till the contrary appears.

Mod. Caſes, 78. Tucker v. Goldburne. In debt upon an aſſignment of a bail-bond, taken by the ſheriff who had arreſted the defendant on a *capias*; it was objected, that the plaintiff had not in his declaration ſet forth the *capias*, or the *teſte*, or return of any *capias*; and this on a ſpecial demurrer was held fatal, it being the *capias* that gives life to the bond.

Leon. 72. (*a*) The plaintiff may declare, &c. that *inter alia* it was awarded; *per* Lit. Rep. 312. If in an action of debt upon an award the plaintiff declares, that the arbitrators did make an award, that the defendant ſhould pay unto the plaintiff 10 *l.*, &c., this is a good declaration, though nothing is ſhewn to have been awarded on the other ſide; for it is ſufficient (*a*) for the plaintiff to ſet forth that part of the award that entitles him to his action.

But 1 Mod. 36. *per* Twiſden *cont.*; but for this *vide* title Award.

Cro. Eliz. 272. Tenacy v. Brown. If in an *aſſumpſit* the plaintiff declare, that the defendant, in conſideration that the plaintiff would forbear him one week, aſſumed, &c., and aver, that he did forbear him one week, but ſay not one week following; yet this is a good declaration, for it muſt neceſſarily be intended ſo.

Yelv. 49. Allen v. Randall. If in an *aſſumpſit* the plaintiff declare, that whereas there was a certain bargain between the plaintiff and the defendant for certain woods for which the plaintiff was to pay 20 *l.* at a day after; and that the defendant, in conſideration that the plaintiff *aſportaret ſufficiendum hominem fore obligat.* to the defendant for the payment of the ſaid 20 *l.*, did aſſume and promiſe that the plaintiff ſhould enjoy the ſaid wood, &c., and the plaintiff aver *quod aſportavit B. ſufficientem hominem fore obligat.* to the defendant, &c. yet this is no good declaration; 1*ſt*, Becauſe it is not ſhewn (*b*) how he was ſufficient, ſo that it may appear to the court to be according to the agreement;

(*b*) *Vide* Hob. 65, 70. 77. 1 Mod. 77.

agreement; 2*dly*, Becauſe it is not in fact ſhewn that *B.* (*a*) did become bound, or that *obtulit ſe obligari*, and perhaps he came to be bound, but being there refuſed.

(*a*) In an action upon promiſe to repay money laid out, or to be laid out, for goods for the uſe of the defendant, the plaintiff need not aver, that the goods came to the hands of the defendant. Bulſt. 169. adjudged.

If in an *aſſumpſit* the plaintiff declare that his father was ſeiſed of the manor of *D.*, and of divers lands, *&c.* in *D.* in fee, and in conſideration that the plaintiff, together with his father *ſigillaret quandam indenturam per quam* his father *barganizaret*, &c. the ſaid manor and lands, the defendant did aſſume, *&c.*, and allege, that the plaintiff ſuch a day *ſigillavit indenturam prædict.*; yet the defendant, *&c.*; this is no good declaration; for *diverſa terras et tenementa in* D. are uncertain, and comprehend not all his lands in *D.*, and therefore the plaintiff ought to have ſhewn in certain, and particularly what lands were compriſed within the indenture. Yelv. 110. Lord Mordant v. Walden, adjudged.

Alſo, in the above caſe it was held, that the allegation that he had ſealed *indenturam prædict.* was not good; for *prædict.* ought to refer to ſome certainty before, but (*b*) *quandam indenturam* is altogether uncertain; and the plaintiff ſhould have ſhewed in certain, that he ſealed ſuch an indenture *per quam* the plaintiff and his father *barganizaverunt*, &c. *de verbo in verbum*, as laid in the premiſes of the declaration. Yelv. 111. adjudged. (*b*) The plaintiff declared, that whereas *quædam pars domus*, &c. was out of repair, the defendant, in conſideration that the plaintiff would repair *eandem partem* of the ſaid houſe, aſſumed and promiſed, &c. and avers, that he did repair *eandem partem*; and though it was objected, the plaintiff ſhould have ſhewed which part of the houſe was out of repair, yet after a verdict, it was adjudged for the plaintiff. 2 Leon. 53. 3 Leon. 91.

But, if a perfect indenture in date, in the nomination of the parties and limitation of the land, had been mentioned before, it had been ſufficient to ſay, that they ſealed *indenturam prædict.*, becauſe by the premiſes it appears there was *in facto* a true and perfect indenture. Yelv. 111. *per cur.*

The plaintiff declares, whereas he and the defendant were joint executors, and the defendant had received all the eſtate of the teſtator, and the plaintiff threatened to ſue the defendant for one moiety, the defendant, in conſideration the plaintiff would forbear, *&c.* and would ſhew an account concerning the teſtator's eſtate, did aſſume, *&c.*; and the plaintiff avers, that he did ſhew *quoddam computum*; and though not ſaid *computum prædict.*, yet after a verdict for the plaintiff it was adjudged for him. Raym. 203, 204.

If in an *aſſumpſit* the plaintiff declare, that the defendant, in conſideration that the plaintiff would leaſe certain lands to the defendant, rendering 10*l. per ann.*, the defendant did aſſume and promiſe to, *&c.*, and aver, that he did make a leaſe of the ſaid lands, but do not ſay that it was rendering 10*l. per ann.*; this is no good declaration. 3 Bulſt. 35. Lee v. Adams, adjudged after verdict for the plaintiff.

If in an *aſſumpſit* the plaintiff declare, that whereas the defendant had committed a felony, and thereupon had requeſted the plaintiff to do his endeavour (*c*) to procure a pardon for the defendant; and thereupon the plaintiff, by all the means he could, and many days labour, did his endeavour to obtain a pardon for Hob. 105, 106. Lampleugh v. Blaithwait, adjudged *per totam cur.*

*prater* Warburton; and the rather, becauſe it was after verdict. Moor, 866. Brownl. 7. S. C.

the ſaid felony, *viz.* in riding and journeying, at his own charge, from *London* to *N.* where the king was, and ſo to and from *Newmarket* to obtain a pardon, *&c.*; this is a good declaration (*d*), though nothing in particular is laid to be done, but only riding up and down, and nothing done when he came there; for an endeavour in general is expreſsly laid, and particulars ought to be ſet forth for form's ſake only; for though upon the trial he could have proved no riding nor journeying, yet any other effectual endeavour, according to the promiſe, would have ſerved.

(*c*) Stile, 465. Like point, where the defendant did his endeavour to reconcile differences, &c. (*d*) But if the plaintiff declare, that the defendant, in conſideration the plaintiff had done him *multa beneficia*, aſſumed and promiſed, &c. this is not good. Vent. 27. Sid. 413. adjudged, after verdict for the plaintiff; *& vid.* 2 Keb. 552.

Roll. Rep. 382.

In *aſſumpſit* the plaintiff declared, that in conſideration the plaintiff would deliver all the corn in a certain barn, the defendant did aſſume and promiſe, *&c.*, and avers, that he did deliver all the corn in the barn, but does not ſhew that there was any corn there; and it was agreed *per curiam*, that had this been on a demurrer, the declaration would not be good; but that being after a verdict, upon *non aſſumpſit* pleaded, by which iſſue it was admitted there was corn there; it was adjudged for the plaintiff, and afterwards affirmed upon a writ of error.

Cro. Jac. 503. Lenerett v. Rivett, adjudged.

If in an *aſſumpſit* the plaintiff declare, that whereas *J. S.* had acknowledged himſelf to be indebted to the plaintiff in 10*l.* for divers treſpaſſes, which 10*l.* the plaintiff at the defendant's requeſt had accepted; and that the defendant, in conſideration the plaintiff would acquit and diſcharge the ſaid *J. S.* of the ſaid debt, and would permit the ſaid *J. S.* to carry out of the plaintiff's houſe certain goods, did aſſume and promiſe to pay the ſaid 10*l.* to the plaintiff; and allege *in facto*, that he did acquit and diſcharge the ſaid *J. S.*, and did permit the ſaid *J. S.* to carry away the ſaid goods: this is no good declaration, becauſe he doth not ſhew how he did acquit the ſaid *J. S.*, for it could not be without deed, which ought to have been particularly ſhewn; and though the performance of the other part of the conſideration is ſufficiently averred, yet that will not help it.

Raym. 400. Agilonby v. Towerſon, adjudged, after verdict for the plaintiff. Moor, 595. Like point adjudged.

If in an *aſſumpſit* the plaintiff declare, that whereas there was a certain diſcourſe between the plaintiff and defendant concerning a marriage to be had between the nephew of the plaintiff and the niece of the defendant; and thereupon the defendant, in conſideration the plaintiff would do his endeavour, and labour to perſuade his nephew to marry the niece of the defendant, did aſſume and promiſe to pay to the plaintiff, *&c.*, and aver, that ſuch a day, and divers other days and times *omnibus modis quibus poterat conatus fuit & elaboravit ſuadere* his ſaid nephew to marry the defendant's ſaid niece, *&c.*, this is a good declaration, without ſhewing in particular how he did his endeavour; for if he ſhould ſet forth his ſeveral ſpeeches to his nephew in the praiſe of the young lady, or the advantages of a married life, *&c.*, the record would be too long.

4. Where

4. Where the Averments muſt be poſitive and expreſs in the Declaration.

The declaration muſt contain ſuch certain affirmation, that it may be traverſed; for if there be no certain affirmation to make the declaration itſelf traverſable, it will not be cured after a verdict, becauſe it is a defect in ſubſtance: as, if the declaration be *quod cum* the defendant (*a*) aſſaulted him, and the defendant plead not guilty, here is nothing put in iſſue, for the pleadings have affirmed nothing; and though the defendant be found guilty, yet cannot the plaintiff have judgment, becauſe nothing is poſitively affirmed: but, if the plaintiff declare *quod cum* the defendant *conceſſit ſe teneri*, or *quod cum mutuatus fuiſſet & non ſolvit*, or, *quod cum dimiſit*, the defendant *ejecit;* in theſe caſes there is a poſitive charge upon the defendant; and the *quod cum* being a branch of the whole period, and making one ſentence with the latter part of it, it is a poſitive affirmation, and therefore being equally poſitive, it is equally traverſable with the latter part, and therefore a man may plead *non eſt factum*, *non mutuatus*, *non dimiſit;* becauſe, though theſe come under the *quod cum*, yet, taken together with the reſt of the ſentence, being poſitive, they make ſubſtantive iſſues of themſelves.

Co. Lit. 303. Plow. 128. Cro. Jac. 361, 362. 2 Buiſt. 214. Yelv. 121. Cro. Eliz. 33. 441. Co. Ent. 161. 2 Sand. 319. (*a*) 2 Lev. 206.

If on a demiſe the plaintiff declare, *quod cum per quandam indenturam teſtat. exiſtit quod dimiſit*, this hath been held ill after a verdict; becauſe there is no poſitive affirmation that there was a demiſe; and ſo he hath not ſet forth a demiſe in a manner that it might be traverſed, for the traverſe muſt be of the demiſe, and not of the indenture; but if in covenant he declare, *quod cum per quandam indenturam teſtat. exiſtit*, that the defendant did covenant, this, with a *profert*, is good; becauſe when he ſays the indenture atteſts that he did covenant, this is a certain allegation there was ſuch an indenture, and the indenture only is traverſable on the iſſue of *non eſt factum*.

Lutw. 535. 877. & *vide* Lev. 12. 75. Sand. 275.

So it hath been held, that *licet* is an affirmation; for what is contained under it, as *licet ad hoc faciend. ſæpius requiſit.*, is a poſitive affirmation that there was a requeſt.

Sand. 116. Lev. 194. 2 Vent. 278. Dyer, 257.

In debt on the ſtatute 12 *Car.* 2. *c.* 25. for ſelling wine without a licence, the plaintiff began his declaration by way of recital, *pro ſe*, viz. *quod cum* the defendant at ſeveral times, between ſuch a day and ſuch a day, had ſold wines by retail by the pint, *&c.;* on the general iſſue pleaded, and verdict for the plaintiff, it was moved in arreſt, that the declaration was not poſitive, but by way of recital only, and ſo doth not directly charge the defendant with the crime intended: *ſed per curiam*, The plaintiff ſhall have judgment; for all the precedents in the like caſes are after this manner; as, in debt upon the ſtatute of tithes, *&c.* Moreover, this is an action of debt, wherein the offence is only an inducement to the action; for it is the non-payment of the penalty which is the original cauſe.

Carth. 216. Show. 337. Mullacke *qui tam* v. Speering.

In

2 Salk. 636. pl. 2. Hore v. Chapman.

In treſpaſs the plaintiff declared, *quare* vi & armis clauſum fregit*, and after verdict for the plaintiff judgment was arreſted; for *quare* is not poſitive, but interrogatory, and much worſe than *quod cum*.

* This is the form in the writ, but the count muſt contain a poſitive allegation.

For this *vide* Roll. Abr. 4. Cro. Car. 254, 487. 2 Sid. 127. 4 Co. 18. Dyer, 25. 286. Allen, 92. 2 Bulſt. 291.

It hath been held a good declaration to ſay, *quod defendens quendam canem ad mordendum oves conſuetum ſcienter retinuit*, without ſaying, *quod retinuit quendam canem ſciens canem prædict. ad mordendum oves conſuetum*, for this is tantamount, for the word *ſcienter* goes to all the precedent matter; and the court ſaid, the *ſciens* was not † traverſable, but ought to be proved in evidence, and that otherwiſe the action did not lie.

3 Bulſt. 76. Sid. 21. Roll. Rep. 43. 193. —— In caſe for ſelling two oxen, affirming they were his, the defendant's, whereas in truth they were the property of *J. S.*, without alleging, that he *ſciens* they were the property of *J. S.*, yet the declaration was held good. Carth. 90. ——† The general iſſue is in fact a traverſe of the *ſciens*, for unleſs the plaintiff on the trial prove the defendant knew his dog was accuſtomed to bite ſheep, his cauſe of action falls to the ground, as in ſuch caſe the defendant is not guilty of any thing which can entitle the plaintiff to an action.

Noy, 21.

In debt upon an obligation, the condition whereof was to perform all covenants compriſed within certain indentures, bearing even date with the ſaid obligation, and, in truth, both obligation and indentures were without date; it was held, that the plaintiff ought to have averred a date of the obligation, and that the indentures bore equal date therewith.

Yelv. 18. Soprani v. Skurro, adjudged.

If in an *aſſumpſit* the plaintiff declare, that whereas it was agreed between the plaintiff and one *A.*, that the ſaid *A.* ſhould leaſe a certain houſe to one *B.* for ſeven years; and it was alſo agreed, that *B.* during the ſaid term, ſhould repair the houſe with tile and ſlate only, and thereupon an indenture was drawn; but becauſe there was a covenant therein, that *B.* ſhould be bound to all manner of reparations, *B.* refuſed to ſeal the ſaid indenture, and the plaintiff refuſed to ſeal a bond for performance, *&c.*; and further ſhew, that in the ſaid houſe there was a great wall, part whereof was ruinous, and likely to fall during the ſaid term; and that the defendant, in conſideration that the ſaid *B.* would ſeal the ſaid indenture, and the plaintiff would ſeal the ſaid bond, did aſſume and promiſe, that he the ſaid defendant would maintain and uphold the ſaid wall *durante prædict. termino 7 annorum*, and aver, that the ſaid *B.* the ſaid indenture, and the plaintiff the ſaid bond, did thereupon ſeal; and in fact ſay, that the ſaid wall, during the ſaid term, did fall, *&c.*; this is no good declaration, becauſe not expreſsly averred that *A.* did demiſe the ſaid houſe; and if there was no demiſe, it was not poſſible for the defendant to repair it during the term; and, for any thing that appears, the indenture was ſealed only on the part of the leſſee, and not on the part of the leſſor.

Yelv. 38. Heyford v. Reeve, adjudged.

If in an *aſſumpſit* the plaintiff declare, that whereas the defendant had diſtrained ſix oxen of the plaintiff's for a quit-rent due to the bailiffs of *B.*, and thereupon the defendant, in conſideration that

that the plaintiff would pay the money for the redemption of his ſaid cattle, did aſſume and promiſe, upon requeſt, to ſhew to the plaintiff, or to ſuch other perſon or perſons as he ſhould name, a ſufficient record to charge the ſaid lands with the ſaid quit-rents; and allege, that he appointed *B.* to ſee the ſaid record, and requeſted the defendant to ſhew it *B.* accordingly; but that the defendant had not ſhewn to the ſaid *B.* any ſufficient record to charge the ſaid lands; this is a good declaration; for though the ſufficiency of the ſaid record is not triable *per pais*, and the plaintiff might have averred a breach generally, *ſcilicet*, that he did not ſhew any record, yet this is ſufficient and moſt proper for the plaintiff to lay the breach according to the promiſe; and in this caſe the defendant may plead, that he did ſhew *tale recordum* reciting it, and conclude, which was ſufficient; and thereupon the plaintiff may demur, and put the ſufficiency thereof to the judgment of the court.

If in an *aſſumpſit* the plaintiff declare, that the defendant, in conſideration of, *&c.* aſſumed and promiſed to take the ſon of the plaintiff to be his apprentice for ſeven years, and to find him meat, drink, and apparel, *&c.*, during the term, but aver, that he did not find him meat, drink, and apparel, *&c.*, but do not aver that he did put him, or that the defendant did accept him as his apprentice; this is no good declaration; for it ought to appear that he was his apprentice, elſe the defendant was not bound to provide for him. Cro. Jac. 406. 3 Bulſt. 221. Roll. Rep. 414. Talker v. Wrigg.

If in an *aſſumpſit* the plaintiff declare upon a promiſe made by the defendant, to pay 50*s.* to the plaintiff when the defendant ſhould have received the money, and aver, that the defendant hath received the money, but yet hath not paid, *&c.*; this is no good declaration, becauſe it doth not appear how much money the defendant hath received, and perhaps he hath not received ſo much as 50*s.* and though the promiſe is general, yet the breach ought to be laid ſo as to be adequate to the conſideration *. Mod. 169. agreed *per cur.*, but being after a verdict adjudged for the plaintiff. * The beſt method would have been to have declared generally, that the defendant was indebted to him in 50*s.* for money had and received by defendant to the plaintiff's uſe, and being ſo indebted, he promiſed to pay, and then, on proving any part received, the plaintiff would have been entitled to his verdict, and the declaration would not be liable to any exception.

If in an *aſſumpſit* againſt an executor the plaintiff declare, that the teſtator of the defendant, in conſideration of, *&c.*, did aſſume and promiſe that he would leave the wife of the plaintiff as good a portion as he ſhould give to any of his children; and aver, that the teſtator to ſuch a daughter *dedit* ſuch a portion, but did not leave, *&c.*; this is no good declaration, becauſe it does not appear when he did give this portion, and perhaps it might be before the promiſe. Latch, 203. by the Judges againſt one, after verdict.

## 5. Of the Certainty required in the Deſcription of the Thing declared for.

The law requires no greater certainty than the (*a*) nature of the thing will admit of; as, where an action is brought for things not ſubject For this *vide* tit. Treſpaſs. (*a*) That

where the thing is well described, the court ought not to be too strict in scanning the words; and that if the thing is so described, that the jury may know what is meant thereby, it is well enough. Stile, 136. 235.

subject to distinction by number, weight, or measure; as, in trespass for breaking his close with beasts, and eating his peas, without saying how much; yet this declaration hath been held good, because no body can number or measure the peas that beasts can eat.

For this *vide* tit. Trover and Conversion.

So, where there are several parts which compose an aggregate body, there, it is sufficient to mention the body, and it is not necessary to ascertain the several parts; as, trover for a ship and sails is good, because the sails go to make up the aggregate body; but if it had been for sails only, it would not have been good without specifying the number and quality: so, trover lies for a library of books *.

* *Sed qu.?*

Raym. 2. Seaman v. Barns, adjudged.

If in trover the plaintiff declare for two pair of pot-hooks, &c., and hangers; this declaration is not good, because of the uncertainty of the word hangers; and they cannot be intended such upon which the pot-hooks used to hang, because they do not immediately follow the word pot-hooks; but there are several other words between.

*Vide* tit. Trover.

So, trover for a beam, and scales and weights, is not good for the weights, because there may be more or less of the weights used with the scales, and therefore altogether uncertain as to the quantities or weights of them.

2 Sand. 74. Taylor v. Wells, adjudged.

If in trover the plaintiff declare *pro decem paribus velorum & tegulorum, Anglice* curtains and vallance; this is a good declaration, and certain enough, and shall be intended for ten pair of curtains, and ten of vallance; and in such artificial things there needs no other description, than to name them by their usual names by which they are commonly called, without shewing the quantity of yards or stuff of which they are made.

*Vide* tit. Trover, and the several authorities there cited.

Where a thing is laid in the declaration by way of aggravation, though such allegation is uncertain, or that circumstance is not proved to the jury, yet this shall not arrest the judgment; because the gist of the action is the thing itself in demand, and the aggravation is only the manner of doing it; and though this may increase the damage something, yet it is not to be out of proportion to the thing in demand; as, if trover be brought for a box of writings †, and charters or vestments, this is good, because the trover is for the trunk, and for the detention of the goods therein, which are withheld by the detention of the trunk, but not for the value of the goods; and therefore anciently they held that trover lay only for a trunk locked, but now they admit it though the trunk be not locked, because the detaining is still the same.

† If for writings, the plaintiff perhaps had better sue in detinue, as on recovery in that action he will be entitled to a return of the things in specie, besides damages for the detention.

Keb. 825. Prior v. Dawkes.

In an action upon the case for setting an house on fire *per quod* (amongst divers other goods) *ornatus & equis aratris & carucis amisit* was held certain enough: so, if he had mentioned only *diversa bona*; for when a man's house is burnt, he cannot set forth the certainty of the goods he lost.

But,

But, where in an action on the ſtatute of *hue and cry*, the plaintiff declared that he was robbed of a certain ſum of money, *ac diverſa bona & catalla in cuſtodia ipſius*, to the value of 30*l.*, and becauſe he had not ſet forth the goods particularly, and that he had not likewiſe alleged that they were his goods, it was held, that as to this part he could not have judgment. 2 Sand. 379.

Declaration in treſpaſs for breaking his cloſe and taking away his fiſh, without expreſſing either the number or nature of them, was held inſufficient: but, in an indictment for taking fiſh out of a pond, the number need not be expreſſed, for damages are not to be recovered; but the party is to be fined according to the circumſtances of the fact, and not according to the number of the fiſh. 5 Co. 34. Playter's caſe. Vent. 272. *& vide* 1 Vent. 329.

So, treſpaſs *quare arbores ſuccidit ad valentiam*, &c., was held inſufficient for not expreſſing the kind of trees. Vent. 53.

## 6. Of the Declaration's being good in Part, and void in Part.

It ſeems to be now agreed, that if a declaration be good in part, though bad as to another part, that the plaintiff is entitled to judgment, for ſo much as is well alleged, eſpecially, if it be not of an (*a*) entire demand: alſo, where the jury find greater damages than the party declares of, the court may, to prevent error, give judgment for ſo much as the party declares of, *nullo habito reſpectu* to the reſt: alſo, the party may (*b*) releaſe the overplus, and take judgment for the reſt. Roll. Abr. 784, 785. 10 Co. 115. Yelv. 45. 2 Show. 103. (*a*) *Vide* 1 Vent. 27. Hob. 178. 189.

That if one brings an action for two things, and of his own ſhewing it appears, that he cannot have an action for one of them, or a better writ, there, the writ ſhall be well for that part for which it is good. 11 Co. 45. Godfrey's caſe. (*b*) Where the plaintiff may releaſe damages for part, and take judgment for the reſt, *vide* F. N. B. 107. Moor, 281. Leon. 92. 2 Bulſt. 280. Brown. 235. Stile, 364. Hard. 58.

As, where the party avowed for 5*l.* rent, and a *nomine pœnæ* for non-payment at the day, but laid no actual demand of the rent, the avowry was held naught as to the *nomine pœnæ*, becauſe it could not be forfeited without a demand of the rent; yet he had judgment for the return of the cattle, becauſe he had a lawful cauſe to diſtrain for rent arrear, and the demands were ſeveral. Hob. 133. Howell v. Sambeck.

So, where the plaintiff brought an action of debt upon the ſtatute of uſury, and declared, that the defendant *corruptivè* did lend 40*l. cont. formam ſtatuti*, and ſuch a day did alſo lend 20*l. contra formam*, &c., but did not ſay *corruptivè;* upon *nil debet* pleaded the plaintiff had a verdict, and it was moved in arreſt of judgment that the declaration was not good for the laſt 20*l.* becauſe it wanted the word *corruptivè;* but, notwithſtanding, the court gave judgment for what the plaintiff had well declared, and a *nil capiat per billam* was entered as to the reſidue. Cro. Jac. 104. Woody's caſe. 1 Saund. 286.

So, if in treſpaſs the plaintiff declare for taking the mare of the plaintiff, and ſeveral goods, but do not ſay of the plaintiff, and thereupon the defendant demur, the plaintiff may have judgment for the mare, and releaſe the action for the reſt. Raym. 395. Cutworthy v. Taylor.

So, if an action of debt be brought upon ſeveral bonds, and it appear that one is not due, the plaintiff may recover the reſt. Hob. 178. Sand. 286.

In

Roll. Abr. 785. Cro. Car. 458.

In ejectment, if (a) part of the things be well demanded, and others not, and a verdict be given for the plaintiff for the whole, and entire damages, the plaintiff may releaſe all the damages in that which is not well demanded, and pray judgment for the reſidue.

(a) As, in ejectment of land and a free fiſhery, becauſe an ejectment does not lie of a free fiſhery. Cro. Jac. 144. 146. 1 Roll. Abr. 784.——So, in an *ejectione cuſtodiæ & hæredis*, where it does not lie of the cuſtody of the heir, but of the land only. Dyer, 369. 10 Co. 130. 5 Co. 108. 2 Bulſt. 28.——So, in an ejectment of a meſſuage, cottage, and tenement, if it be found for the plaintiff, and one entire penny damages given to the plaintiff for the whole, becauſe an ejectment does not lie of a tenement, the plaintiff may releaſe all the damages, for that it is entire, and have judgment for all the land, ſaving the tenement. Cro. Eliz. 119. 3 Leon. 128. 2 Bulſt. 28. Stile, 30.

Roll. Abr. 784. Aſhford's caſe. 2 Sand. 286 Like point.

In a writ of debt for 100 *l.* againſt an executor, if the plaintiff count upon an obligation for 99 *l.*, and upon a *mutuatus* by the teſtator for 20 *s.*, and upon the iſſue the jury find for the plaintiff in the whole, and aſſeſs damages entire, where it appeared no action lay againſt the executor upon the *mutuatus* of the teſtator; yet, if the plaintiff releaſe the 20 *s.* and all the damages, he may have judgment for the reſidue.

Roll. Abr. 785. Barber v. Pomeroy, Stile, 175. & *vide* Allen, 29.

In debt for rent the plaintiff declared for more than was due upon his own ſhewing, and upon *nil debet* pleaded, the plaintiff had judgment, and damages and coſts; and it was moved in arreſt of judgment, that the plaintiff had made an (b) entire demand for rent to a certain ſum, when it appeared that he could not have an action for ſo much; yet the court held, that he might releaſe the ſurplus and damages, and take judgment for the reſidue.

(b) In all actions of debt the plaintiff is privy to the ſum in demand; and therefore ought at his peril to declare for the true debt; and the reaſon why he ought to demand the very ſum is, becauſe if he ſhould do otherwiſe, and recover, he might afterwards bring an action for the true ſum, and ſo the defendant would be doubly charged; and therefore in debt on a bond, if the plaintiff declares for leſs than is due, he ſhall never have judgment. 2 Roll. Rep. 54, 55. 5 Mod. 213. cited. [It is not true, that in debt the plaintiff ſhould demand the very exact ſum due, that he cannot recover any other ſum than that which he demands. Many inſtances might be given where this action lies, and yet where it is impoſſible to ſtate the demand with preciſion, as, in debt againſt a tenant who holds over, under the ſtat. of 4 G. 2. c. 28. for *double the value of the land*; or in debt for *treble the value* for not ſetting out tithes, under the ſtat. of 2 & 3 E. 6. c. 13.; or, for the *value of foreign money*. In all theſe caſes the extent of the demand is uncertain at the commencement of the ſuit; the *value* is to be found by a jury. But if the declaration import a title to a fixed, groſs ſum, to a duty numerically certain, there, the evidence muſt ſhew a right to that very ſum, elſe the very giſt and foundation of the action fails. But this is not peculiar to this ſpecies of action: in *aſſumpſit* as well as debt the caſe proved muſt be conſiſtent with the declaration; the proof muſt be commenſurate with the allegation. Walker v. Whitter, Dougl. 6. Aylett v. Lowe, 2 Bl. Rep. 1221. Rudder v. Price, 1 H. Bl. 550. Grant v. Aſtle, Dougl. 731.]

7 Mod. 87. *per* Holt, Ch. J. 2 Salk. 658. pl. 3. S. C. 2 Ld. Raym. 814. S. C.

If there be a certain ſtated ſum ſpecified in the deed itſelf, *that* ſhall not be abridged by any *remittitur* or releaſe of the plaintiff, if he declare upon that deed: as, if a man bring debt upon a bond of 30 *s.*, and declare upon a bond of 20 *l.* this will be bad; becauſe he has brought his action for more than is due, and this reſts upon the deed only, and the ſum in it does not amount to his demand. But if the action be brought upon a deed which refers to a matter of fact, that makes the duty more or leſs; if then the fact which is referred to will entitle him to a leſs ſum only, and he demand more than the fact which the deed refers to upon (c) computation will entitle him to; there, let him remit ſo much of his demands as the facts does not make out, and it will be well,

(c) As, in debt for the arrears of rent, in which the plaintiff declared for more rent, and for a

and

and he ſhall have judgment for the reſt; for that fact which is not made out is not contradicted by the deed.

longer time than upon his own

ſhewing appeared to be due to him. Sand. 282. Dupper v. Baſkervil.——So, where the plaintiff declared for 100*l.* due for ſo many years, and it appeared upon the record in caſting up the ſums, that he had declared for 8*l.* too much. 5 Mod. 212. Thwait & *Ux.* v. Lady Aſhfield, Comb. 365. S. C.

*Aſſumpſit*, and two ſeveral counts laid; one was a promiſſory note, and the plaintiff counted thereon as on a bill of exchange, upon the cuſtom of merchants; on *non aſſumpſit* entire damages were given, and judgment accordingly; and upon a writ of error brought in *B. R.*, it was held 1*ſt*, That the plaintiff could not declare upon the promiſſory note as upon a bill of exchange; and as there could be no ſuch count or action, ſo there could be no ſuch damages. 2*dly*, That they could not reverſe the judgment in part, viz. as to the one count, and affirm it as to the other; and denied *Jacob* and *Mill*'s caſe, *Hob.* 6. and took this difference, *viz.* where the judgment is partly by the common law, and partly by ſtatute, it may be reverſed in part, for that which was a judgment at common law will remain a judgment, and be complete without the other.

Salk. 24. pl. 8. Cutting v. Williams. 7 Mod. 155. S. C. 2 Ld. Raym. 825. S. C. 11 Mod. 24. S. C.

## (C) Of Imparlance: And herein,

### 1. Of the Nature thereof, and the ſeveral Kinds.

(*a*) IMparlance is, when one, who is to anſwer to the action of another, deſireth ſome time to adviſe what he ſhall anſwer; and (*b*) it is nothing elſe but the continuance of the cauſe till a further day.

2 Lil. Reg. 41. 2 Show. 310. pl. 321.

(*a*) This *libertas interloquendi* has been thought to ariſe from a notion of religion, which is mentioned in St. Matthew, chapter v. verſe 25. *Agree with thine adverſary quickly, whilſt thou art in the way with him*; they looked upon the plaintiff at the time of declaring to be in his way towards judgment: and that therefore, ſince the defendant was ordered by the precepts of religion to agree with him, that there was a neceſſity to give him time for that purpoſe, and therefore *libertas loquendi* was entered on the roll. Gilb. Hiſt. C. P. 42, 43.

(*b*) When the defendant appears, and the parties by conſent obtain a day before the declaration, this is called *dies datus prece partium*. Gilb. Hiſt. C. P. 41.—A day given before the count is called *dies datus*; but when after it is called an imparlance. Hard. 365, 366. But for this diverſity between an imparlance and the *dies datus*, *vide* Moor, 79. pl. 209. 3 Leon. 14. N. Bendl. 153. pl. 214. Cro. Eliz. 740.

In the Common Pleas they anciently proceeded by original writs, which were warrants out of Chancery for them to proceed; thoſe always gave the defendant notice of the cauſe of action; and as he had a view of the writ before he appeared, if he had any dilatory plea he was to put it in immediately; but when he pleaded in chief, and came in towards the end of the term, they gave him time to make his defence, which was called imparlance.

2 Show. 444. Skin. 2. pl. 2. Yelv. 211. Lev. 197. Gilb. Hiſt. C. P. 182.

But in the King's Bench, when the defendant comes in by *latitat*, he does not know, till after his appearance, for what the plaintiff declares; and as he had not ſight of the bill beforehand, he had time allowed him to plead any plea in abatement, which is called a ſpecial imparlance.

12 Mod. 529.

When

2 Show. 310. pl. 321. When the Common Pleas proceeded on *clauſum fregit*, as the defendant was under the ſame diſadvantages as when he was arreſted on a *latitat*, he had the ſame privilege as to time to make his objections to the declaration.

12 Mod. 529. This begot the diſtinction between a general and ſpecial imparlances, which latter is again diſtinguiſhed into the general ſpecial imparlance, and that which is ſtill more ſpecial.

Gilb. Hiſt. C. P. 183. * Imparlances are now much diſcouraged, as tending to delay plaintiffs in their juſt demands.— The general imparlance is entered on the imparlance roll in the words following, *petit licentiam interloquendi*, which, in the King's Bench, and on *clauſum fregit* in the *C. B.*, is entered of courſe, and is all * that is done the firſt term; but in ſpecial originals, returnable in an iſſuable term, the courts have denied the defendant leave to imparl, in order to put off a trial. Alſo, after this general imparlance, the defendant cannot regularly plead any dilatory plea.

Note: If a declaration be *not* delivered or filed, and alſo *notice* of the filing given *before* the laſt four days of term, the defendant is entitled to an imparlance of courſe.

Gilb. Hiſt. C. P. 183. (*a*) Mr. Juſtice Powel thus lays down the different kinds of imparlances: The general ſpecial imparlance is entered thus, *ſalvis ſibi omnibus & omnimodis advantagiis & exceptionibus*; that which is more ſpecial is, *ſalvis ſibi omnibus advantagiis ad breve, billam ſive narrationem* (*a*); the general imparlance is of courſe, but the ſpecial muſt be obtained from the court.

There are two ſorts of imparlances; the one general, after which one cannot plead in abatement at all; the other ſpecial, with a *ſalvis ſibi omnibus exceptionibus tam ad breve quam ad narr.*, after which one may plead in abatement of the writ and count; and this ſort of ſpecial imparlance may be granted by the prothonotary: there is another ſort of imparlance more ſpecial, with a *ſalvis ſibi omnibus exceptionibus & advantagiis quibuſcunque*, which cannot be granted without leave of the court, and is diſcretionary, after which one may plead to the juriſdiction of the court. 12 Mod. 529. 1 Lutw. 46. 2 Bl. Rep. 1094.——* In B. R. on a declaration of Hilary, there may be an imparlance to Trinity term; for it is the courſe of that court to give imparlance on declaration till the day of pleading. Fletcher v. Richardſon, Ca. temp. Hardw. 322. Time to plead is the ſame as an imparlance. Barnes, 345.

## 2. What the Defendant muſt do before any Imparlance.

Dyer, 210. 7 H. 6. 39. 22 H. 6. 7. a. Palm. 406. Latch, 83. Cro. Car. 9. If a defendant pleads to the juriſdiction of the court, he muſt do it *inſtanter* on his appearance; for if he imparls, he owns the juriſdiction of the court by craving leave of the court for time to plead in.

Stile, 90. Hard. 365. Gilb. Hiſt. C. P. 183, 184. [But after a general ſpecial imparlance, he may plead to the juriſdiction of the court. 2 Bl. Rep. 1096.]

Sid. 318. Cro. Car. 9. *& vide* tit. Ancient Demeſne. But the plea of ancient demeſne may be pleaded after imparlance; becauſe the lord may reverſe the judgment by writ of deceit, and it goes in bar of the action itſelf in that court.

[But ſee 1 Ventr. 235.]

Raym. 34. The defendant after imparlance pleaded to the juriſdiction of the court of *B. R.*, that he was a member of the Privy Chamber, and ought not to be ſued in any other court without the ſpecial licence of the Lord Chamberlain of the Houſehold for the time being; this was held an ill plea, and the court offended thereat.

Gilb. Hiſt. C. P. 184. Dyer, 210. If the defendant in a plea of land would have view, he muſt demand it before imparlance; for by imparling he undertakes to

defend the lands mentioned in the plaintiff's count, and it would be abſurd in him to defend what he does not know. pl. 26. That a view cannot be had, nor non-tenure, nor jointenancy pleaded, after imparlance; but in Jenk. 130. it is ſaid, a view may be had after imparlance*. ——— * In perſonal or mixt actions, views may be had on motion made, even after notice of trial, if there is time ſufficient. In B. R. a rule for a view is drawn up on motion ſigned by counſel.

If in (a) dower the defendant pleads *ſemper paratus*, this muſt be before imparlance. Dyer, 300. Hob. 62. (a) Error on a judgment in dower in Durham, where after imparlance the defendant pleaded detinue of charters, and judgment on demurrer for the plaintiff, and that judgment affirmed in B. R. Show. 271. Burdon v. Burdon.

So, tender and *uncore priſt* muſt be pleaded before imparlance; for by craving time he admits he is not ready, and therefore falſifies his plea. Dyer, 300. Hob. 62. Sid. 365. Lutw. 238. 2 Mod. 62.

In *aſſumpſit* for goods ſold, the defendant imparled ſpecially, with a *ſalvis ſibi*, &c. in common form, and afterwards he pleaded in bar to the action, that he tendered the money demanded to the plaintiff on the very day on which he had laid his requeſt in the declaration, and that from that day forward *ſemper paratus fuit* to pay it, *& profert hic in cur.*; and on demurrer to this plea, one objection was, that this tender could not be pleaded after an imparlance, being contradictory to that part of his plea, viz. *ſemper paratus*, and after ſeveral debates, the plea was for this adjudged ill; and in this caſe the court held, that the ſpecial imparlance made no difference, as it appeared thereby that he was not *ſemper paratus*. Carth. 413. Salk. 622. pl. 1. Comb. 443. Giles v. Hart, 3 Salk. 353. Ld. Raym. 254. S. C.

[A tender muſt therefore be pleaded before imparlance, of the ſame term with the declaration; unleſs the declaration be delivered or filed ſo late, that the defendant is not obliged to plead to it that term: and then it may be pleaded of courſe within the firſt four days inclusive of the next term; or even afterwards, upon motion, as of the preceding term.] Tidd's Pr. 241. 1 Burr. 59. Barnes, 343. 351. 355. 357. 359. 361, 362.

### 3. What he is to plead after a general Imparlance.

After a general imparlance the defendant can only plead in bar to the action, and cannot regularly plead any dilatory plea in abatement; as outlawry, excommunication, jointenancy, miſnomer, or non-tenure. 2 Roll. Rep. 59. Jenk. 130. [A plea in abatement after a general imparlance is bad on a general demurrer. Buddle v. Wilſon, 6 Term Rep. 369. It has been conſidered too ſo far as a nullity, that the plaintiff may ſign judgment as for want of a plea. Doughty v. Lafcelles, 4 Term Rep. 520.]

But, though outlawry after imparlance cannot be pleaded in abatement, yet, if the ground or cauſe of action be forfeited, as it is in felony, it may be pleaded in bar after imparlance; ſo, of a debt certain and due to the outlaw, which veſts in the king by the forfeiture, outlawry in the plaintiff may be pleaded after imparlance, and the turning the remedy from an action of debt to an action on the caſe (according to the modern practice, to avoid the Bro. Nonability, 36. 2 Roll. Rep. 59. Cro. Eliz. 203. 2 Vent. 282. 3 Lev. 29.

law-wager) whereby it becomes uncertain and ſounds only in damages, ſhall not diveſt the king of what he was once lawfully poſſeſſed of.

Doct. pl. 224. Lutw. 1117. So, if one be excommunicated after the term to which the imparlance is, ſuch excommunication may be pleaded after imparlance.

Jenk. 130. That the demandant is an alien may in a real action be pleaded in bar after imparlance, as well as to the writ before imparlance.

Lutw. 23. 1178. After a general imparlance (*a*) a feme cannot plead coverture in abatement, but may plead it in bar*: but note, that if the marriage was after the cauſe of action accrued, it muſt be pleaded in abatement.

(*a*) In an aſſiſe againſt baron and feme, the feme tenant *per receit* not allowed to imparl. Dyer, 298. pl. 28. —— * It hath been a common practice ſo to plead; *ſed qu.* If it can be a good bar, as plaintiff may maintain another action againſt huſband and wife?

2 Lev. 190. Lutw. 1178. So, in an action againſt an executor, he may plead that he is not executor in bar after imparlance, but not in abatement.

3 Leon. 232. In an action of debt, the defendant pleaded an attachment made in *London* after imparlance, and adjudged ill.

## 4. What may be pleaded after a ſpecial Imparlance.

*Vide* the authorities *infra*. It is clearly agreed that all pleas in abatement, unleſs to the juriſdiction, may be pleaded after a ſpecial imparlance.

[Where the defendant pleaded a miſnomer in abatement after an imparlance, which was entered thus: "And *A. B.*, who was arreſted by the name of *A. C.*, comes, &c." the court held this to be tantamount to a ſpecial imparlance. Brewſter v. Capper, 1 Wilſ. 261. 1 Bl. Rep. 51. S. C. But this reſolution hath been over-ruled in a later caſe. See Doughty v. Laſcelles, 4 Term Rep. 520.]

2 Roll. Rep. 244. Sid. 29. 2 Show. 145. pl. 124. (*b*) Hard. 365. But it hath been doubted whether privilege could be pleaded after a ſpecial imparlance, becauſe it is neither an objection to the writ, bill, or count: but it ſeems to be now ſettled (*b*) that it may be pleaded after a ſpecial imparlance, inaſmuch as it does not ouſt the court of their juriſdiction, but is a privilege which each court allows to the officers of another to be ſued in their own court.

Lutw. 46. Gilb. Hiſt. C. P. 185. 10 Mod. 125. Caſe of the Univerſity of Cambridge. 2 Wilſ. 406. S. P. An action of aſſault and battery was brought againſt one of the members of the univerſity of *Cambridge*, and a general imparlance given from one term to another. The chancellour of the univerſity comes and claims cognizance of pleas by virtue of a charter in Queen *Elizabeth*'s time, whereby *cognitio placitorum*, with excluſive words *non alibi*, &c., was given to the court of the vice-chancellour to proceed *ſecundum legem & conſuetudinem univerſitatis*, in all caſes where any of the body of that univerſity ſhould be defendant, which charter was confirmed by act of parliament, of which they produced a copy; and whether this claim, being made after imparlance, ſhould be received, was the queſtion? and adjudged that it ſhould not: and herein the court held, that, though the crown might grant conuſances, yet it could not grant them with power to proceed by any other law than the common law; that as it was neceſſary to plead this privilege, ſo there was the like neceſſity to

to plead it according to the rules of law, which must be before a general imparlance.

On a plea to the jurisdiction on special privileges, it is usual to grant a special imparlance; as in the common case of conusance, &c., for *Oxford*, &c., but they cannot imparl generally. Comb. 68.

5. In what Cases the Courts exercise a discretionary Power in granting or refusing an Imparlance.

It is said, that where the cause is by original, it is a favour of the court whether they shall have an imparlance or not. Skin. 2. pl. 2. *vide supra.*

Also it is said, that on a special *capias* in *C. B.*, the defendant shall plead the same term (especially if it be an issuable term) the writ is returnable, without any imparlance, because the whole case is set forth in the writ; and an imparlance being only the better to inform himself of the cause of action in order to his defence, there is no occasion for it when he is sufficiently informed thereof by the special *capias*. 2 Show. 145. pl. 124. Lil. Reg. 43.

Want of an imparlance where allowable, if prayed, is error: *Secùs*, if not prayed. Comb. 13.

A second imparlance was moved for in a *quo warranto*, and said to have been granted in the case of the city of *London*, but the court denied it; for *Astry* said, that by the course of the court they were to have but the common imparlance; and the court said, that being *ex gratiâ* they may grant or deny it as they please. Comb. 12.

If a man plead by force of an indenture which is lost, and affidavit made thereof, the party shall be compelled by the court to shew his counterpart, and he to plead thereto, otherwise the court (*a*) may grant an imparlance. Cro. Jac. 429. (*a*) The court would not grant the defendant an imparlance, though he was sued upon a bond of twenty-eight years old, and could not see the bond, but bid him pray oyer of it, and plead, for the antiquity of the bond is no cause of imparlance. 2 Lil. Reg. 42.

It is said that no imparlance is allowed in a *homine replegiando*, or in an assise, unless upon good cause shewn; because it is *festinum remedium*. 3 Salk. 186. Ld. Raym. 285.

*A.* bound by recognizance to appear and answer to an information, appeared and prayed an imparlance; the Attorney-General said an imparlance is not to be denied, but asked how long he shall be allowed; and *per cur.* an imparlance is a reasonable time to advise; and these have been from one return-day to another, but now they are always from one term to another in the Crown-office; but by *Holt*, C. J. it seems reasonable that the defendant should have the same time on such appearance as if he had stood out, and come in upon attachment or *capias*, *viz.* the same time that the length of the process would take up, and no more; for when he had come in upon that, he must plead *instanter*. Salk. 397. pl. 3. 6 Mod. 243. S. C. The Queen v. Rawlins, *& vide* 3 Mod. 315. Comb. 3.

Heretofore, when one came in upon a recognizance or *habeas corpus*, he was put to plead *instanter*, which was thought hard, and is therefore now redressed. 6 Mod. 243. *per* Northey *arguendo*.

Sid. 325. On an amendment

In an appeal of murder the appellant cannot imparl, but the court may adjourn it by a *dies datus* till ſuch a day.

defendant ſhall have an imparlance or coſts, at his election. Lechill v. Reynell, 2 Str. 950.——In action for words defendant ſhall have imparlance, on affidavit of plaintiff's being under proſecution for the offence. Barnes, 224.——If defendant is lunatick there ſhall be imparlance. Barnes, 225.——It ſhall be granted, though writ returnable on firſt return, if declaration was not delivered with notice to plead. Barnes, 225.——If plaintiff has a rule to file a bill to warrant proceedings, he may enter imparlance on roll; but if not entered in time, he pays coſts. Barnes, 227——If notice of declaration is ſerved on Sunday, imparlance ſhall be granted. Barnes, 309.——If *habeas corpus* removes a cauſe from ſheriff's court to B. R. November 6, and declaration is delivered November 12, and rule to plead given, the court will not grant imparlance. Wood v. Wenman, 1 Wilſ. 154.——On proceſs returnable the firſt, ſecond, or third return of any term, if declaration is delivered within four days before the end of the term, defendant ſhall plead without imparlance. General Rule C. B. T. 8 G. 3. 2 Wilſ. 381.——Not in real actions. Barnes, 2.——Not after a peremptory rule to plead. Barnes, 225.——Nor if notice to plead has been ſerved, though not indorſed on the declaration. Barnes, 226, 227.

## (D) Of making Defence: And herein, of the Difference between full and half Defence.

Co. Lit. 127. b.

DEFENCE cometh from the word *defendo*, ſo called from the manner of pleading, viz. *venit & defendit*, and is twofold; 1*ſt*, Half defence, which is *venit & defendit vim & injur.* 2*dly*, Full defence, viz. *venit & defendit vim & injur. quando*, &c.

Co. Lit. 127. b. Lit. § 199. Brownl. 75.

Defence, ſays my Lord *Coke*, is what the defendant ought to make immediately after the count or declaration; and in real actions is thus, *Et prædict.* B. *venit & defendit jus ſuum*, &c. In perſonal actions it is thus, *Et prædict.* B. *venit & defendit vim & injuriam quando*, &c. *Et damna & quicquid quod ipſe defendere debet.* By the ſecond part of the defence, *& damna*, &c. he affirms the plaintiff is able to ſue and recover damages on juſt cauſe. If the defendant pleads in diſability of the perſon, he muſt not make this part of the defence; as by the laſt part, *viz.* "and all that "which he ought to defend, when and where he ought," *&c.* he affirms the juriſdiction of the court; and therefore this part muſt be omitted when he pleads to the juriſdiction *.

* Defence, in its true legal ſenſe, as defined by Mr. Juſtice Blackſtone, ſignifies not a juſtification, protection, or guard, which is now its popular ſignification, but merely an *oppoſing* or *denial* (from the French verb *defender*) of the truth or validity of the complaint. It is the *conteſtatio litis* of the civilians: A general aſſertion that the plaintiff hath no ground of action; which aſſertion is afterwards extended and maintained in his plea. For it would be ridiculous to ſuppoſe that the defendant comes and *defends* (or, in the vulgar acceptation, juſtifies) the force and injury, in one line, and pleads that he is *not guilty* of the treſpaſs complained of, in the next. *Vide* Black. Com. 3 V. 296., &c.

Co. Lit. 127. b.

Defence alſo, ſays he, is ſo neceſſary in all caſes, that though the defendant appear and plead a ſufficient bar without making defence, judgment ſhall be given againſt him.

3 Lev. 240. Hampſon v. Bill.

And therefore, where in debt on an obligation the defendant *venit & dicit*, that the plaintiff was excommunicated, *&c.* without making defence, *&c.*, it was adjudged ill, and a *reſpondeas ouſter* awarded.

Lutw. 9.

But, though this be a general rule, and though the *venit* is the record of the defendant's coming into court, and is neceſſary to make him a party; yet it hath been held, that the *defend. vim & injur.*

*injur.* were not (*a*) uſed in *clauſum fregit* and aſſaults, and that therefore the want of them in thoſe caſes is not fatal, though ſhewn for ſpecial cauſe. (*a*) As appears in the old Book of Entries, fol. 5. 13. 30.

Alſo, where a plea to the juriſdiction was offered in an inferior court, without making defence, it was reſolved not to be neceſſary where the court have no juriſdiction of the *matter*; otherwiſe, where not of the *perſon*. Vent. 334.

So, where an attorney of *C. B.* was ſued in *B. R.* in action *qui tam*, for exerciſing the office of under-ſheriff longer than one year, and he *venit & dicit*, and pleaded his privilege, and held good without defence. Salk. 30. Comb. 319. S. C. Kirkham v. Wheeler, Ld. Raym. 27.

In ejectment the defendant *venit & dicit* that the land is ancient demeſne, without making defence; the plaintiff demurred ſpecially; and it was reſolved that the plaintiff may refuſe the plea for want of defence; but that if he receives the plea, he admits a defence; as, if one pleads outlawry, he ought to plead it *ſub pede ſigilli*, and if he does not ſo plead it, the plaintiff may refuſe it; but if he accept the plea, he ſhall not demur for that cauſe, for it is well enough if he allow it. Salk. 217. Ferrers v. Miller. Carth. 220, 221. S. C. adjudged; and that being a plea to the juriſdiction, it is good without *defendit vim & injuriam*, and that moſt of the precedents were ſo. 3 Lev. 182. North v. Hoyle, S. P. reſolved, and ſaid, that the precedents were both ways.

Defence is never made in a *ſcire facias*. 3 Lev. 182.

## (E) The ſeveral Kinds of Pleas: And herein,

### 1. Of Pleas to the Juriſdiction; and therein,

#### 1. To what Courts to be pleaded, and of the Difference between a Plea to the Juriſdiction and a Claim of Conuſance.

HERE it will be neceſſary to obſerve, that the courts of *Weſtminſter* are the ſuperior courts of the kingdom, and have a ſuperintendency over all the other courts by prohibitions, if they exceed their juriſdiction, or writs of error and falſe judgment, if their proceedings are erroneous, and have conuſance of all tranſitory actions, except between the ſcholars of *Oxford* and *Cambridge*; and every thing is ſuppoſed to be done within their juriſdiction, unleſs the contrary appears; but, on the other hand, nothing ſhall be intended within the juriſdiction of an inferior court, but what is expreſsly alleged to be ſo. Alſo, ſuch inferior courts being bounded in their original creation to cauſes ariſing within the limits of their juriſdiction, if a debtor, who has contracted a debt out of ſuch limited juriſdiction, comes within it, yet they cannot ſue for ſuch debt; and if any ſuch action be brought, the defendant may plead to the juriſdiction. Gilb. Hiſt. C. P. 188, 189. See tit. Courts, Letter (D).

But there is a diſtinction, which is now fully eſtabliſhed, between the counties palatine and other inferior courts, in this laſt reſpect; for a county palatine is a general court for all the ſubjects of the palatinate, and not merely for the cauſes ariſing within that palatinate; Sand. 74. Sid. 331. Peacock v. Bell. Gilb. Hiſt. C. P. 189, 190.

tinate; ſo that if a debtor goes from a foreign country into a palatinate, his obligations go along with him as much as if he went from one kingdom into another; and if it were otherwiſe, a palatinate juriſdiction would be a ſhelter and *aſylum* to debtors, for no proceſs but the ſupreme prerogative proceſs runs there; and therefore it hath been determined, that though the cauſe of action be out of the palatinate, yet if the party be a ſubject of that palatinate, as he is by coming into that dominion, that the action may be brought againſt him there.

4 Co. 223. Sid. 103. In all actions tranſitory the ſuperior courts have a juriſdiction, unleſs the plaintiff by his declaration ſhews that the action accrued within a county palatine; or, if it be between the ſcholars of *Oxford* and *Cambridge*, in which caſe the univerſity ſhall have conuſance; becauſe by their charter, confirmed by act of parliament, they have juriſdiction over the perſons of their ſcholars. But, though an inferior court might have determined it, yet the ſuperior court, being once poſſeſſed of the action, cannot be hindered from proceeding.

4 Inſt. 224. Roll. Abr. 489 Hard. 509. (*a*) So, ancient demeſne, or held of the king's manor, may be pleaded. Herne's Pleader, 7. 351 Panſ. 105. Tho. 2. Raſt 419. — So may the juriſdiction of the cinque ports. 4 Inſt. 224. But *vide* Carth 109. & *quare*; for it is there ſaid to be ſuch a franchiſe as Ely, and there reſolved, that Ely, being no county palatine, but only a royal franchiſe, the defendant cannot plead to the juriſdiction of a ſuperior court, but muſt demand conuſance. —— But in what caſes, in what manner, conuſance is to be made, *vide* V. 2. 102.

In local actions inferior courts have a juriſdiction; but here a difference muſt be obſerved as to the manner of claiming it; for as to the principal courts of this kind, and into which *brevia domini regis non currunt*, as the (*a*) counties palatine, they may plead their juriſdiction when intrenched upon by the ſuperior courts; but, where a franchiſe, either by letters patent or preſcription, hath a privilege of holding pleas within their juriſdiction; if the courts at *Weſtminſter* intrench on their privileges, they muſt demand conuſance; that is, deſire that the cauſe may be determined before them, for the defendant cannot plead it to the juriſdiction. And the reaſon is, becauſe when a defendant is arreſted by the king's writ, within a juriſdiction where the king's writ doth not run, he is not legally convened, and therefore may plead it to the juriſdiction; but the creating a new franchiſe does not hinder the writ from being made out as before, nor the courts above from having the ſame juriſdiction over the cauſe, but grants juriſdiction to the lord of the liberty; and whenever the king's courts intrench on his juriſdiction, he may make his claim, and demand that the cauſe may be determined before him.

Carth. 11. 354. If the plaintiff in his declaration ſhews that the action accrued in a county palatine, the defendant cannot take advantage of it in arreſt of judgment, nor can he take advantage of it by way of demurrer, but muſt plead to the juriſdiction of the court. And here note, that wherever the defendant can plead to the juriſdiction of the courts at *Weſtminſter*, there, the franchiſe may demand conuſance, but not *vice verſâ*.

Paſch. 5 G. 2. in B. R. Alſo in ſuch caſes, as the defendant may plead to the juriſdiction of the courts of *Weſtminſter*, leave muſt be obtained from the court

court for that purpoſe (*a*); as was done in an ejectment brought in *B. R.* for lands in the county palatine of *Lancaſter*. Jones v. Hammond. Andr. 368.

(*a*) So, Trin. 3 & 4 G. 2. in B. R. Truſtant v. Brocklehurſt, on the demiſe of Lady Lawley, leave was given to plead to the juriſdiction for lands lying in Cheſhire. Barnard. K. B. 352. 365.

As to pleading to the juriſdiction of an inferior court, herein we muſt again take notice, that inferior courts are bounded in their original creation to cauſes ariſing within ſuch limited juriſdiction; ſo that if an action is brought on a promiſe in a court below, not only the promiſe but the conſideration muſt be alleged to ariſe within its juriſdiction; for a debtor who has contracted a debt does not, by coming into the limits of ſuch juriſdiction, give ſuch court authority to hold plea thereof; nor is it ſufficient to allege the cauſe of action within the juriſdiction of the court, but it muſt be proved on the trial; and if the plaintiff proves a conſideration out of the juriſdiction, it cannot be given in evidence; and if it is, the defendant's counſel may tender a bill of exceptions; and upon ſuch bill of exceptions the judgment will appear to be erroneous. 2 Inſt. 231. Roll. Abr. 545, 6. Gilb. Hiſt. C. P. 188, 189.

As, in an action in an inferior court for calling the plaintiff whore, by which ſhe loſt her marriage, it was adjudged, that the loſs of the marriage ſhould be laid within the juriſdiction, the words not being actionable without ſpecial damage. Raym. 63. Lev. 69. Sid. 85. ——And Salk. 404. pl. 1. S. P. adjudged, the loſs of the marriage being held to be the giſt of the action.

So, if in the marſhal's court the plaintiff declares, that in conſideration the plaintiff, at the requeſt of the defendant, had taken pains to procure him a leaſe of an houſe in *Holborn*, the defendant *apud* S. *infra jur.*, &c. promiſed to pay him 10 *l.* &c. this is not ſufficient to entitle the court to a juriſdiction, inaſmuch as it does not appear that *Holborn*, where the houſe ſtands, is within the juriſdiction; and the jury are not only to try the promiſe, but the conſideration alſo. Lev. 50. Sid. 65. Ramſey v. Atkinſon.

So, in an *indebitatus aſſumpſit* for money for a cow ſold, it muſt appear that the ſale was within the juriſdiction; for the being indebted there does not neceſſarily imply that the ſale was there, for he that is indebted in one place is ſo in every place. Sid. 87. Lev. 96.

So, in debt for rent upon a leaſe made *infra jur.* of an inferior court, it muſt appear alſo, that the lands lie within the juriſdiction; for if part of the cauſe ariſes within the inferior juriſdiction, and part without, the inferior court ought not to hold plea. Lev. 104. Sid. 151. Vent. 2. S. C. Drake v. Beare.

But, if that which is only inducement, or matter of aggravation, be alleged to be out of the inferior juriſdiction, this will not ouſt ſuch inferior court of its juriſdiction; as, if in the court of *H.* the plaintiff declares, that he lent his horſe at *H.* for the defendant to ride to *B.*, and that the defendant aſſumed at *H.* to redeliver him, this is well enough; for it is not the riding but the re-delivery which is the cauſe of the action. Sid. 151. 189. Vent. 72.

So, where in caſe the plaintiff declared in the court of *Bath in com. Somerſet*, that he was a taylor, and that he uſed the ſaid art for Cro. Car. 570. Jon. 450.

Roll. Abr. 546. S. C. Howell v. Ireland.

for ſeveral perſons inhabiting *tam infra civitat. prædict. quam alibi infra regnum Angliæ*, and the defendant, to ſcandalize him in his ſaid art, ſaid theſe words of him, *Thou haſt ſtole as much cloth out of my ſuit and cloak which thou madeſt for me as did make thy wife a waiſtcoat*, by which he loſt his cuſtomers; it was holden, that the action lies in that court, notwithſtanding the allegation, *quam alibi infra regnum Angliæ*, for that is only matter in aggravation of damages.

Salk. 404. pl. 1. 6 Mod. 223. S. C. Stannion v. Davis. 2 Ld. Raym. 795.

So, in a writ of error of a judgment in the palace-court in an action on the caſe, wherein the plaintiff declared, that ſuch a day, in ſuch a pariſh in the county of *Middleſex*, he delivered to the defendant (being an innkeeper) a gelding ſafely to be kept in his inn, and that he ſuffered him to be taken out of his ſtable, and rid ſo immoderately that the gelding was ſpoiled: it was objected in error, that the riding did not appear to be within the juriſdiction of the marſhal's court. But *per cur.*—In actions in inferior courts it is neceſſary that every part of that which is the giſt of the action ſhould appear to be within their juriſdiction; otherwiſe, of ſuch matters as are inſerted only for aggravation of damages, and might be omitted, and yet the action remain, as in this caſe; and therefore the judgment was affirmed.

2 Inſt. 229, 230. Raym. 189. Mod. 81.

The defendant, when ſued in an inferior court for a matter not ariſing within its juriſdiction, muſt plead to the juriſdiction; and if ſuch plea be refuſed, the courts above will grant an attachment.

(*a*) F. N. B. 45, 46. 2 Roll. Abr. 317. (*b*) Where upon the ſtatute Weſtm. 1. c. 35. a prohibition will be granted, *vide* Salk. 201. pl. 5. 202. (*c*) 2 Mod. 271, 272.

Alſo, it hath been (*a*) held, that if the defendant admits the juriſdiction of ſuch inferior court, the courts above may grant (*b*) a prohibition; but in the caſe of (*c*) *Mendyke* v. *Stint* it hath been adjudged, that after verdict and judgment no prohibition lies; but in this caſe it was ſaid, that if any matter appears in the declaration which ſheweth, that the cauſe of action did not ariſe *infra juriſdictionem*, a prohibition may be granted at any time: ſo, if the ſubject-matter of the declaration be not proper for the judgment and determination of that court; or if the defendant, who intended to plead to the juriſdiction, be prevented by any artifice, or by the attorney's refuſing to plead it, or, if his plea be not accepted, or be over-ruled; in all theſe caſes a prohibition will lie at any time.

2 Inſt. 312.

If in the county-court, or other inferior court, they ſhall divide a debt of 20*l.* into ſeveral plaints, under 40*s.*, in ſuch caſe the defendant may plead the ſame to the juriſdiction of the court, or may have a prohibition to ſtay that indirect ſuit.

Carth. 189, 190.

But it hath been held, that no action will lie for ſuing in a court that hath no juriſdiction of the matter. [But *quære.*]

## 2. The Manner and Time of pleading to the Juriſdiction.

5 Mod 145, 146. Carth. 363. Salk. 298. pl. 9.

A plea to the juriſdiction is not properly a plea in abatement, though in its conſequence it be ſo; and therefore is to have its proper concluſion; as, *reſpondere non debet*, or, *ſi curia cognoſcere velit*, and not *quod billa caſſetur*.

According

According to the order of pleading, the defendant must first plead to the jurisdiction of the court, and this he must regularly do before imparlance; for by craving leave to imparl, he submits to the jurisdiction, except where ancient demesne is pleaded, which may be done after imparlance, because the lord might reverse the judgment by writ of disceit; and it goes in bar of the action itself in that court, because it is *coram non judice*. 2 H. 6. 30. 22 H. 6. 7. Doct. pl. 234. Hard. 365. Lutw. 46. Dyer, 210. Stile, 30. Latch. 83.

The defendant must make (*a*) but half defence, for if he makes the full defence *quando*, &c., he submits to the jurisdiction, the, &c., being *quando & ubi cur. consideraverit*. Co. Lit. 197. b. Lutw. 9. Show. Rep. 286. (*a*) Where an inferior court hath no jurisdiction of the matter, it is not necessary to make any defence at all. Vent. 334.

The defendant must plead *in propria persona* (*b*), for he cannot plead by attorney without leave of the court first had, which leave acknowledges their jurisdiction; for the attorney is an officer of the court, and if they put in a plea by an officer of the court, that plea must be supposed to be put in by leave of the court. 6 Mod. 146. that such plea must be put in *propria persona*, and whilst the court is sitting, and oath must be made of the truth thereof; but in Carth. 402. it is held, that a plea to the jurisdiction need not be on oath, as a foreign plea must.——No dilatory plea without affidavit. 4 Ann. c. 16. § 11. [(*b*) In these two points, viz. that they must be pleaded in person, and that in pleading them, the defendant must make but *half* defence, pleas to the jurisdiction differ from pleas in abatement; for these may be pleaded by attorney, and with *full* defence. Lutw. 7. Wheatley v. Cudmerson, Mich. 15 G. 2. C. P. Thompson v. Stockdale, Hil. 23 G. 3. K. B.]

He who pleads to the jurisdiction, ought by his plea to give jurisdiction to some other court. Doct. pl. 234.

See farther on this subject, Vol. I. 2.

## (F) Of Pleas in Abatement.

See tit. *Abatement*, Vol. I.

## (G) Of Pleas in Bar and in Chief: And herein,

### 1. Of the General Issue, and how formed.

ISSUE is thus defined by my Lord *Coke*, a single, certain, and material point issuing out of the allegations and pleas of the plaintiff and defendant, consisting regularly of an affirmative and negative, to be tried by twelve men; and is either general or special. Co. Lit. 126.

The general issues were contrived in such words as were most proper to deny the whole fact in the declaration; as, in a charge of trespass, the general issue is (*c*) not guilty; in debt, that he owes nothing (*d*); if the action is grounded on a specialty, *non est factum*, or that it is not his deed; for the debt being grounded on a specialty, he admits the debt, unless he denies the deed; for the seal continuing, it must be dissolved *eo ligamine quo ligatur*. (*c*) That not guilty is a good plea to any misfeasance whatsoever, Cro. Eliz. 257. 3 Mod. 324. Skin. 280.

[*Riens in arrere* is a good plea to an action of debt for rent; it is the general issue. *Secùs*, to an action of covenant,

*covenant*, becauſe it confeſſes the covenant to be broken, and tends but in mitigation of damages. Wather v. Theobald, Cowp. 588. Hare v. Saville, 1 Brownl. 19. *Nil debet* is alſo a good plea to debt for rent. Hardr. 332. 2 Ld. Raym. 1503. Bull. N. P. 170.] (*d*) Cro. Jac. 377. 531. to an uſurious bond or ſheriff's bond *non eſt factum* cannot be pleaded, but muſt be avoided by ſpecial pleading. Hob. 72. & *vide* titles Sheriff and Uſury.

Co. Lit. 126. a. An iſſue being taken generally referreth to the count, and not to the writ; as, in account, the writ chargeth him generally to be his receiver, the count chargeth him ſpecially to be his receiver by the hands of *T.* The defendant pleadeth, that he was never his receiver in manner and form, *&c.*; this ſhall refer to the count, ſo as he cannot be charged but by the receipt by the hands of *T.*

Co. Lit. 126. a. An iſſue ſhall not be taken on a negative pregnant, which implieth another ſufficient matter; but upon that which is ſingle and ſimple, as *ne dona pas per le fait* implies a gift by parol, and therefore the iſſue muſt be *ne dona pas modo & forma.*

Co. Lit. 126. a. Some iſſues be good upon matter affirmative and negative, albeit the affirmative and negative be not in preciſe words (*a*); as, in debt for rent upon a leaſe for years, the defendant pleads, that the plaintiff had nothing at the time of the leaſe made; the plaintiff replieth, that he was ſeiſed in fee, *&c.*; this is a good iſſue.

[(*a*) Of neceſſity, an iſſue may be joined on two affirmatives. Co. Lit. 126. a. Bro. Iſſue, 28. So, if iſſue be tendered by an affirmative, and the other join, it is good, though there was not a negative. As, if an executor plead, *no aſſets*, and the plaintiff reply, that he purchaſed another writ, and then he had aſſets, and tender an iſſue thereon, and the defendant join, it is good. Aldrich v. Welthal, Cro. Jac. 580. 589. So, to debt upon bond, the defendant pleaded, dureſs of impriſonment; to which the plaintiff replied, that the defendant was at large, and at his own diſpoſal, and executed the bond of his free will, and not for fear of impriſonment, and concluded to the country. To this there was a demurrer, and judgment given for the plaintiff, which judgment was affirmed in error. For *per curiam*—This is ſuch an affirmative as implies a negative; like the caſe of pleading in a writ of right, where the demandant counts, that he has more right than the tenant, and the plea of the tenant is, that he hath more right than the demandant. The ancient rule of requiring an affirmative and negative hath been long broken into, as, in the common caſe of infancy, where formerly they not only replied full age, but alſo traverſed the infancy, which is not now required. Sir T. Jones, 6. It is enough, if the ſecond affirmative is ſo contrary to the firſt, that the firſt cannot in any degree be true. Tomlin v. Purlis, 2 Str. 1177. 1 Wilſ. 6. S. C. However, in Sav. 86. it is ſaid, that where there are two affirmatives, one of which implies a negative of the other, the iſſue cannot be properly joined upon them without a traverſe.]

Co. Lit. 126. a. 33 H. 6. 21. Where the iſſue is joined of the part of the defendant, the entry is *et de hoc ponit ſe ſuper patriam;* but if it be of the part of the plaintiff, the entry is *et hoc petit quod inquiratur per patriam.*

Co. Lit. 126. a. (*b*) The reaſon is, that it would be inconvenient to go on to a replication, becauſe to reply generally would leave it too large and comprehenſive, and to reply any particular kind of eſtate would be too narrow, and conſequently immaterial. 1 P. Wms. 259. There be ſome negative pleas which be iſſues of themſelves, whereunto the demandant or plaintiff cannot (*b*) reply, any more than to a general iſſue, which is *et prædictus* A. *ſimiliter;* as, if the tenant do vouch, and the demandant counterplead, that the vouchee or any of his anceſtors had any thing, *&c.* whereof he might make a feoffment, he ſhall conclude, *et hoc petit quod inquiratur per patriam & prædictus tenens ſimiliter:* ſo, in a fine pleaded by the tenant, *&c.*, the demandant may ſay, *quod partes finis nihil habuerunt*, and *hoc petit quod inquir. & prædict. tenens ſimiliter:* and ſo in a writ of dower, the tenant pleads, *ne unques ſeiſi que dower*, he ſhall conclude, *et de hoc ponit ſe ſuper patriam & prædict. tenens ſimiliter.*

Every

Every iſſue conſiſts of an (*a*) affirmative and negative; and an iſſue being once well tendered muſt be accepted, and cloſes the pleadings. Co. Lit. 126. Sand 338. Lutw. 623. 1139.

Comb. 86. (*a*) A diſtinction was thus taken by counſel, viz. that where an affirmative came after a negative, there, iſſue ought not to be joined, but ought to be left on the other ſide; but, where the affirmative was firſt, and the negative came after, there, it ought to be joined. But Holt, Ch. J. ſaid he had never heard of this diſtinction, and therefore gave but little regard to it. Carth. 88.

In an *audita querela*, to avoid the execution of a recognizance, the plaintiff ſet forth, that it was defeaſanced upon payment of divers ſums of money at certain days, and that he was at the place appointed and tendered the money, and that the defendant was not there to receive it: the defendant pleaded (*b*) *proteſtando*, that the plaintiff was not there to pay it, and that he was there ready to receive it, *abſque hoc*, that the plaintiff was ready to pay it; which being ſpecially demurred to, the court held the plea naught; and that there being an expreſs affirmative and negative, there ſhould have been no traverſe; for ſo they may traverſe one upon another *ad infinitum*. Cro. Eliz. 754-5. Huiſh v. Phillips. (*b*) A proteſtation availeth not the party that taketh it if the iſſue be found againſt him; and therefore, if the iſſue be found for a villein, he is enfranchiſed for ever; and yet in ſome ſpecial caſes, albeit the iſſue be found againſt him that maketh the proteſtation, yet he ſhall take benefit of his proteſtation; as, if a man entereth into warranty, and taketh by proteſtation the value of the land, albeit the plea be found againſt him, yet the proteſtation ſhall ſerve him for the value. Co. Lit. 126. a.

The reaſon of joining iſſue is, that the party may come prepared to defend one ſingle point; which holds in all caſes, except in barratry; and even in that notice muſt be given of the point the proſecutor intends to proceed on. Lucas's Rep. 299. *vide* title Barratry.

In an action of falſe impriſonment, the defendant juſtifies by force of a *latitat* out of *B. R.* by force of which he took him; the plaintiff replies, that he did it *de injuriâ ſuâ propriâ*, &c. It was moved, that this was naught after a verdict, and not helped; but the court held it well after a verdict; but that upon demurrer it would be naught, as being multifarious, jumbling matters of record and matters of fact together. Raym. 50. Keb. 125. 164. Beeſly v. Walker.

An action of debt was brought upon a recovery in the court of *Norwich*; the defendant ſhews, that the court is holden by cuſtom before other perſons, *abſque hoc*, that the plaintiff ſuch a day recovered *ſecundum conſuetudinem*, &c., upon which it was demurred; and in defence of the plea it was ſaid, that it is not the record that is put in iſſue, but the cuſtom only, and that may well be traverſed; for which were cited *Hob.* 244. *Hutt.* 20. 1 *R.* 3. 9. But the whole court held the plea pregnant and inſufficient; for he has made the day parcel of the iſſue, which he ought not to have done, but have ſaid only (*c*) *modo & formâ*; and they held clearly, that the cuſtom to hold courts might well have been traverſed, if that point had been ſingly brought into iſſue; but here, matter of record is mixed with matter of fact, which is ill on a general demurrer; and therefore judgment was given for the plaintiff. Lev. 193. Sid. 302. 2 Keb 107. 122. S. C. Dring v. Repaſs. (*c*) Where *modo & formâ* are of the ſubſtance of the iſſue, and where but words of form, this diverſity is to be obſerved; where the iſſue taken goeth to the point of the writ or action, there, *modo & formâ* are but words of form; but otherwiſe it is where a collateral point in pleading is traverſed; as, if a feoffment be alleged by two, and this be traverſed *modo & formâ*, and it be

be found the feoffment of one, there, *modo & formâ* is material: ſo, if a feoffment be pleaded by deed, and it be traverſed, *abſque hoc, quod feoffavit modo & formâ*, upon this collateral iſſue *modo & formâ* are ſo eſſential, that a jury cannot find a feoffment without deed. Co. Lit. 281. b.

Crokatt v. Jones, 2 Str. 734. 2 Ld. Raym. 1441.

[The plaintiff declared upon two bills of exchange, and ſeveral other promiſes: the defendant, as to the two firſt counts upon the bills of exchange, pleaded, *quod actio non accrevit infra ſex annos*, and as to the other counts *non aſſumpſit* generally. The plaintiff replied, that upon ſuch a day he ſued out a *latitat*, which he continued down to the preſent declaration, and averred, that the cauſe of action aroſe within ſix years before the ſuing out of the *latitat*. The defendant in his rejoinder, *proteſting* that there was no ſuch writ iſſued as ſet out by the plaintiff, for plea ſaid, that after the ſix years were expired, *viz.* ſuch a day, the plaintiff firſt ſued out a *latitat*, which he ſet forth, and that he appeared to it; and that the plaintiff declared upon it, as above, and traverſed that he appeared and put in bail to the writ mentioned in the replication, and concluded with an averment. The plaintiff demurred, and ſhewed for cauſe, that the rejoinder is contrary to the record of appearance, and a negative pregnant. The plaintiff had judgment.

Co. Lit. 126. a.

An iſſue ought to be upon a point, which may be well tried. Thus, if it be alleged, that a woman was *enſeint* by her huſband at the time of his death, the iſſue muſt be, if ſhe was *enſeint*, not if *enſeint* by her huſband, for *filiatio non poteſt probari*.]

## 2. Immaterial and informal Iſſues, and where aided.

*Vide* tit. Amendment.

Here the general rule is, that where the iſſue is immaterial, a verdict will not aid it; but where it is only informal, it is helped.

Carth. 371. Lev. 32. 2 Mod. 137.

An immaterial iſſue is, where what is immaterially alleged by the pleadings is not traverſed, but an iſſue taken on ſuch a point as will not determine the merits of the cauſe: an informal iſſue is, where it is not traverſed in a right manner.

Cro. Eliz. 227. Brownl 229. Carth. 371. 2 Roll. Rep. 117. Cro. Jac. 580.

A verdict cannot help an immaterial iſſue, becauſe what is alleged in the pleadings is not put in iſſue; or, if it be, it is not deciſive between the parties, and ſo the verdict is no good foundation for the judgment; and if what is material in the pleadings be not put in iſſue, it is not made neceſſary to be proved on that trial; but if it be not deciſive, then what is neceſſary to be proved on the trial will not in all caſes be a foundation for the judgment; for the courts in theſe caſes are judges on what point they ought to go to iſſue, ſo as to be a legal charge by the plaintiff, or diſcharge by the defendant; ſince it is the province of the judges to ſettle the matter of law, and the jury the matter of fact.

3 Leon. 66. Kirbee v. Leers. 2 Leon. 195. S C. cited. Godb. 56. S. C. cited.

If the plaintiff declares upon a promiſe to find the plaintiff, his wife and two ſervants, with meat and drink for three years, upon requeſt; and the defendant pleads, that he promiſed to find the plaintiff and his wife with meat, *&c. abſque hoc*, that he promiſed to find, *&c.* for two ſervants, *&c.*, and the plaintiff replies, that he did

did promiſe to find, &c. for three years next following, & *hoc petit*, &c., and thereupon a verdict is found for the plaintiff; yet he ſhall not have judgment; for the promiſe in the replication is not the ſame with that in the declaration, which was traverſed by the defendant; and ſo there is no iſſue joined, and therefore is not helped by the ſtatute.

If in debt on a bond conditioned for the payment of 105 *l.* at a certain day and place, the defendant pleads, that at the day and place he paid *prædict.* 100 *l. quas ſolviſſe debuit ſecundum formam & effectum conditionis;* and the plaintiff replies, *Quod non ſolvit prædict.* 105 *l.* &c., and a verdict is found *quod non ſolvit* the ſaid 105 *l.*; yet the plaintiff ſhall not have judgment; for *prædict.* 100 *l.* ſhall not be intended the 105 *l.*, and ſo they meet not, and there is no iſſue. Cro. Jac. 585. Sandbank v. Turvy. Hob. 113. Cro. Car. 593. S. P. adjudged.

If in a *ſci. fa.* upon a judgment againſt the adminiſtratrix of *J. S.*, the defendant pleads, that the ſaid *J. S.* made *B.* within age his executor, and that adminiſtration *durante minore ætate* of the ſaid *B.* was committed to the defendant, and that ſuch a day the ſaid *B.* attained the age of ſeventeen, and then refuſed to be executor, &c., and that when the ſaid *B.* attained his ſaid age, the defendant had fully adminiſtered, &c. and the plaintiff replies, that at the time the ſaid *B.* came to his ſaid age *devaſtavit diverſa bona*, &c., and the defendant rejoins, *Quod ipſe non devaſtavit*, &c., and thereupon iſſue be joined, and found for the defendant; ſhe ſhall have judgment; for the devaſtation muſt be intended by the adminiſtratrix, and the plaintiff ſhall not avoid the verdict by an exception to his own replication. Cro. Car. 79. 93. Oxford v. Rivet, adjudged by three judges againſt two, who held, there was no iſſue, and ſo the verdict void and not aided by the ſtatute of jeofails. Hetl. 35. Lit. Rep. 52. S. C.

In treſpaſs the defendant pleads an accord between the plaintiff and *J. S.* of the one part, and the defendant of the other part; the plaintiff replies, *Quod non habetur talis concordia* between the plaintiff and defendant, *qualis* the defendant had alleged; and on iſſue joined a verdict for the plaintiff; yet he ſhall not have judgment; becauſe the plaintiff does not traverſe the ſame concord that is ſet out in the defendant's bar, but puts another concord in iſſue, not alleged in the defendant's bar, between the plaintiff and defendant only, and the court cannot be certain which is proved on the trial; and though it may be ſaid in this caſe, that either may bar the action, yet only one thing is to be put in iſſue; and if it ſhould be otherwiſe, there would be no correſpondence between the *probata* and *allegata*. Roll. Rep. 86.

In debt on a bond conditioned for the payment of 8 *l.* on a certain day, the defendant pleads payment on the day in the condition, *et de hoc ponit ſe ſuper patriam, & prædict.* the plaintiff *ſimiliter*; and found for the plaintiff: here, the defendant has cloſed the iſſue on the plaintiff by the *hoc ponit ſe ſuper patriam*; yet the defendant cannot take advantage of the informality of his own plea, and it is waived on both ſides when they go to iſſue on the ſubſtance of it. Cro. Car. 316, 317. Parker v. Taylor. Sid. 290. S. C. cited.

But, if in treſpaſs the defendant pleads a ſpecial juſtification, and the plaintiff replies *de injuriâ ſuâ propriâ abſque tali cauſâ*, there, though the iſſue is found for the plaintiff, yet it is wrong Sid. 341. Cro. Jac. 599. S. P. adjudged.

Roll. Rep. 47. S. P. adjudged. Stile, 150. 398. *Vide* Hard. 40. S. P cited. Vent. 7. S. P. ſaid to have been adjudged.

after verdict, becauſe the *injuriâ ſuâ propriâ* does no more than affirm the declaration, and does not confeſs or deny the bar; and therefore the giſt of the bar is not put in iſſue at all, but rather ſtands confeſſed by the replication ſince the cauſe is not traverſed; for ſaying it was *de injuriâ ſuâ propriâ* is no more than ſaying, that notwithſtanding the cauſe mentioned in the bar the defendant committed the injury, which the bar being a ſufficient excuſe cannot be; but it does not in the leaſt put the bar in iſſue.

8 Co. 66.——The poſition in this paragraph is too general.—There are many caſes where the general replication with the general traverſe is ſufficient. Many where it is not.

Sid. 341-2. Burton v. Chapman.

If in an *aſſumpſit* for wares ſold, the defendant pleads *quod tempore quo*, &c. he was an infant, and the plaintiff replies they were for neceſſaries, *& hoc petit quod inquiratur per patriam*, &c., and thereupon iſſue is joined, and a verdict found for the plaintiff; though this traverſe is informal, becauſe the plaintiff ought not to have cloſed the iſſue, but to have given the defendant an opportunity of rejoining, that there might have been a proper negative to his affirmative; yet, ſince the matter of his replication is put in iſſue, *viz.* whether they were neceſſaries or not, the defendant has waived all objections to the form, and by ſuch waiver it appears that he is not any ways injured by not rejoining, and it being found that they were neceſſaries, the plaintiff ought to prevail.

Cro. Jac. 435. Holmes v. Brocket.

In debt on a bond conditioned for the payment of 60 *l.* on the 25th of *June*, the defendant pleads payment on the 20th of *June ſecundum formam & effectum conditionis*, *& ſur ceo* iſſue is joined, and the verdict finds *quod non ſolvit* 60 *l.* at the 20th; the plaintiff ſhall not have judgment, for the iſſue is *dehors* the matter of the condition, and ſo void, and it might have been paid the 25th, though it was not paid the 20th, ſo that it does not appear the condition was broken. But, where the iſſue is deciſive between the parties, though it be not ſo apt, yet this ſhall be cured after a verdict.

Cro. Jac. 44. Yelv. 54. Pigott v. Pigott.

As, in replevin the defendant avows that *Ellen Enderby* was ſeiſed in fee, and took *Pigott* to huſband, and had iſſue by him *Thomas*; that *Ellen* and *Thomas* granted a rent-charge for which he diſtrains; the plaintiff replies, that one *Fiſher* being ſeiſed in fee gave the land to *J. Enderby* in tail, who had iſſue *Ellen*; that *J. Enderby* died, and *Ellen* entered, and being ſeiſed in tail took *Pigott* to huſband, and had iſſue *Thomas*, who is dead, who granted, *&c. abſque hoc*, that *Ellen* was ſeiſed in fee; though this was an informal iſſue; for the plaintiff ought to have traverſed that *Thomas* the grantor was ſeiſed in fee; yet it is a deciſive iſſue, for it is allowed on both ſides that *Thomas* was in by deſcent from *Ellen*; and if *Ellen* was ſeiſed in fee, *Thomas* was ſo too, and, conſequently, had good right to make the grant.

5 Co. 43. Nichol's caſe. Moor, 692. S. C. Cro.

If in debt upon a ſingle bill the defendant pleads payment, without an acquittance, and thereupon iſſue is joined, and found for the plaintiff, he ſhall have judgment; for the payment without an acquittance is no plea to a ſingle bill; yet, becauſe iſſue was

was joined upon an affirmative and negative, and verdict for the plaintiff, he ſhall have judgment: adjudged upon a writ of error *in Camera Scaccarii*, and the firſt judgment affirmed accordingly. Eliz. 455. S. C. 3 Bulſ. 301.

In an action of debt, if not guilty be pleaded, and there be a verdict for the plaintiff, it ſhall be aided by the ſtatute; becauſe being an ill plea, and a falſe one, the plaintiff ought to have his judgment, both for the badneſs of the plea, and for its falſehood: but, if the verdict had been for the defendant, yet the plaintiff ſhould have judgment; becauſe the declaration is not anſwered by the plea. Noy, 56. Cro. Eliz. 773. 2 Jon. 184. [*Qu.* Whether *not guilty* would not be a good plea in debt on a penal ſtatute, as for not ſetting out tithes, uſury, &c.? 1 Term Rep. 462. Upon a *devaſtavit* againſt executors, not guilty may be pleaded as well as *nil debent*. *Ibid.*]

So, if in an *aſſumpſit* the defendant pleads not guilty, and thereupon iſſue is joined, and found for the plaintiff, he ſhall have judgment; for though this is an (*a*) improper iſſue in this action, yet becauſe there is a diſceit alleged, not guilty is an anſwer thereto; and it is but an iſſue misjoined, which is aided by the ſtatute. Cro. Eliz. 470. Corbyn v. Brown. (*a*) Where in debt againſt an executor upon the bond of his teſtator the defendant pleaded *non eſt factum*. Hard. 458.

If in debt againſt *A.* as executor of *B.* the defendant pleads, that *B.* died inteſtate, and that adminiſtration of his goods was committed to *C.*, and the plaintiff replies, that, before the ſaid adminiſtration granted, divers goods, *&c.* came to the hands of the defendant, which, as executor to the ſaid *B. adminiſtravit ſeu aliter ad uſum ſuum proprium diſpoſuit & convertit*, &c., and thereupon in the diſjunctive iſſue is joined, and found for the plaintiff, he ſhall have judgment (*b*); for the point in iſſue is directly found, and ſo it is within the ſtatute; and this alſo is no improper iſſue; for whether he adminiſtered or converted to his own uſe, both muſt be as executor. Hob. 49. Keble v. Oſbaſton. [(*b*) So, an iſſue, that gold was found in a ſhip paſſing or upon its paſſage from London to R. is good. Hardr. 17. 19. So, that the cuſtoms were not concealed or withholden. Hardr. 17. Dyer, 43. b. So, that he paid or cauſed to be paid. Hardr. 19. For an iſſue may be upon a diſjunctive, where the words of the diſjunctive propoſition are ſynonymous.]

If in replevin the defendant avows for damage-feaſant, and the plaintiff replies, that he was ſeiſed in fee of a meſſuage and certain land, and that *J. S.* was ſeiſed of another meſſuage and land, and that they two, and all thoſe whoſe eſtate, *&c.* had common, *&c.* in the place where, *&c.*, and conveys to himſelf the other meſſuage and lands for years, and ſo juſtifies, *&c.*, and the defendant traverſes the preſcription, and it is found for the plaintiff; though the preſcription thus confeſſed for ſeveral is groſsly faulty, and (*c*) the iſſue thereupon confuſed, yet after verdict it was ſaved by the ſtatute. Hob. 113. (*c*) If in debt upon an obligation the defendant pleads the ſtatute of uſury, & *quod corrupte agreat. fuit*, &c. & *quod querens corrupte recepit*, the uſury is taken upon both, and found for the defendant, he ſhall have judgment; though this iſſue is double, the one part material, and the other not. Moor, 574. pl. 790. If in debt for rent the defendant pleads *nil hab. in tenementis*, and the plaintiff replies *quod. hab. bonum & ſufficientem ſtatum*, &c. but does not ſhew what in particular, and thereupon iſſue is joined, and found for the plaintiff, he ſhall have judgment; for though the iſſue is informal, yet the ſubſtance of the matter is found, viz. that he had an eſtate, &c. Glaſs v. Gill, Yelv. 227. Cro. Jac. 312. & *vide* Bulſ. 41.

If

Si. 289. Lev. 183. Walſingham v. Comb.

If in an action of (*a*) covenant the plaintiff aſſigns a breach, that the defendant was not ſeiſed in fee, *& ſic infregit conventionem*; and the defendant pleads *non infregit conventionem*; and thereupon iſſue is joined, and a verdict for the plaintiff, he ſhall have judgment; for this is but an informal iſſue.

(*a*) So, where the covenant is to repair, and the plaintiff aſſigns the breach, that the defendant ſuffered the houſes to be ruinous, *& ſic non reparavit*, and the defendant pleads, that he did not ſuffer them to be ruinous. Moor, 399. Cro. Eliz. 457. 2 Leon. 116.

Sid. 444. Vent. 70. 2 Keb. 623.

In an action of aſſault and battery, the defendant pleads, that the plaintiff neglected his ſervice, *per quod moderatè caſtigavit*; the plaintiff replies, *Quod non moderatè caſtigavit*; and the iſſue was found for the plaintiff: though this be an informal traverſe, being rather a traverſe of the chaſtiſement than of the moderate manner of doing it, and the right traverſe ſhould have been *de injuriâ ſuâ propriâ abſque tali cauſâ*, yet after verdict it is good; becauſe the jury have aſcertained that he did not beat him moderately.

If an iſſue be on a point that is impoſſible in ſubſtance and nature of the thing, it is not cured by the verdict; but, if it be only impoſſible in the manner and form of it, a verdict will cure it: for where the ſubſtance is impoſſible, no verdict can cure it, becauſe it cannot make that true which cannot poſſibly be; but where it is only impoſſible in the manner of it, there, the thing which is poſſible may be found to be or not, and the manner which is impoſſible totally rejected (*b*): as, if an action of aſſault and battery be brought, and the defendant juſtify by conveying to himſelf an eſtate by copy of a parcel of the manor of *C.*, whereof *D.* is ſeiſed, and that the plaintiff came upon it, and that he laid his hands *mollitèr*; the plaintiff reply, and convey to himſelf an eſtate by copy of another parcel of the manor, and that *D.*, lord of the manor, had for himſelf and tenants a way over the defendant's piece of land; iſſue is joined, and verdict for the plaintiff; this is a void preſcription; for a copyholder, being originally but a tenant at will, could not preſcribe at will, but in the name of the lord, for an eaſement; and for an eaſement out of the manor he could not preſcribe in the lord's name, but muſt lay it by cuſtom as the *lex loci*; but being laid here by way of preſcription, it is in its own nature void; and the verdict could not make that which was repugnant to the nature of the thing to be true or falſe, and by conſequence could not help it.

(*b*) Hob. 112, 113. Moor, 867. Taſker v. Salter.

Cro. Car. 78. Jon. 140. Latch. 158. Noy, 85. Purchaſe v. Jegon.

But, in debt on a bond conditioned for the payment of 100*l.* on 31 *September*, if defendant pleads payment at the day, and it is found againſt him, the plaintiff ſhall have judgment; becauſe the payment is what is material, and the day is impoſſible and altogether idle and void; for not being paid before the end of that month the obligation is abſolute.

Woolley v. Briſcoe. 1 Str. 554. 8 Mod. 173. S. C.

[In an action upon a contract for ſtock, which was required by act of parliament to be regiſtered before the 1ſt of *November* 1721, the defendant pleaded, that the contract was not regiſtered before the 1ſt of *November* 1720, *ſecundum formam ſtat.*; the plaintiff replied, it was regiſtered before the 1ſt of *November* 1720, *ſecundum formam*

*ſorman ſtat.*; upon which they were at iſſue, and the plaintiff had a verdict. Upon motion in arreſt of judgment, that this was an immaterial iſſue, the court held it well enough; the regiſtering of the contract was the material part; and the time which was impertinently alleged, may be rejected as ſurpluſage.

To debt upon bond the defendant pleaded, *plenè adminiſtravit*; the plaintiff replied, that the defendant had aſſets in his hands to ſatisfy the *damages* aforeſaid, and thereupon iſſue was joined; and the jury found a verdict for the plaintiff. It was moved in arreſt of judgment, that this is an immaterial iſſue, for it ought to have been, whether the defendant had ſufficient to ſatisfy the *debt and damages*. In anſwer, it was ſaid, that the word *damages* is only ſurpluſage, and by leaving it out, the iſſue will be a ſenſible, material iſſue, *viz.* that the defendant had ſufficient to ſatisfy, *&c.*; and of that opinion was the court.] Collet v. Maſterman, 1 Wilſ. 238.

If in treſpaſs iſſue is taken, that the prebendary of *A.*, and all his predeceſſors, *&c.*, had uſed time out of mind to keep a ſhepherd, for the better keeping together their ſheep feeding in the ſaid paſture from the ſheep of *T.* Earl of *S.*, and the iſſue is found for the plaintiff accordingly; though it is ſenſeleſs and impoſſible that the ſheep of the prebendary, *&c.* time out of mind could be kept from the ſheep of the Earl of *S.*, being but one man's life, yet the plaintiff ſhall have judgment; for the ſubſtance of the iſſue is the keeping the ſheep of the prebendary, *&c.*, and the other part is but a conſequence thereof, that thereby they were kept from the ſheep of the ſaid earl. Hob. 117. Napper v. Jaſper.

In debt upon a bond againſt an adminiſtrator brought in *Hil. term* 22 *Jac.* the defendant imparled; and in *Eaſter term* 1 *Car.* the defendant pleaded a judgment upon a bond, dated *anno quinto regis nunc*, where it ſhould have been *regis Jac.* and that he had not aſſets *ultra* to ſatisfy that judgment; and thereupon the plaintiff joined iſſue, that the ſaid recovery was by fraud and covin; and it was found for the plaintiff: though it was impoſſible there could be a bond *anno quinto regis Caroli*, which was not then come, yet the plaintiff, having a good declaration, had judgment. Cro. Car. 25. Knight v. Harvey.

In covenant on a conveyance of lands, the vendor covenants, that he was ſeiſed in fee, and aſſigns a breach, that he was not ſeiſed in fee, and ſo had not performed his covenant; the defendant pleads, that he had not broken his covenant; and on the iſſue ſo joined, a verdict was for the plaintiff: it was moved in arreſt of judgment, that this was not any iſſue, it conſiſting only of two negatives, *viz.* that he was not ſeiſed in fee, and ſo had not performed his covenant on the plaintiff's part, and that he had not broken his covenant on the defendant's part; alſo, that the pleading is too general, for that he ought to anſwer particularly in covenant to the breach aſſigned; and it was ſaid, that though in actions founded upon tort, the declaration, being ſpecial, may be anſwered generally, yet in actions founded on a contract, a ſpecial declaration muſt be anſwered ſpecially. The court at firſt doubted, but afterwards gave judgment for the plaintiff; for it is an iſſue, though argumentative and informal; for if he had not Lev. 183. Sid. 289. 2 Keb. 10. 13. 47. S. C. Trin. 18. Car. 2. between Walſingham v. Coombe.

broken his covenant he was ſeiſed in fee, and if he was not ſeiſed in fee, he had broken his covenant; that it is not wholly immaterial, and informal iſſues are cured by 32 *H.* 8. *c.* 30. after verdict, though immaterial ones are not.

3. Of ſpecial Pleas; and therein of Pleas amounting to the General Iſſue, and of Matters which may be pleaded or given in Evidence.

(*a*) Pleading that amounts to the general iſſue is not to be allowed; and when ſuch plea is pleaded, it is a good cauſe of a ſpecial demurrer

The defendant is at liberty to plead the general iſſue, or traverſe any material point of the declaration; but (*a*) he cannot plead a plea that amounts to the general iſſue; for pleas which amount to the general iſſue are only facts on which the iſſue may be turned in evidence, and therefore are not iſſues of fact, to be referred to the court, but matters of evidence to be determined by a jury, and conſequently not good pleas; becauſe they draw to the examination of the court what is proper to be determined by a jury.

ſince 27 Eliz. c. 5. and before it, of a general one. 10 Co. 95. a. The reaſon of preſſing the general iſſue is not for inſufficiency of the plea, but not to make long records when there is no occaſion. Hob. 127. A plea which amounts to the general iſſue is only matter of form, Roll. Rep. 112 3. and therefore muſt be ſpecially ſhewn as cauſe of demurrer. Cro. Car. 157.

3 Mod. 166. Where the defence conſiſts in matters of law, there, the defendant may plead ſpecially; but, where it is purely fact, the general iſſue muſt be pleaded. And in all actions the defendant may ſhew any matter to the court why the action does not lie; and this being matter of law, is proper to be ſhewn to the court, and not to the jury; for being queſtions of law, the judges are to determine whether they diſcharge or bar the plaintiff's action; but ſuch bars or matters produced by the defendant may be traverſed by the plaintiff, whether they are true or not, which ſubſequently draws them to the examination of a jury.

5 Mod. 252. 2 Salk. 580. pl. 1. Hob. 174. Whatever therefore makes the fact complained of to be lawful, is matter of juſtification, and to be ſhewn to the court; becauſe the court are judges how far the fact, if done, was lawfully done; and therefore on not guilty in treſpaſs the defendant cannot ſhew a licence to prove there was no treſpaſs; becauſe though the licence makes it no treſpaſs, yet he ſhews that licence to an improper juriſdiction, *viz.* to the jury, who are not proper judges of the law.

So, if the defendant ſhews a releaſe of a debt to a jury, it is no evidence; becauſe, though the releaſe makes it to be no debt, he ſhews it to an improper juriſdiction. But, though a man muſt ſhew all matters to the court that confirm the fact complained of, and diſcharge it, yet, where any thing goes in denial of the fact, there, it muſt be given in evidence on the general iſſue; becauſe whatever denies that cauſe of complaint is matter proper to be exhibited to the jury, who are judges whether the fact was, or not; and therefore actions of trover and *aſſumpſit*, which are modern inventions to get rid of the law-wager, which lay in the ancient action

action of debt and detinue, were ſo formed, that almoſt every thing may be given in evidence on the general iſſue.

As, in trover, the plaintiff declares of the property of the goods and chattels, and that they came by finding to the defendant; whatever matters are alleged that confeſs property in the plaintiff, will entitle him to his damages, and whatever deny it, are on the general iſſue; and therefore levying by diſtreſs, releaſes, and the like, which were anciently in this action, are now given in evidence; becauſe they diſaffirm the property of the plaintiff on which his action is founded. *Vide* title Trover and Converſion.

So, in *aſſumpſit*, the action is formed on a contract, and the treſpaſs to the plaintiff is the non-performance of it; and though the iſſue be *non-aſſumpſit* inſtead of the old iſſue not guilty, yet on this iſſue every thing may be given in evidence which diſaffirms the contract, for that goes to the giſt of the action; ſince if there be no contract to be performed at the commencement of the action, there can be no treſpaſs for the non-performance of it: and therefore a releaſe goes to the giſt of this action; for it ſhews there was no cauſe of action at the time this action was commenced; for as in trover he muſt have a right to the thing, ſo in *aſſumpſit* he muſt have a right to the thing declared on; therefore every thing that ſhews the contract to be void, as, non-age, or more money loſt at play than the ſtatute allows, may be given in evidence on the general iſſue (*a*). *Vide* title Aſſumpſit. [(*a*) So, on non-aſſumpſit, the defendant may give in evidence an uſurious contract; for that makes it a void promiſe. Lord Bernard v. Saul, 1 Str. 498. And in general, whatever affects the promiſe may be given in evidence on this plea: as, where a ſeaman had ſued in the Admiralty court for his wages, and had judgment againſt him there, and afterwards brought an *aſſumpſit* at law, the defendant was allowed to give the ſentence in evidence on *non-aſſumpſit*. 2 Str. 733.]

But matters of law, which do not go to the giſt of the action, but to the diſcharge of it, even in theſe new-framed actions, are to be pleaded, as the ſtatute of limitations: ſo, if a leſs ſum be paid before the time; becauſe that is not a performance which deſtroys the being of the action, but a collateral agreement that deſtroys the performance of it. Carth. 387. Salk. 278. pl. 1.

If matter be pleaded which amounts to the general iſſue, yet, if there be alſo a ſpecial matter of juſtification joined in the ſame plea, the plea is good. 3 Lev. 41.

In trover the defendant pleaded a ſale in a market overt, and thereby juſtified the converſion; and ruled that a *nihil dicit* ſhould be entered, if he did not plead the general iſſue, for that it amounted to it. And in another (*a*) caſe in trover the defendant pleaded another plea amounting to the general iſſue; and the court doubted, whether they ſhould compel him to plead the general iſſue, or award a writ of inquiry; but reſolved at laſt to award a writ of inquiry. Cro. Jac. 165. (*a*) Cro. Jac. 319.

In an action on the caſe by a commoner for digging pits, the defendant juſtified, that he was lord of the ſoil, and digged for coals, doing as little damage as he could, and that he left ſufficient common; and on demurrer adjudged againſt him, that it amounted to the general iſſue. Sid. 106.

Vent. 249. 2 Lev. 92. Cro. Eliz. 329.

In treſpaſs, if the defendant pleads property in a ſtranger or himſelf, it amounts to the general iſſue; otherwiſe, in replevin, in which caſe it may be pleaded in bar or abatement. But, where in treſpaſs the plaintiff declared, that the defendant broke his cloſe, and took *quædam averia*, &c.; the defendant pleaded the cattle were his own, and that *J. S.* took them from him, and put them in the plaintiff's cloſe by his aſſent, and that he took them, *&c.*: It was held a good plea; for the plaintiff does not declare that the property of the goods is in him; and when the defendant's beaſts are taken from him by wrong, he may juſtify retaking them wherever he finds them.

Cro. Eliz. 871. Salk. 344. pl. 2. Ld. Raym. 87. Comyns, 4. pl. 4. 5 Mod. 175. Carth. 356.

Where the matter of the plea confeſſes the cauſe of action but avoids it, the defendant may plead ſpecially, though he might have given it in evidence; otherwiſe, where the matter of the plea does not avoid but deny, as in *aſſumpſit*, the ſtatute of gaming may be pleaded, though it might be given in evidence on the general iſſue.

Holt, 328. pl. 2. 12 Mod 96.

Salk. 394. pl. 2.

In treſpaſs for taking his horſe, the defendant pleads that the horſe was the horſe of *J. S.*, and that the plaintiff took and impounded him, and that he the defendant took him by replevin, *&c.*: this amounts to the general iſſue, for it does not ſo much as admit a poſſeſſion in the plaintiff; for the taking and impounding gave him no poſſeſſion, becauſe the horſe was thereby in the cuſtody of the law, ſo no colour of action left to the plaintiff.

Salk. 394. pl. 3. 2 Ld. Raym. 968.

In *aſſumpſit* the defendant pleaded *quod ipſe performavit omnia ex parte ſuâ performand.*; and this was held to amount to the general iſſue; *ſed Q.* for the *aſſumpſit* is admitted, ſo that this is but a diſcharge.

5 Co. 119. reſolved *per curiam*. 2 Inſt. 483.

If a man executes a deed by (*a*) *dureſs* he cannot plead *non eſt factum*, for it is his deed, though he may avoid it by ſpecial pleading, judgment *ſi actio*, &c.

S. P. (*a*) In a plea of *per minas* the very manner of it, as, whether for fear of life, member, or impriſonment, ought to be ſpecially laid. *Vide* Keb. 516.

Colborne v. Stockdale, 1 Str. 493.

[So, if the bond were given for a gaming debt, the ſtatute ſhould be pleaded; and the defendant in his plea ſhould ſet out the game played at, and conclude *contra formam ſtatuti*, that the court may ſee that it was within the ſtatute.]

Hob. 72. Humberton v. Howgil. (*b*) Though the ſtatutes relating to ſheriffs bonds and uſurious bonds are penned in very ſtrong terms, yet the bonds are void only as to their efficacy; for in theſe caſes the defendant cannot plead *non eſt factum*, but muſt avoid them by ſpecial pleading. Dyer, 375. b. Cro. Eliz. 915. Hob. 72. 166.

Upon an iſſue *feoffavit vel non*, the jury found a feoffment, but a covinous one, and the court was of opinion, that upon this iſſue a covinous feoffment was a feoffment, and that if the party would have taken advantage of the covin, he ought to have done it by ſpecial pleading. It is there likewiſe ſaid, that a *non eſt factum* cannot be pleaded upon the (*b*) ſtatute of uſury or ſheriff's bonds, the reaſon of which is, that theſe things have the appearances of feoffments and bonds, though they want the validity.

It

It is ſaid by my Lord Chief Juſtice *Holt*, that all the ſpecial *non eſt factums*, in caſe of *eſcrow* and *raſure*, are impertinent, for thereby the defendant brings all the proof upon himſelf; whereas if he had pleaded *non eſt factum* generally, he would turn the proof of whatever is neceſſary to make it his deed upon the plaintiff *. 6 Mod. 218. * *Sed qu.* As to the caſe of an *eſcrow*; for it is his deed, though perhaps delivered to another on condition? Indeed in pleading an *eſcrow* ſome are of opinion it ſhould conclude, and *ſo not his deed*. *Vide poſt.*

In debt upon a leaſe for years the defendant may plead entry into part, upon which follows ſuſpenſion, and it does not amount to the general iſſue. Vent. 2.

In every action on the caſe for a miſdemeſnour the defendant may plead generally not guilty, or traverſe the point of the writ, as *ne forga pas*, *non ejecit*, *non rapuit*, *non manutenuit*, &c. Dyer, 121. Doct. pl. 203.

But in treſpaſs *non depaſcit herbas* is no plea, but he ought to plead not guilty, the other being only argumentative. 22 H. 6. 37. Doct. pl. 204.

In dower the tenant pleads, that the huſband of the demandant was only tenant for life, the remainder in tail to his ſon; and this was held an ill plea, it amounting to the general iſſue *ne unques ſeiſe que dower*. 40 E. 3. 15. Doct. pl. 205.

In debt againſt an adminiſtrator, the defendant pleads, that the inteſtate was indebted to him by bond 80 *l.* and that goods to that value & *non ultra* came to his hands, which he detains for his debt; and on demurrer it was objected, that it amounted to the general iſſue of *plenement adminiſter*: but the better opinion of the court was, that this is no cauſe of demurrer, for the plea is (*a*) ſufficient; and beſides, it is ſome matter in law which hath been allowed always to be pleaded ſpecially, and not left to a jury; and the reaſon of preſſing a general iſſue is not for ſufficiency of the plea, but not to make long records when there is no cauſe, which is matter of diſcretion; and therefore it is to be moved to the court, and not to be demurred upon. Hob. 127. Sir Henry Warner v. Wainsford. (*a*) That it is a good plea, and ſafer than pleading the general iſſue. Noy, 106. Winch. 19. Cro. Car. 157. Cro. Jac. 165. Leon. 178.

Hob 218. Like point, & *vide* Raym. 230. [It was holden in Plumer v. Marchant, 3 Burr. 1380. as ſettled, that an adminiſtrator may either plead a retainer, or give it in evidence on *plene adminiſtravit*.]

In an action on the caſe by a commoner, the plaintiff declared, that the defendant had incloſed the places in which the plaintiff had a right of common, and likewiſe had put his cattle in thoſe places, by which he could not *in tam amplo & beneficiali modo* enjoy the ſame; the defendant pleaded, that he put his cattle in rightfully, and that the plaintiff had common enough; and on demurrer it was held, that the plea was the ſame as not guilty, and therefore amounted to the general iſſue; yet the court likewiſe held, that for that reaſon alone the plaintiff had no cauſe of demurrer; for that the defendant may well diſcloſe the matter of law in pleading, which is a much cheaper way than to have a ſpecial verdict; and that this is on the ſame reaſon of giving colour: but, if the matter, by which the defendant juſtifies, be all matter of fact, and proper for the trial of a jury, then the defendant ought to plead the general iſſue. 2 Mod. 274. Birch v. Wilſon.

Paſch. 29 Car. 2. in C. B. Nicholls v. Jeames.

In aſſault and battery at *Maidſtone in com. Kent*, the defendant pleads, that he is poſſeſſed of a houſe in *D.* and that the plaintiff with another woman came to his door, and the other woman endeavoured to turn him out of poſſeſſion, and thruſt him down, and that in his fall he threw down the plaintiff againſt his will and fell upon her; *abſque hoc*, that he is guilty of a battery at *Maidſtone* or any other place *extra*, &c. Plaintiff demurs, 1*ſt* (*a*), Becauſe the defendant has traverſed the place without alleging any ſuch local juſtification as to make it material. 2*dly*, Becauſe the plea amounts to the general iſſue. *Per cur.*—The juſtification, if we may call it ſo, is local; but the plea does amount to the general iſſue: but we are not bound to give judgment for the plaintiff upon that, though he do aſſign it as cauſe of demurrer; it is a diſcretionary thing, and we may allow of a plea that does amount to the general iſſue, if it contain any thing that may breed a ſcruple in the *lay gents*; and therefore they adviſed the parties to compound the matter.

(*a*) For this *vide* Cro. Eliz. 705.

5 Mod. 314. Hackſhaw v. Clerk.

An action on the caſe was brought upon a bill of exchange, to which the defendant pleaded, that after the acceptance of the bill he gave a bond in diſcharge thereof; and upon demurrer to this plea it was objected, that it amounted to the general iſſue; for, the debt upon the bill being extinguiſhed by the bond, the defendant ought to have pleaded *non-aſſumpſit*, and to have given the bond in evidence; and the court ſeemed to be of that opinion; but by conſent the defendant pleaded the general iſſue.

1 P. Wms. 258. [*Vide* tit. Bankrupt, *ſupra*, vol. 1. p. 452. A general plea of bankruptcy in *Ireland*, referring to an *Iriſh* act of parliament, and concluding to the country, (in a mode ſimilar to that given by ſtat. 5 G. 2. c. 30. § 7. to bankrupts in *England*,) is bad. Quin v. Keep, 2 H. Bl. 553.]

By the ſtatute of bankrupts a liberty of pleading *generally* is given to the bankrupt, and thereby he may avoid the hazard of pleading *ſpecially*; but then he muſt take upon himſelf the proof of his conformity to the ſtatute in every particular; or, if he thinks fit to plead the matter ſpecially, then he muſt ſet forth every point; and by it he has this advantage againſt the plaintiff, that he muſt reply to one particular only, upon which iſſue muſt be taken: but, where he pleads the matter ſpecially, but does not ſet forth the whole, judgment muſt be given againſt him; for by the act it is ſo to be pleaded as that the whole merits may be tried.

Carth. 380. 5 Mod. 252. Hallet v. Byrt.

In treſpaſs for taking three cows at *Beomiſter* in *Dorſetſhire*, the defendant pleaded ſpecially, that the Biſhop of *Sarum* was ſeiſed in fee of the hundred of *Beomiſter* in the right of his biſhoprick, and that he and all his anceſtors, time out of mind, had a hundred court of all perſonal actions under 40*s.*, and of replevin within the ſaid hundred from three weeks to three weeks; and that the Biſhop, and all thoſe whoſe eſtates, *&c.* had uſed time out of mind by their ſteward of the ſaid hundred, upon complaint made, *&c.* to replevy cattle unjuſtly taken at any place within the ſaid hundred, and that the Biſhop had demiſed the ſaid hundred unto *Carleton Whitlock*, Eſq. for three lives, by virtue of which he was ſeiſed, *&c.* and that the plaintiff and *T. S.* took

thoſe cows, being the cows of one *E. G.* at *Beomiſter* within the ſaid hundred, and impounded them there, and thereupon the ſaid *E. G.* complained to *Henry Samways*, ſteward of the ſaid *Carleton Whitlock* of his hundred court aforeſaid, of the unjuſt taking the ſaid three cows; and that thereupon the ſaid ſteward made his precept to the bailiff of the ſaid hundred, *&c.* to replevy thoſe cows; by virtue whereof the defendants took them and delivered them to the ſaid *E. G.*. On a ſpecial demurrer to this plea, for that it amounted to the general iſſue, it was adjudged that the plea, in the form it was drawn, did amount to the general iſſue, for that the defendants had not admitted by their plea ſo much as a poſſeſſion of the cows in the plaintiff at the time of taking, *&c.* for they ſay the cows were then impounded, which is the cuſtody of the law, and not of the party, ſo that the defendants by their plea had not given any colour of action whatſoever to the plaintiff.

If there are three or more partners, and an action is brought againſt two of them, and they plead the partnerſhip, this amounts to the general iſſue *. Carth. 63. *per* Holt, and two other Judges.

* The text is equally erroneous, as I conceive the Reporter, Carthew, to be, no ſuch plea of partnerſhip being pleaded. The defendants pleaded the general iſſue of not guilty; and though in Carth. it is ſaid that judgment was given for plaintiff, yet Salk. and all the other reporters of this caſe, who are numerous, expreſsly ſay, judgment was given for defendants, by reaſon of all the partners not being made defendants. It was to be ſure argued that ſuch matter ought to have been pleaded in abatement, if defendants mean to take advantage of ſuch matter; but then it was doubted whether it was pleadable in abatement, it only amounting to the general iſſue. *Vide* 2 Salk. 440.—*N. B.* This caſe in Carthew was againſt *ſome* of the owners of a ſhip, for damages to goods. [It was in form an action of *aſſumpſit*, and its authority hath been denied in later caſes; for it hath been holden, that in *aſſumpſit* againſt one partner, the partnerſhip muſt be pleaded in abatement, and cannot be given in evidence. Rice v. Shute, 5 Burr. 2611. Abbot v. Smith, 2 Bl. Rep. 947. And the law is the ſame in an action on the cuſtom of the realm. Buddle v. Willſon, 6 Term Rep. 369. In an action *ex delicto*, that there are other partners not named is no cauſe of abatement, for every *tort* is ſeveral. Mitchell v. Tarbutt, 5 Term Rep. 649.]

In many caſes, though a man plead a thing which may be given in evidence, yet this ſhall not amount to a general iſſue; as, where the plea goes by way of confeſſion and avoidance, as, in treſpaſs, where the defendant acknowledges the plaintiff to have a good cauſe of action, unleſs for the matter which the defendant has pleaded in his plea; in ſuch caſe ſuch plea ſhall not amount to a general iſſue. Skin. 362. pl. 5. *per* Holt.

In an appeal of maihem if the defendant plead not guilty, he cannot give in evidence that it was *ſe defendendo*, but ought to plead it by way of juſtification in bar of the action. 2 Inſt. 316.

In treſpaſs brought by *R.* for breaking his cloſe and beating his ſervant, and carrying away his goods; upon not guilty pleaded the jury found this ſpecial matter, *viz.* that Sir *F. B.*, Chancellour of *England*, was ſeiſed, and leaſed to the plaintiff and one *A.*, which *A.* aſſigned his moiety to one *C.*, by whoſe command the defendant entered: And it was moved in arreſt, *&c.* that this tenancy in common betwixt the plaintiff and him, in whoſe right the defendant juſtifies, could not be given in evidence; ſo it could not be found by verdict, but ought to have been pleaded ſpecially: but the whole court was againſt that, and held, that it might be given in evidence. 3 Leon. 94. Roſſe's caſe.

Co. Lit. 47. b. In debt for rent the defendant may plead *nil debet*, and give in evidence *nil habuit in tenementis*, *per* Holt, Ch. J. Or on ſuch plea may give eviction in evidence. Comb. 238. [But in *aſſumpſit* under the ſtat. 11 G. 2. for uſe and occupation, *nil habuit in tenementis* is not good. Lewis v. Willis, 1 Wilſ. 314.]

In debt for rent, if the leſſor has nothing in the land, the leſſee may plead, that the leſſor *non dimiſit*, and give in evidence the other matter.

Dyer, 92. a. pl. 16.

In waſte the defendant may plead *nul waſt fait*, and give the lopping of trees in evidence.

Dyer, 276. a. pl. 51.

But, if waſte be aſſigned in houſes, and the defendant plead *nul waſt*, he cannot give in evidence that the houſes were repaired before the action brought, but ought to plead it ſpecially; for having once committed waſte, he ought to diſcharge himſelf by ſhewing the ſpecial matter to the court, which would be a good bar.

Carth. 356. 5 Mod. 175. Salk. 344. pl. 2. Ld. Raym. 87. Comyn, 4. pl. 4. 5 Mod. 175. Carth. 356. Holt, 328. pl. 2. 12 Mod. 96. Huſſey v. Jacob.

In an action brought againſt *Jacob* a goldſmith, upon a bill of exchange drawn by the Lord *Chandois* on the ſaid *Jacob* for 112 guineas, which was accepted by him, the defendant pleaded in bar, that after the 29th of *September* 1664, and before the making that bill of exchange, *viz.* on ſuch a day, the ſaid Lord *Chandois* and the plaintiff *Huſſey* played together with dice, at a certain play, called Hazard, upon tick and credit, without ready money, and that the Lord *Chandois* then and there at one time and meeting loſt to the plaintiff the ſaid 112 guineas upon tick, and that for the ſecurity of the payment of the ſaid guineas loſt as aforeſaid the ſaid Lord *Chandois*, on the day and year in the declaration, *&c.* made the ſaid bill of exchange, and directed it to the defendant, requeſting him to pay, *&c.* and that the defendant did accept of the ſaid bill and aſſume upon himſelf, as the plaintiff had declared, *quorum præmiſſorum prætextu & vigore ſtatuti in ea caſu edit. & proviſ.*, the ſaid bill of exchange ſo by him accepted, and the acceptance thereof, and the promiſe of the ſaid defendant ſo as aforeſaid made, *devenerunt & fuerunt & modo ſunt vacua & nullius vigoris in lege, & hoc*, &c. To which the plaintiff demurred, and ſhewed for cauſe, that it amounted to the general iſſue. *Sed per cur.*—The plea is good, both as to the matter and form, and it does not amount to the general iſſue; and it is not a rule, that becauſe ſuch a matter may be given in evidence, therefore it ought not to be pleaded ſpecially; for it often happens to be in the election of the defendant, either to plead it ſpecially or not, as he may be adviſed; as for inſtance, the pleading of a releaſe, coverture, or infancy, in an *aſſumpſit* is certainly good; and yet thoſe things may be given in evidence upon *non-aſſumpſit* pleaded: however, the defendant ſometimes may not be willing to put ſuch matters of law to the judgment of the jury, or, perhaps, may deſign to ſave the coſts of a ſpecial verdict.

Salk. 278. pl. 1. ruled by Holt at Hertford aſſizes.

In debt for rent, upon *nil debet* pleaded, the ſtatute of limitations may be given in evidence, for the ſtatute has made it no debt at the time of the plea pleaded, the words of which are in the preſent tenſe: But in caſe on *non-aſſumpſit* the ſtatute of limitations cannot be given in evidence, for it ſpeaks of a time paſt, and relates to the time of making the promiſe.

[Whatever

[Whatever is matter of inducement may be given in evidence on the general iſſue: *ſecùs*, of matter of ſubſtance. 4 Burr. 2469.

A proviſo in the ſame act of parliament, whereon an action is brought, and the matter provided in it, may be given in evidence on the general iſſue: as, in an action againſt a parſon for merchandizing, contrary to 21 *H.* 8. *c.* 13. which has a proviſo for neceſſaries to maintain his houſehold. So, it ſeems, that a proviſo in the bribery act of 2 *G.* 2. *c.* 24. that a perſon, who has been a diſcoverer, ſhall not be an object of that law, may be taken advantage of under the plea of *nil debet*.] *Ibid.*

## 4. Of ſham Pleas, and the Conſequence of falſe Pleading.

The pleading a ſham plea, or ſuch a one as the party knows to be falſe, is a great abuſe of the juſtice of the court; and ſuch pleas have not only been ſet aſide with coſts, but the parties cenſured, and otherwiſe puniſhed according to the diſcretion of the court.

If it appears judicially to the court, on the defendant's own ſhewing, that he hath pleaded a falſe plea, this is a good cauſe of demurrer; as, where the defendant brought an indenture into court, and pleaded that it contained no covenants, and on inſpection it appeared to contain ſeveral, judgment was given againſt him. Sand. 316. Smith v. Yeomans.

It hath been holden, that pleading a falſe plea is within the ſtatute of *Weſtm.* 1. (3 *Ed.* 1.) *c.* 29. which my Lord *Coke* ſays was made in affirmance of the common law. 2 Inſt. 215. Vent. 213.

If therefore, ſays he, a ſerjeant, or an apprentice of the law, in pleading a matter of fact iſſuable for his client, allege the ſame to be done at a town in ſuch a county, where indeed he knoweth there is no ſuch town, of purpoſe to delay juſtice, *et a' enginer la court*, this is a deceit within the ſtatute, and hath been ſo holden. 2 Inſt. 215.

And if the client would have the attorney plead a falſe plea, he ought not to do it, for he may plead *quod non ſum veraciter informatus & ideo nullum reſponſum*, and that ſhall be entered in the roll to ſave him from damages in a writ of deceit; and if an attorney ought not wittingly to plead a falſe plea, *à fortiori* (*a*), a ſerjeant or apprentice ought not to do the ſame. 2 Inſt. 215. (*a*) Though counſel are obliged to be faithful to their clients, yet not to manage their cauſes in ſuch a manner, as juſtice ſhould be delayed or truth ſuppreſſed. Vent. 213. *per* Hale.

In debt upon an obligation the defendant pleaded *non eſt factum*, and afterwards *relictâ verificatione* confeſſed the action, and the judgment againſt him was *in miſericordiâ*: it was moved, that it ſhould be *capiatur* *, becauſe he once denied his deed, and ſo ought to be fined to the king; and of this opinion was *Gawdy*; but *Fenner* and *Williams* held otherwiſe, becauſe a fine is not payable but where he denies his deed, and it is found againſt him upon a falſe plea, and the jurors are troubled with the trial thereof; there, for troubling the king's courts, and for troubling the country, Cro. Jac. 64. Davis v. Clerk. * The *capiatur pro fine* is taken away, and other proviſion made in lieu thereof, by 5 W. & M. c. 12.

country, and the falſity of his plea, he ſhall be fined and impriſoned; but when it is not found againſt him, but he relinquiſhes his plea, he ſhall only be amerced, and accordingly the judgment was affirmed.

Co. Lit. 366. a. In dower if the tenant pleads non-tenure for part, and detinue of charters for the reſidue, and theſe pleas are found againſt the tenant, the demandant ſhall recover damages for all the time, from the death of her huſband, without any defalcation, for which reaſon the tenant ought to be careful that he does not plead a falſe plea.

Dyer, 222. Doct. pl. 181. * If the bond is conditioned to pay on or before, payment before the day, *ſcil.* ſuch a day is good. Anon. T. 3 G. 3. 2 Wilſ. 173. ——If money is payable *at or before* ſuch a day, and is paid before, it ſhould be pleaded paid at ſuch precedent day; and plaintiff may reply, not paid that day, nor before, nor after. Fletcher v. Hennington, P. 33 G. 2. 2 Burr. 944. If an obligation be made to pay money at a certain day and place, payment before the day and at another place is a good diſcharge: yet in pleading, if the defendant ſays, that he paid at the ſame day and place, according to the obligation, the iſſue will be found againſt him unleſs the jury help him, which they are not obliged to do, his plea not being in ſtrictneſs true *.

Co. Lit. 366. Doct. pl. 180. In a formedon, if the tenant pleads warranty and aſſets, deſcended, and the demandant takes iſſue thereon, and the iſſue is found for the demandant that aſſets did not deſcend, and thereupon the demandant recovers; in this caſe, although aſſets afterwards deſcend, yet the tenant ſhall never have a *ſcire facias* on the ſame judgment; for by his falſe plea he hath loſt the benefit of the ſtatute of *Glouceſter*, and of the ſtatute *de donis* in this point.

Doct. pl. 181. *Vide* title Heir and Anceſtor. If an heir at law pleads *riens per diſcent*, which is found againſt him, there ſhall be a general judgment of his body and other lands and goods, becauſe of his falſe plea.

Cro. Car. 436. In a writ of annuity againſt one as heir to his anceſtor the defendant pleaded, *non eſt factum patris ſui*, and found againſt him; whereupon it was moved that the execution ought to be awarded of his proper lands, and of his lands deſcended, becauſe he had pleaded a falſe plea: But *per cur.*—The denying the deed to be his father's was not a falſe plea in his cognizance; and although it were falſe, yet being charged in reſpect of his anceſtor's deed, the land of his anceſtor ſhall only be taken in execution, for that is the cauſe of his charge.

## (H) Traverſe: And herein,

### 1. The Nature thereof.

Doct. pl. 344. 2 Lil. Reg. 586. Co. Lit. 282. Yelv. 195. † In moſt caſes it does A Traverſe is the denial of ſome material point alleged in the pleadings, and which, if properly taken, cloſes † the iſſue. It may be taken to the declaration, bar, replication, *&c.*; and therefore, if properly taken to the declaration, it deſtroys the plaintiff's action; and if to the bar, it deſtroys what is ſaid in avoidance

ance of the action; and if to the replication, what was faid in avoidance to the bar.

not clofe, but only offers the

iſſue; and if the traverſe is material, iſſue muſt be taken thereon by the adverſe party: a traverſe, properly ſo called, being by *abſque hoc*, or without that, that, &c., and concluded with a verification. The author may here, perhaps, mean a general traverſe, or a poſitive denial of the moſt material fact alleged or pleaded by the oppoſite party; in which caſe, the party ſo denying, concludes to the country: but the common acceptation of the term is, where iſſue is offered in the above-mentioned form, the party concluding with a verification. —— N. B. A general traverſe *abſque tali cauſa* concludes to the country.

But, for the better underſtanding the nature of a traverſe, we ſhall in the firſt place inſert ſome general rules that have been laid down herein.

And, firſt, it is laid down, that where a matter is expreſsly pleaded in the affirmative, which is expreſsly denied by the other party, there, a traverſe is needleſs; becauſe in ſuch caſe a ſufficient iſſue is joined.

36 H. 6. 15. Cro. Eliz. 755. Lit. Rep. 15. ſame rule.

Vent. 101. ſame rule laid down; and that if it were otherwiſe, they might traverſe one upon another *in infinitum*.

As, where in *audita querela*, to avoid the execution of a recognizance, the plaintiff ſet forth that it was defeaſanced upon the payment of divers ſums of money at certain days, and that he was at the place appointed, and tendered the money, and that the defendant was not there to receive it; the defendant pleaded *proteſtando*, that the plaintiff was not there to pay it; and that he was there ready to receive it, *abſque hoc*, that the plaintiff was ready to pay it, which being ſpecially demurred to, the court held the plea naught; and that there being an expreſs affirmative and negative, there ſhould have been no traverſe.

Cro. Eliz. 754-5. Huiſh v. Phillips.

So, if in an aſſiſe the defendant pleads a feoffment by a ſtranger, which he avers to be abſolute and without any condition, and the plaintiff replies that it was on condition, this is ſufficient without any further traverſe.

2 Roll. Rep. 35. Hob. 71, 72.

But this rule, that there ſhall be no traverſe where the matter alleged by one party is expreſsly denied by the other, muſt be underſtood of thoſe caſes where the denial makes a complete iſſue; for though the matter contradicts, that is not ſufficient without an apt iſſue is formed upon an affirmative and negative; as, where the death of a man is poſitively alleged on one part, and his life by the other party, here the death ought to be traverſed *, otherwiſe no iſſue is joined.

5 H. 7. 5, 6. Vent. 213. Lutw. 15.

* *Sed qu. de hoc*, unleſs the traverſe conclude to the country?

A traverſe therefore ſeems to be properly taken when the adverſe party to the declaration, plea, replication, *&c.* forſaking the general iſſue ſets up a title for himſelf, or ſets forth a particular ſpecification of his caſe, with a juſtification thereof, *&c.* with a traverſe (*a*), *abſque hoc*, or denial of the matter alleged by the adverſe party, or that the ſame is true in that (*b*) manner and form he hath alleged; and ſuch ſpecification is called an (*c*) inducement to the traverſe.

Hob. 103-4. (*a*) That *abſque hoc*, ſo that without that, &c. are the proper words of a traverſe. Sand. 22. 2 Salk. 628.

pl. 2. Ld. Raym. 349. (*b*) Where the words *modo & formâ* are only words of form and not of ſubſtance, and the diverſities therein, *vide* Co. Lit. 281. Doct. pl. 344. (*c*) Such inducement is ſaid to be the ſhewing of croſs matter contrary to the allegation of the adverſe party, Dyer, 365. pl. 33.

Hence

Sid. 301. Hence it is ſaid to be a rule, that when any thing pleaded ſpecially by the defendant, is directly contrary to the matter in the declaration, ſuch plea is not good without a traverſe; yet it is in the election of the other party to waive the advantage thereof, or demur thereupon.

Cro. Car. 336. The inducement to the traverſe ought to be (a) ſufficient in matter.

(a) Alſo, it is ſaid to be a rule, that nothing can be an inducement to a traverſe but ſuch a thing as is traverſable. 2 Leon. 32. *per* Manwood. [In general, the inducement to a traverſe cannot be traverſed: it ought, however, to be ſuch, as, if true, will defeat the title of the other party; otherwiſe it amounts to a negative pregnant. *Per* Parker, C. B. Park, 131.]

3 Mod. 320. A traverſe ought not to be taken but where the thing traverſed is (b) iſſuable.

(b) That matter of law cannot be traverſed, Yelv. 200. nor where part is matter of law, and part matter of fact. 2 Mod. 55. [Hence, in an information in nature of a *quo warranto*, the defendant made title under the conſtitution of Honiton, and then traverſed the uſurpation: the Attorney-General, without taking any notice of the title, joined iſſue on the traverſe; and it was holden to be ill, becauſe the uſer being admitted by the defendant's making title, the uſurpation was a matter of law, not to be ſent to a jury. Rex v. Blagdon, Paſch. 1 Geo. cited in 2 Str. 841.—But matter of law connected with fact is clearly traverſable; as ſeiſin in fee, or in tail, Ewer v. Moile, Yelv. 140. ſimony, Raſt. Entr. 532. a. right of a county to repair a bridge, 2 Lev. 112. right to preſent to a church. Grocers' Company v. Archbiſhop of Canterbury, 3 Wilſ. 234. 2 Bl. Rep. 776.]

Cro. Jac. 221. Yelv. 151. Bedell v. Lull. [In this caſe, according to Yelverton, the court ſaid, that the traverſe ought to purſue the very words of the plea traverſed. Though perhaps this may be too ſtrict, and it may be not neceſſary to follow the very words of the plea; yet, moſt certainly the traverſe muſt be *ad idem*, it muſt be the ſame with the plea in effect and ſubſtance; thus, where in treſpaſs, a plea alleged the injury to be in conſequence of cutting a beam, the replication, traverſing its being previous, was adjudged ill. Humphreys v. Churchman, Ca. temp. Hardw. 289.]

And therefore, where in ejectment upon a leaſe made by *E. J.* the defendant pleaded, that before *E. J.* had any thing to do, &c. *M. J.* was ſeiſed in fee, after whoſe death the land deſcended to his heir, and that *E.* entered and was ſeiſed by abatement; the plaintiff replied, and confeſſed the ſeiſin of *M.*, but ſaid, that he deviſed it in fee to *E. J.* who entered; *abſque hoc*, that *E. J.* was ſeiſed by abatement; upon demurrer, this was held to be an ill traverſe; for the plaintiff had confeſſed the ſeiſin of *M.* and avoided it by the deviſe, and therefore ought not to have traverſed the abatement; for having derived a good title by the deviſe of the leſſor, it is an argument that he entered lawfully, and it was that alone that was iſſuable, and not the abatement; therefore it was ill to traverſe that, becauſe it muſt never be taken, but where the thing traverſed is iſſuable.

(c) 2 Sand. 5. 28. Roll. Rep. 235. *& vide infra.* The traverſe is regularly to be taken to the (c) moſt material point alleged by the other party, and is not to be (d) multifarious, but to a ſingle point.

(d) 3 Lev. 40, 41.

Hard. 317. But any part of what the defendant (e) makes his title is traverſable; as, if in treſpaſs the defendant allege a ſeiſin in fee in *J. S.*, and a demiſe to himſelf; the plaintiff may traverſe either the ſeiſin in fee, or the demiſe, at his election.

(e) But a defendant cannot traverſe a matter not alleged in the declaration. 2 Vent. 79. 2 Lutw. 1560. 1480. But, if the plaintiff aſſign ſeveral breaches, the defendant may traverſe any of them. Salk. 138.

Alſo,

Alſo, when the defendant traverſeth any part of the plaintiff's count or declaration in a *quare impedit*, it ought to be ſuch part as is inconſiſtent with the defendant's title, and being found againſt the plaintiff, abſolutely deſtroys his title; if it do not ſo, however inconſiſtent it be with the defendant's title, the traverſe is not well taken. Vaugh. 8.

It is laid down as a general rule in all the books which ſpeak of this matter, that there cannot be a traverſe upon a traverſe, that pleadings and proceedings may not be endleſs; for if that were permitted, each party might go on traverſing *ad infinitum*. But for the exceptions to this general rule, *vide infra*.

An iſſue joined upon an *abſque hoc* ought to have an (*a*) affirmative after it. Co. Lit. 126. (*a*) Salk. 4. pl. 10.

S. P. admitted to be the general rule; but the court ſeemed to think, that where an *abſque hoc* compriſes the whole matter generally, as *abſque tali cauſâ*, it may conclude *& de hoc ponit ſe ſuper patriam*; but where it only traverſes a particular matter, as *abſque tali warranto*, &c. it ought to be averred. 7 Mod. 105. L. P. [Although it is a general rule that a traverſe muſt conclude with a verification, yet it may, and when it compriſes the whole ſubſtance of the plea, it ought to conclude to the country. Boyce v. Whitaker, Dougl. 96. Haywood v. Davies, 1 Salk 4. Robinſon v. Railey, 1 Burr. 316. Smith v. Dovers, Dougl. 428. Hedges v. Sandon, 2 Term Rep. 439.]

In aſſault and battery, the defendant pleaded a releaſe of all actions, *&c.* The plaintiff replied, that the releaſe was gotten by dureſs, *&c.* The defendant rejoined, and ſhewed cauſe why it was not gotten by dureſs; *abſque hoc*, that it was voluntary, *et hoc petit quod inquiratur per patriam:* upon this iſſue the cauſe was tried, and the plaintiff had a verdict; and it was moved in arreſt of judgment, that he ought not to conclude to the country after a traverſe; becauſe a traverſe itſelf is negative, and therefore the defendant ought to have joined iſſue in the affirmative: it was admitted, that if iſſue had been joined before the traverſe, it might have been helped by the ſtatute of jeofails; but not being ſo in this caſe, the judgment was arreſted. 3 Mod. 203.

If the defendant's plea be in the negative, the plaintiff need not traverſe it, for a negative cannot be traverſed; and therefore, if an executor or heir in debt, for a debt due by the teſtator or anceſtor of the defendant, pleads no aſſets, or *riens per deſcent præter*, &c., the plaintiff, without traverſing the *præter*, may reply generally aſſets *ultra*, without ſaying what, or where they are. Palm. 511. 2 Mod. 50. But for this *vide* 8 Co. Mary Shipley's caſe, Cro. Car. Dorcheſter v. Web. Hob. 104. Yelv. 165.

But for the fuller explication of this matter we ſhall conſider more particularly:

## 2. In what Caſes a Traverſe is permitted.

It hath been held, on the 26 *H.* 8. *c.* 3. for payment of tenths, which enacts, *That after default and certificate made thereof to the court, under the ſeal of the biſhop, the benefice ſhall be void*, that the party may traverſe ſuch certificate; for herein the biſhop acts only as an officer, not as a judge. Cro. Eliz. 80. Leon 269. Moor, 541, 915 Savil, caſe 63.

But, if, on a trial of general baſtardy, the party be certified a baſtard by the ordinary, ſuch certificate cannot be traverſed; for herein the ordinary acts as judge; and ſuch certificate ſhall bind perpetually the perſon certified a baſtard, though he was not party to the ſuit; as all perſons are eſtopped to ſpeak againſt the memorial Roll. Abr. 362.

rial of any judicatory, becauſe the act of the publick judicatory, under which any perſon lives, is his own act; and were they not thus bound, there might be contradiction in certificates.

2 Mod. 10. Whitrong v. Blaney.

If upon a judgment obtained by *A.* he ſues out a *ſcire facias*, upon which *J. S.* is returned tertenant, he cannot traverſe this return of the (*a*) ſheriff.

(*a*) That a ſheriff's return of a reſcous cannot be traverſed. Dyer, 212. Cro. Eliz. 780.

Hawk. P. C. c. 64. *Vide* title Forcible Entry and Detainer.

On the ſtatutes againſt forcible entries and detainers, it hath been holden, that one juſtice of peace may make a record of a forcible detainer, and that ſuch record is not traverſable; becauſe the juſtice of peace in making thereof acts not as a miniſter, but as a judge.

Carth. 74. but for this *vide* Hawk. P. C. c. 76. § 72. 83.

It hath been held, that preſentments in the quarter ſeſſions of the peace, and even in *B. R.*, are traverſable; and that if it be ſo in courts ſuperior to the leet, *à fortiori*, it muſt be ſo in preſentments at the leet.

2 Hawk. P. C. c. 11.

2 Hawk. P. C. c. 19. § 21. * Yet there are caſes where theſe are traverſable, or their truth called in queſtion —Perhaps in all caſes, by removing them into B. R. or by pleading to actions brought on them for recovery of the amerciaments; or where there is a diſtreſs and replevin.

It is held, that wherever an eſcape is finable, the preſentment of it is traverſable; but where the offence is amerciable only, there the preſentment is of itſelf concluſive, ſuch amerciaments being reckoned among thoſe *minima de quibus non curat lex* *.

But for this *vide* title Coroner, letter (D).

It is held by ſome opinions, that an inquiſition taken by the coroner *ſuper viſum corporis* cannot be traverſed: alſo, in reſpect to that high credit which the law gives to an inquiſition found before a coroner, it hath been held, that if an inquiſition finds that a perſon has been ſlain, and that *J. S.* hath fled, he forfeits his goods and chattels; the coroner's inqueſt being of that ſolemnity as not to be traverſable.

Roll. Rep. 226. 2 Roll. Abr. 299. Hard. 131. Raym. 406.

The probate of a will is not traverſable; and herein it is ſettled, that the eccleſiaſtical courts having the probate of wills, they, as incident to ſuch juriſdiction, have power to determine all thoſe matters that are neceſſary to the authenticating of ſuch teſtament: therefore, if the ſeal of the ordinary appears, it cannot be ſuggeſted, or given in evidence in the common law courts, that the will was forged, or that the teſtator was *non compos*, or that another perſon was executor; for of theſe they had proper juriſdiction, and the remedy muſt be by appeal.

Dyer, 254. Gouldſ. 351. 3 Leon. 199. 5 Co. 57. but *vide* Show. P. Caſes, 88. 3 Lev. 313.

If the ordinary refuſe a perſon preſented to him for cauſe, ſuch cauſe is traverſable, and ſhall be tried by the metropolitan, if the party be living, but if dead, by a jury; for though the biſhop be judge in examining, yet, as his proceedings are not of record, the cauſe of refuſal is traverſable.

Watkins v. Barry, 1 Str. 444. Hayley v. Fitzgerald, *Id.* 643. S. P.

[In debt on a bail-bond, the defendant traverſed the arreſt of the principal; and on demurrer, judgment was given for the plaintiff; for otherwiſe this would be a way to avoid all bail-bonds that are civilly taken, without expoſing the party by an arreſt.]

3. In

### 3. In what Caſes a Traverſe is neceſſary.

Herein it is laid down as a general rule, that where the matter alleged by the defendant in his plea is contrary to the matter ſet forth in the declaration, there muſt be a traverſe or denial of ſuch matter ſet forth in the declaration. So, if the replication contradicts the matter alleged in the plea, *&c.* (*a*), as, where the defendant alleges ſeiſin in one from whom he claimeth, the plaintiff cannot allege ſeiſin in another from whom he claimeth, without traverſing, confeſſing, or avoiding the ſeiſin alleged by the defendant. Lutw. 381. (*a*) Cro. Eliz. 30.

So, if it be alleged by the defendant, that the party died ſeiſed in fee, and the plaintiff allege that he died ſeiſed in tail, he muſt traverſe the dying ſeiſed in fee (*b*), becauſe two affirmatives cannot make an iſſue. 5 H. 7. 11, 12. Doct. pl. 349. Dyer, 312. b. S. P. (*b*) Leon. 78. S. P.

The omiſſion of a traverſe where neceſſary is matter of ſubſtance; and therefore, where in treſpaſs for taking his horſe the defendant pleaded, that he was ſeiſed of ſuch lands, and entitled himſelf to an heriot; the plaintiff replied, that another perſon was jointly ſeiſed with the defendant, *et hoc paratus eſt verificare;* on demurrer it was adjudged for the defendant, becauſe the plaintiff ought to have traverſed the ſole ſeiſin. 2 Mod. 60. Snow v. Wiſeman; *& vide* Cro. Jac. 221. that the plaintiff having ſaid enough in his caſe to avoid the bar, if he had traverſed it alſo it would make his replication naught. *Et vide* 1 Leon. 43-3. that a traverſe is but matter of form, and the want thereof ſhall not prejudice the other party in point of judgment; but the judges ought to judge upon the ſubſtance, and not upon the manner or form of pleading; *& vide* title Amendment and Jeofail.

Where a man confeſſes and avoids, he needs not traverſe; but, where in *aſſumpſit* againſt the defendant as executor, he pleaded that the teſtator made *J. S.* executor, who proved the will, and took upon him the execution thereof, and concluded in abatement; here, becauſe he had not traverſed, *abſque hoc*, that he was executor, or adminiſtered as executor, it was adjudged againſt him. 2 Mod. 168. Singleton v. Bawtree.

When a maleſeaſance is laid to the defendant's charge, he ought expreſsly to traverſe it, and not to anſwer it by argument; but in waſte the defendant may ſay it was ruinous, without anſwering expreſsly to the waſte: ſo, in caſe of an innkeeper, he may allege a robbery, without traverſing it was by his default. Cro. Eliz. 281.

In debt for rent, the plaintiff declared on a leaſe of four acres of land at 5 *l.* rent, and for rent arrear he brought the action: the defendant pleaded to part *nil debet*, and to the reſidue, that the leaſe was of the ſaid four acres, and of one acre more, and that before the rent was arrear, the plaintiff entered into the fifth acre: on which the plaintiff demurs; and the reaſon ſhewn on the argument was, for that he did not traverſe, that he demiſed four acres only. But on the other ſide it was ſaid for the defendant, that the traverſe ought to come on the plaintiff's part, *viz.* he ought in his replication to have maintained the leaſe in the declaration, Sand. 206. Sid. 405. Raym. 175. 2 Keb. 467. Lev. 263. Salmon v. Smith.

claration, and have traverſed, that he demiſed the fifth acre. To which it was anſwered, that that would be a departure from his declaration, and therefore the traverſe ought to have been on the defendant's part; for when he pleads another leaſe than that upon which the plaintiff declared, he ought to traverſe the leaſe on which the plaintiff declared, *viz.* to plead the leaſe of the fifth acre, *abſque hoc*, that he demiſed the four acres only; and ſo held the court, and gave judgment for the plaintiff.

Vent 211. 217. Sir Ralph Bovey's caſe. Lutw. 381. S. C. cited. Latch, 200. S. P. adjudged. *Et vide* Cro. Jac. 657.

In an action againſt a ſheriff for an eſcape, the plaintiff declared, that the defendant being ſheriff of *Surry* voluntarily ſuffered *J. S.* whom he had in execution to eſcape, the defendant proteſting, that he did not let him voluntarily eſcape, pleaded, that he took him upon freſh purſuit. To which it was demurred; becauſe he did not traverſe the voluntary eſcape: and reſolved for the defendant; it being impertinent for the plaintiff to allege it, and no ways neceſſary to his action; and it being out of time to ſet it forth in the declaration, being a matter that ought to come in in the replication. And *per Hale*, C. J.—It is like leaping before one comes to the ſtile; as, in debt upon a bond, the plaintiff ſhould declare, that at the time of the ſealing and delivery of the bond the defendant was of full age, and the defendant ſhould plead *deins age*, without traverſing the plaintiff's allegation.

Lutw. 381. *Duppa & al.* v. Stephens.

But in debt by the gentlemen uſhers of the king for a fee of 5 *l.* due to them from one who had received the degree of knighthood, they declared, that time out of mind they had uſed to receive a fee of 5 *l.* of every perſon who voluntarily and without compulſion had received the degree of a knight, *&c.* The defendant pleaded, that he had taken the degree in ſole obedience to the king; but becauſe he had not traverſed *abſque hoc, quod def. recepit vel ſuſcepit gradum militar. voluntariè & ſine compulſione*, it was adjudged for the plaintiff; for the voluntary acceptance of honour, without compulſion, is of the eſſence of the action, and not like the aforeſaid caſe of an eſcape.

Dyer, 66. b. pl. 15.

In account againſt one as bailiff of a manor ſuch a year, it is a good plea, that *J. S.* was his bailiff that year; but there, he muſt traverſe that he himſelf was not.

Dyer, 66. b.

So, in eſcape againſt a gaoler he may plead, that the priſon was broken open by the king's enemies, or that it was burnt by ſudden fire; but then he muſt traverſe, that the eſcape was not in other manner, or as the plaintiff hath alleged.

Poph. 67. (*a*) That where the parties in pleading vary in the eſtate alleged,

If in treſpaſs the defendant entitles himſelf by the feoffment of a ſtranger, and the plaintiff replies and maintains that the ſame ſtranger did enfeoff him, this cannot be a good iſſue (*a*) without a traverſe of the feoffment alleged to be made to the defendant.

or in the quantity thereof, there ought to be a traverſe. Yelv. 140.

Stile, 150. 198. 210.

In aſſault and battery the defendant pleads a ſpecial plea, and juſtifies; the plaintiff replies *de injuriâ ſuâ propriâ*, upon which iſſue is joined, and a verdict for the plaintiff; but in arreſt of judgment it was held, that the replication was not good, in not anſwering the ſpecial matter pleaded, and traverſing *abſque tali cauſa*, ſo

ſo that an iſſue might be joined on an affirmative and negative; and therefore the court ordered a repleader.

If in covenant for payment of money the defendant pleads, that he was at *Liſbon* in *Portugal* at the day of the payment of the money which he had covenanted to pay, the plaintiff may reply, that he was in *England*, without a traverſe, *abſque hoc*, that he was in *Portugal*. Stile, 373.

If account be brought againſt two, and one of them plead *ne unques ſon receiver*; this is good without a traverſe, that he and his companion were receivers. Godb. 43.

If in treſpaſs for chaſing his ewes, being great with lamb, ſo as by driving them he loſt his lambs, the defendant juſtifies, that they were damage-feaſant, and that therefore he drove them to pound, *&c.*; this is naught without a traverſe*; for though he might take and drive them to pound, yet this ſhould have been without any prejudice to them, and was therefore a matter traverſable. 3 Leon, 15. * Inſtead of a traverſe he ſhould have pleaded he drove the ewes gently, doing as little damage as he could, and there would not have been any occaſion for a traverſe; nor do I ſee what traverſe could, properly, have been taken.

If there are two preſcriptions, one pleaded by the defendant by way of bar, the other ſet forth by the plaintiff in his replication, without any traverſe of that which is alleged in bar, this is naught. 2 Leon. 209. that one preſcription pleaded againſt another is not good without a traverſe, *vide* Yelv. 217. 9 Co. 59. 2 Mod. 104. Carth. 116.

As, where in treſpaſs for cutting oaks the defendant pleads, that he was ſeiſed of a meſſuage in fee, and preſcribes to have *rationabile eſtoverium ad libit. capiend. in boſcis*; the plaintiff replies, that the *locus in quo* was within the foreſt, and that the defendant and all thoſe, *&c. habere conſueverunt rationabile eſtoverium*, &c. *per liberationem foreſtarii*: upon a demurrer, the replication was held naught; becauſe the plaintiff ought to have pleaded the law of the foreſt, *viz. lex foreſtæ talis eſt*, or to have traverſed the defendant's preſcription, and not to have ſet forth another preſcription in his replication without a traverſe. 2 Leon. 209, 210. Ruſſel v. Broker.

In treſpaſs for pulling down his hurdles in his cloſe, the defendant juſtified, that *J. S.* was lord of the manor of *D.*, and that the ſaid *J. S.*, and all thoſe whoſe eſtate he had in the ſaid manor, had a free courſe for their ſheep in the place where, *&c.*, and that the tenant of the ſaid cloſe could not there erect hurdles without the leave of the lord of the manor, and that the ſaid *J. S.* let to the defendant the ſaid manor, and becauſe the plaintiff erected hurdles without leave, *&c.* in the ſaid cloſe he threw them down, as it was lawful for him to do: The plaintiff replied of his own wrong, without cauſe, *&c.* and it was held an ill replication, becauſe the plaintiff had not traverſed the preſcription. 4 Leon. 16. Ruiſhbrook v. Puſanies.

4. Whether there may be a Traverſe upon a Traverſe.

It is laid down as a general rule, that there cannot be a traverſe upon a traverſe; becauſe that in all pleadings whereupon a Co. Lit. 282. Hob. 104.

Hutt. 97. Sand. 20. 22. Vaugh. 62. 1 Jon. 216. Cro. Car. 105.

traverſe is properly taken, the iſſue is cloſed *; and therefore a traverſe cannot be taken on a traverſe, for a traverſe muſt be of a material point; and if to the declaration, it deſtroys the plaintiff's action; if to the bar, it deſtroys what is ſaid in avoidance of the action; and if to the replication, what was ſaid in avoidance of the bar, *& ſic de cæteris*, and, conſequently, a ſubſequent traverſe will be inſignificant; becauſe (*a*) when a material traverſe is taken, the reſt ſtands confeſſed.

* *Vide ante*, 67. n.

(*a*) That whatever is traverſable and not traverſed is admitted †. Salk. 91. —— † This is avoided by proteſting againſt every thing the party does not mean to admit: though the proteſtation does not put the adverſe party to prove what is ſo proteſted againſt, where iſſue is taken on another point; but the proteſtation operates as an excluſion of a concluſion; or, in other words, the record cannot, as to the points proteſted againſt, be uſed as evidence againſt the party proteſting, as to thoſe points; becauſe by proteſting he has denied them: had he not proteſted, thoſe points might, perhaps, as between the ſame parties in another ſuit relative to the ſame matter, be conſidered as admitted: and the party proteſting might in ſuch ſubſequent cauſe find it neceſſary to offer an iſſue on ſome point that came under the *proteſtando* in a former cauſe.

Hob. 104.

This rule is thus laid down by my Lord *Hobart*, that regularly, whenſoever a traverſe is taken apt and material to the plaintiff's title, the plaintiff is bound to it, and cannot for the ſame thing leave it, and force the defendant to accept another traverſe tendered by him.

20 H. 4. 2. 12 E. 4. 6. 2 Rich. 3. 9. Hob. 104.

But, if a man bring an action of treſpaſs for breaking his cloſe on a certain day, if the defendant plead a releaſe of actions, he ſhall traverſe all treſpaſſes after; if a feoffment, he ſhall traverſe all treſpaſſes before; if a licence for once, all before and after: and in theſe caſes the plaintiff hath it in his choice to leave the traverſe, and traverſe the point of juſtification, *ſſ.* the releaſe, feoffment, or licence; or he may allege a treſpaſs before or after, and ſo join upon the traverſe offered, which is traverſe after a traverſe, but yet is not according to the rule, a traverſe upon a traverſe to the ſelf-ſame point.

Hob. 104.

So, if a man bring an action of waſte for the felling of trees, and lay that the leſſee felled and ſold them, and the defendant confeſs that he felled them, but ſay, that he beſtowed them in repairing the houſe, *abſque hoc*, that he ſold them; the plaintiff may reply that he let them rot, or any like caſe of waſte, *abſque hoc*, that he employed them in reparations; and though this be a traverſe upon a traverſe, and directly to the ſame thing, yet it is out of the above-mentioned rule, becauſe the traverſe in this caſe was not material; for the plaintiff might have declared of the felling only, and the other point was mere ſurpluſage.

Poph. 107. 10. Eliz. 418. Moor, 350. S. C. Paramor and Verrald. 2 Lutw. 1437. S. C. cited, and like point adjudged, Cro. Eliz. 99. S. P. adjudged.

If aſſault and falſe impriſonment be laid in *London*, and the defendant plead a ſpecial juſtification in (*b*) another county, with a traverſe or *abſque hoc*, &c. the plaintiff may maintain his action, and traverſe the ſpecial matter alleged by the defendant, though this be a traverſe upon a traverſe; for as the matter alleged by the defendant may be falſe, it would be unreaſonable by ſuch falſity to ouſt the plaintiff of the liberty the law gives him, of laying his action in the proper county where the cauſe ariſes.

(*b*) There never ſhall be a traverſe upon a traverſe, but where the traverſe in the bar takes from the plaintiff the liberty of his action for the place or time, or ſuch like; for there, the plaintiff may maintain his action for the place or time, and may traverſe the inducement to the traverſe,

traverſe, and needs not to join with the defendant in the traverſe, but at his pleaſure may do the one or the other: but, when the inducement is made and concluded with a traverſe of a title ſhewn by the plaintiff, there, the plaintiff is enforced to maintain his title, and not to traverſe the inducement to the traverſe, Cro. Car. 105. 2 Lutw. 1630. S. P.

In treſpaſs, the defendant juſtifies his entry by the command of *J. S.* Plaintiff replies, and ſhews that *J. S.* was ſeiſed in fee, and let unto him at will, and traverſeth the command of *J. S.* The defendant maintains his plea, that *J. S.* commanded him to enter, and that he entered by his command, and traverſeth the leaſe at will; and it being hereupon demurred, it was adjudged for the plaintiff, that the command is traverſable, and that therefore the defendant's rejoinder to make a traverſe upon a traverſe is not good. Cro. Car. 586. Thorn v. Shering.

Where one traverſes a thing which he had before confeſſed and avoided, this is merely form, and aided upon a general demurrer; for the other party might traverſe that traverſe, and alſo the inducement to it. Carth. 166. 2 Lutw. 1632.

Where to an indictment for not repairing a bridge the defendants plead, that *A. B.* ought to repair the bridge mentioned in the indictment, and take a traverſe to the charge againſt themſelves; the Attorney-General in this ſpecial caſe may take a traverſe upon a traverſe, and inſiſt, that the defendants are bound to the repairs, and traverſe the charge alleged againſt *A. B.*, and an iſſue ought to be taken on ſuch ſecond traverſe; and the Attorney-General may afterwards ſurmiſe, that the defendants are bound to repair it, and then the whole matter ſhall be tried by an indifferent jury. 2 Lev. 112. Sid. 140. Hawk. P.C. c. 77. § 5.

So, though regularly a common perſon cannot take a traverſe upon a traverſe, yet the king by his prerogative may, upon a title diſcloſed in the traverſe of the party, deſert his own title, and take a traverſe to ſuch matter diſcloſed, though this be a traverſe upon a traverſe. Vaugh. 62. 64. Mod. 280. Standf. 64. for this *vide* title Prerogative.

In debt on an obligation conditioned to appear on a bill of *Middleſex*, returnable *die Sabbati prox. poſt quinden. Paſch.*, the defendant pleads, that he was arreſted on a bill returnable *die Veneris*, and pleads the ſtatute of 23 *H. 6. c.* 9. and that the bond was given for eaſe and favour. The plaintiff replies, that he was taken on a bill returnable *die Sabbati*, and not *die Veneris*. The defendant rejoins, that he was taken by virtue of a bill returnable *die Veneris, abſque hoc*, that he was taken by virtue of a bill returnable *die Sabbati*; on which the plaintiff demurred: and it was argued, that the rejoinder was ill, and a traverſe upon a traverſe; for when the plaintiff replied, that he was taken by a bill returnable *die Sabbati & non die Veneris*, the *& non die Veneris* was a traverſe, whereon the defendant might have joined, and taken iſſue. On the other ſide it was argued, that the *& non* was not any traverſe, at leaſt not a formal traverſe, or ſuch as the books mention, that a traverſe cannot be taken on a traverſe; and to have joined iſſue on the *& non die Veneris* would have made an immaterial iſſue; for it matters not whether he were taken by virtue of a bill returnable *die Veneris*, or not; for if he were not arreſted on a bill returnable Lev. 192. Saund. 20, 21. 2 Keb. 94. 105. S. C. Bennet v. Pilkins.

*die Sabbati*, the bond is void by the ſtatute; but, if he were taken on a bill returnable *die Sabbati*, it is good, for that only is traverſable and triable; and ſo held the court.

Carth. 99, 100. Croſſe v. Hunt.

In debt upon a ſpecialty for 200 *l.*, which was to this effect, ſ. *The defendant did declare from his heart before God, that he had taken the plaintiff to be his wife, as ſhe had taken him for her huſband; and the more to confirm the ſaid plaintiff, that he had no deſign but to perform his promiſe aforeſaid, he (the ſaid defendant) obliged himſelf by the ſame deed to pay unto the plaintiff* 200 l. *if he ſhould happen to be ſo baſe as to be worſe than his word; and that if he did not pay it when demanded, ſhe (the plaintiff) ſhould have good right to ſue and recover it by law*, &c. The breach aſſigned was, that ſhe had tendered herſelf to marry the defendant, but that he refuſed, and afterwards married another woman, *per quod actio accrevit*. The defendant pleaded, that he, after the making of the aforeſaid writing, *obtulit ſe* to marry the plaintiff, and ſhe refuſed; *abſque hoc*, that he refuſed to take her for his wife before ſhe had refuſed to take him for her huſband. The plaintiff replied, that ſhe tendered herſelf to marry the defendant, and he refuſed, *abſque hoc*, that the defendant offered himſelf to marry the plaintiff; *& hoc*, &c. And upon a demurrer to this replication, it was inſiſted for the defendant, that the traverſe in it was ill; becauſe ſhe had traverſed that which was the inducement of the traverſe in the bar, ſo that it is a traverſe upon a traverſe, which the law will not allow; beſides, the words of this deed are *in præſenti*, and not executory, but declaratory of an act executed. On the other ſide it was argued, that the words in this deed are ſufficient to create a contract, and that of the higheſt nature, for God is called as a witneſs to it; and theſe words cannot import any other ſenſe, but only a contract to marry the plaintiff: that the traverſe in the bar is ill, becauſe it is too large; for the defendant had traverſed more than was alleged in the declaration; ſi. *abſque hoc*, that he had refuſed to take the plaintiff for his wife before ſhe had refuſed to take him for her huſband, ſo that he intended to make this circumſtance of time parcel of the iſſue; whereas there is no ſuch circumſtance alleged in the declaration, nor any affirmation, that the defendant had refuſed before the plaintiff had refuſed; and therefore, becauſe the traverſe in the bar was idle and frivolous, the plaintiff might well traverſe the ſubſtance of the matter of the bar; and of this opinion was the court, as well to the pleading as to the matter in law.

Mayor, &c. of Oxford v. Richardſon, 4 Term Rep. 437.

[In treſpaſs for fiſhing in the plaintiff's fiſhery, the defendant pleaded, that the place in queſtion is an arm of the ſea, in which every ſubject has a right to fiſh: the plaintiff in his replication claimed an excluſive right by preſcription, traverſing the general right: the defendant in his rejoinder inſiſting upon the general right, traverſed the preſcriptive right claimed by the plaintiff. The court of *K. B.* held, that the defendant ought to have taken iſſue on the traverſe in the replication, and not to have traverſed the preſcriptive right claimed in the replication; for that the firſt traverſe was a material one, and put in iſſue the true queſtion in diſpute

diſpute between the parties. But this judgment was reverſed in the Exchequer-chamber. For the firſt traverſe was of the right of *all* the king's ſubjects to fiſh in an arm of the ſea, ſtated by the defendants; but this was clearly a bad and an immaterial traverſe, for it was not only a traverſe of an inference of law, but it was ſo taken, that if at the trial it had been proved, that it was the ſeparate right of others, and not of the plaintiff, the iſſue muſt have been found for the plaintiff, not only without his being obliged to prove either poſſeſſion or right, but where in fact he had neither poſſeſſion nor right. An immaterial traverſe may be paſſed over, and the matter of the inducement traverſed; which had been properly done by the defendant in this caſe. 2 H. Bl. 182.

In prohibition, for that the defendants had petitioned the court of common council, complaining of an undue election of the plaintiff as a common council man, which court had no juriſdiction therein, the juriſdiction belonging to the court of mayor and aldermen, the defendant pleaded, that the common council have the juriſdiction, *abſque hoc*, that the juriſdiction is in the court of mayor and aldermen: the plaintiff replied, that the common council have it not, and concluded to the country. The defendants demurred, and ſhewed for cauſe, that the replication is a departure, and that the plaintiff ought to have taken iſſue on the traverſe. But *per curiam*—The traverſe is immaterial; for what is the ground of ſending a prohibition? Not becauſe the court of aldermen have a right, but becauſe the common council have none; and therefore the traverſe which would avoid trying the right of the common council, and bring that of the court of aldermen in queſtion, is immaterial. And where the firſt traverſe is immaterial, that is, where it will not put the proper point in iſſue, there may be a traverſe upon that traverſe. King v. Bolton, 1 Str. 117. 1 Br. P. C. 98. S. C.

In *quare impedit* by the king, for the next turn of a living void by promotion, the defendant pleaded, that the crown preſented *D.*, who is ſince dead, and that he himſelf is parſon imparſonee, and concluded with a traverſe, that the church is ſtill vacant by the promotion. This plea is a full confeſſion and avoidance, without the traverſe; which for that reaſon is immaterial, and therefore may be paſſed over. Rex v. Archbiſhop of Armagh, 2 Str. 837.

In *quare impedit*, the plaintiffs entitled themſelves to the advowſon in queſtion, as executors and deviſees in truſt under the will of *Caleb Lomax*, whom the declaration ſtated to have been ſeiſed in fee of the advowſon, and to have preſented on a former avoidance. The defendant in one of his pleas ſtated a title to the advowſon in one *Ellis*, who preſented in 1680; that *Ellis* conveyed it to *Killigrew*; that *Killigrew* deviſed it to his wife *Lucy* for her life; and that the reverſion on the death of *Killigrew* deſcended to his three daughters in coparcenary. It then ſtated an avoidance during the life of *Lucy* the widow, and a preſentation by *Lomax* the father of the teſtator, uſurping on *Lucy*. It then ſtated, that the living again became vacant after the death of *Lucy*, by the reſignation of the then incumbent *Romney*, and that the crown by uſurpation on the right of the eldeſt coparcener preſented again Thrale v. Biſhop of London, 1 H. Bl. 376.

the ſame clerk. It then ſtated an avoidance by the death of that preſentee, and another preſentation on that avoidance by *Lomax*, uſurping on the right of the ſecond coparcener. A title was then deduced at conſiderable length to the defendant, from the ſecond and third coparcener, concluding with a claim to preſent on the exiſting vacancy, in the third turn. The replication to this plea ſtated a purchaſe by *Lomax* of the right of *Lucy* the widow, and a preſentation to the advowſon made by him during the life of *Lucy*, on an avoidance then happening. It then ſet forth a fine, levied by the three coparceners of the advowſon, and a conveyance to *Lomax* under that fine; and concluded, that the reſignation of *Romney* was fraudulent and without notice, and traverſed, that upon that reſignation it belonged to the eldeſt coparcener to preſent. In the rejoinder to this replication the defendant traverſed the fine; upon which the plaintiff demurred ſpecially, alleging as a defect in the rejoinder, that there was a traverſe upon a traverſe. But the court held, that the traverſe in the replication was an immaterial traverſe, and being ſuch, the defendants were at liberty to paſs it by; and therefore the rejoinder was good.]

5. To what Point the Traverſe ſhall be taken; and therein, what Matters are traverſable, and of the Manner of taking thereof.

2 Sand. 5. 28. 6 Co. 24. a. Roll. Rep. 235. Carter, 217. Lane, 18.

Herein the general rule is, That the traverſe muſt be taken to ſome material point alleged by the adverſe party, which, if found for him who takes it, abſolutely deſtroys the adverſe party's right, by ſhewing, that he hath none in manner and form as he hath alleged; and being to the (*a*) principal point alleged, puts an end to the matter.

(*a*) A traverſe ſhould be always of ſuch part, as, if found for the defendant, deſtroys the plaintiff's action. Comb. 321.

Poph. 161. Latch. 12. Noy, 75. Bendl. 116. Palm. 397. S. C. Conſtable v. Clobery. Lutw. 935. 1560.

If in covenant on a charter-party the plaintiff declares, that upon the ſhip's going with the next fair wind, *&c.* he the defendant ſhould pay ſo much; the defendant by way of traverſe ſays, that the ſhip did not go with the firſt fair wind; this is an ill traverſe, not being to the principal point, or giſt of the action, which is the going of the ſhip, and not the nature of the wind.

A traverſe muſt be taken to ſome matter alleged; and therefore, where in falſe impriſonment the defendant juſtified by proceſs out of an inferior court, and the plaintiff replied, that the cauſe of action accrued out of the juriſdiction, *abſque hoc*, that it accrued within the juriſdiction, the traverſe is ill, being of a matter not alleged before; but it was held, that this being only an immaterial traverſe, no advantage could be taken of it on a general demurrer, and that then the reſidue of the replication ſhould ſtand good.

Sand. 21. Vaugh. 3. Show. Parl. Ca. 220-1.

If any thing in the count be traverſed, it muſt be ſuch part as, if true, is conſiſtent with the defendant's title; and if falſe, or found againſt the plaintiff, doth abſolutely deſtroy his title; nay, if the traverſe leaves no title in the plaintiff, then it is good, whatever comes of the defendant's.

In

In a *ſcire facias* againſt *A.* and his wife, reciting, that the wife *dum ſola fuit* recovered in the King's Bench, in an action upon the caſe, 26*l.* 13*s.* 4*d.* for damages and coſts, and had execution of theſe damages, and is thereof poſſeſſed; and whereas afterwards the ſaid judgment was removed by writ of error into the Exchequer-chamber, and there reverſed, and reſtitution awarded; and afterwards ſhe took the ſaid *A.* to huſband: The plaintiff thereupon brought this writ to have reſtitution. The defendant pleaded, that after the reverſal had, and before the purchaſe of this writ, he paid to the plaintiff the ſaid debt and coſts of 26*l.* 13*s.* 4*d.* *abſque hoc*, that they are *poſſeſſionati* of the ſaid money *prout:* And upon demurrer the plea and traverſe were both held ill; and, 1*ſt*, Three judges held the plea ill, becauſe it is grounded and affirmed againſt a record; for a payment being againſt matter of record cannot be a diſcharge, unleſs by a matter of record. 2*dly*, Admitting it a good plea, yet it is ill as pleaded; for he doth not rely upon it, but traverſeth that which is not material, viz. *abſque hoc*, that he is *poſſeſſionatus*, &c. which was idly alleged, and not material or traverſable; and by this traverſe he waives his pleading of the payment, which being (*a*) ſpecially ſhewn for cauſe of demurrer, the demurrer is good: But *Berkley* held, that payment had been a good plea, if he had relied thereupon; becauſe he avers, that thereby the party is ſatisfied; and that in divers caſes matter in fact may be pleaded in diſcharge; as, in debt upon an eſcape, he may plead, that the plaintiff commanded him to let him out of execution, and ſuch like, *&c.*, but as to the traverſe he conceived it ill; and therefore agreed with the other juſtices, that judgment ſhould be given for the plaintiff.

Cro. Car. 328. Vezey v. Harris & ux.

(*a*) That an immaterial traverſe is aided by 27 El. c. 5. unleſs it be ſpecially demurred to. Dyer, 366. Yelv. 151. Co. Ent. Cro. Jac. 505. 2 Lutw. 221.

In treſpaſs and ejectment the defendant pleads, that the plaintiff diſſeiſed *J. S.* of the land, and then made a leaſe of it to him, and that afterwards the land deſcended to the plaintiff. The plaintiff replies, that he was ſeiſed of the lands, and traverſeth the diſſeiſin on *J. S.* And on demurrer, for that he ought to have traverſed the deſcent, and not the diſſeiſin, it was held by *Rolle*, C. J. that the traverſing the diſſeiſin makes an end of all, and was therefore well taken, being the moſt material matter, although the deſcent might likewiſe have been traverſed.

Style, 344. Wood v. Holland.

Treſpaſs upon the caſe was brought by bill in the King's Bench, that the defendant's father held of him ſuch lands by knight's ſervice, and died in his homage, his heir within age, and that he tendered unto him a convenient marriage, and ſhews what, *&c.*, and demanded of him the value of the marriage, *&c.* The defendant *proteſtando* to the tenure, *pro placito* traverſed the tender, *&c.*; and hereupon the plaintiff demurred: And it was reſolved that the plea was ill, for the tender is not traverſable *.

Cro. Car. 502. Arundel v. Sanders.

* Why was not the tender traverſable if taken in the words of the declaration; as, if the marriage tendered was not convenient or proper, how could the plaintiff be entitled to recover?

If the plaintiff in his replication ſets forth a grant of copyhold lands ſuch a day, and by ſuch a ſeneſchal; and the defendant by way of rejoinder maintains his bar, and traverſes the grant to the defendant the ſaid day, and by the ſaid ſenechal, the traverſe is

Yelv. 122. 3. Lane v. Alexander.

ill; for the principal point is the grant, which may be at another court and day, and by another ſeneſchal, and yet good *.

* He might have traverſed the grant, in *manner* and *form*, &c.

Yelv. 122. If a feoffment by deed ſuch a day be pleaded, there can be no traverſe to the day, becauſe the eſtate paſſes by livery, and not by the deed.

6 Co. 24, 25. Cro. Eliz. 650. Moor, 551. Helyar's caſe. 2 Vent. 212. S. C. cited, and held to be only form, and aided by the 27 Eliz. c. 5. A difference hath been taken between pleading a feoffment and a grant of a particular eſtate; that in the firſt caſe, if the other will entitle himſelf by an elder feoffment, he ought to traverſe, but not in the laſt caſe; becauſe a man may come to a fee-ſimple by divers means, *viz.* by diſſeiſin and tort, or by lawful means; and therefore, when one entitles himſelf to a particular eſtate by an elder grant, he ſhall not traverſe the laſt grant, but ſhall compel the other to ſhew by what title he claims it after the elder grant †.

† The party having the elder grant may confeſs the other, and avoid its effects, by ſhewing his own; and if made by a different grantor, he ſhould ſhew that before ſuch other grantor had any thing in, &c. his grantor was ſeiſed, &c. and made ſuch elder grant.

Marc. 21. A man pleaded a deſcent of a copyhold in fee; the defendant, to take away the deſcent, pleaded, that the anceſtor did ſurrender to the uſe of another, *abſque hoc*, that the copyholder died ſeiſed: And the opinion of the court was, that it was no good traverſe; becauſe he traverſed that which needed not to be traverſed; for being copyhold, and having pleaded a ſurrender of it, the party cannot have it again, if not by ſurrender, as in *Hellyar's* caſe *ſupra*; for as none can have a leaſe for years but by lawful conveyance, ſo none can have a copyhold eſtate if not by ſurrender.

Doct. pl. 365. 6 Co. 24. S. P. and that where there are ſeveral material things alleged, it is in the election of the party to traverſe which he pleaſes. In treſpaſs the defendant pleads, that *A.* was ſeiſed, and enfeoffed *B.* who enfeoffed *C.* who enfeoffed *D.* whoſe eſtate the defendant hath; in this caſe the plaintiff may traverſe which of the feoffments he pleaſes.

Sid. 227. Palm v. Fleſhees. If in treſpaſs or caſe the plaintiff declares that *J. S.* was ſeiſed in fee, and made a leaſe to him, and the defendant pleads that *J. N.* was ſeiſed in fee, and leaſed to him, *&c.*; this ſeiſin of *J. N.* ſhall be intended by diſſeiſin, for he ought to have traverſed the ſeiſin of *J. S.* and ſaid, that long before ſuch a one was ſeiſed, *&c.*

Cro. Jac. 681. 2 Roll. Rep. 362. S. C. Baker v. Blackman. In treſpaſs the defendant pleads, that long before the treſpaſs one *James Stephens* was ſeiſed in fee, and 12 *Eliz.* enfeoffed *Thomas Norwood* to the uſe of *James Baker* and *Mary* his wife, and the heirs of their bodies; and that they had iſſue *Henry Baker*, and died ſeiſed, which deſcended unto him, and from him to his three daughters, and juſtifies by their leaſe, and gives colour to the plaintiff: the plaintiff replies, that long time before the treſpaſs Sir *Thomas Tyrrel* was ſeiſed in fee, and gave it to *Edward Baker* and *Joan* his wife, and the heirs male of their bodies, and that they had iſſue the ſaid *James Baker* and the plaintiff; and that *James* had iſſue *Henry*, and died, which *Henry* died without iſſue male;

male; wherefore he as heir male entered, and that the defendant committed the treſpaſs, &c., and traverſeth the ſeiſin in fee alleged in *James Stephens*; whereupon the defendant demurs, and ſhews that he traverſeth the ſeiſin in fee of *James Stephens*, whereas he ought to have traverſed the gift in tail, which is the principal matter of the bar; but the court held that it was in his election to traverſe the one or the other.

Where by the (*a*) inducement or conveyance to the action the defendant is ouſted of his (*b*) law, there, the defendant may as well traverſe the conveyance as the giſt of the action. Dyer, 121. b. Leon. 252. S. P.

(*a*) But, where a diſſeiſin is alleged by way of conveyance to the title or poſſeſſion of the plaintiff, it need not be traverſed. Dyer, 635. b. pl. 34. (*b*) Where the conveyance to the action is that which doth entitle the plaintiff to the action, it may well be traverſed if the defendant cannot wage his law; otherwiſe, where he may wage his law. Cro. Eliz. 169. 201. S. P.

In *aſſumpſit*, ſuppoſing that ſuch a day 4 *Jac.* upon an account betwixt them, the defendant was found in arrear in ſuch a ſum, and aſſumed to pay, &c., the defendant pleads that ſuch a day 4 *Jac.* they accounted, and then he was found in arrear ſuch a ſum as the plaintiff ſuppoſed, and that the ſame day he made an obligation for the payment thereof, and traverſeth that any other day after the obligation made they accounted together *prout*, &c.: and it was thereupon demurred; for that the account (which is the cauſe of the *aſſumpſit*) is not traverſable, nor the time, for it is but an inducement and conveyance to the action: But the court held, that the account which was the ground of the promiſe was well traverſable; wherefore it was adjudged for the defendant. Cro. Jac. 234. Yelv. 171. Bulſt. 16. S. C. Dalby v. Cook.

It is ſaid, that the conſideration of a promiſe is never traverſable, nor allowed to be traverſed, but it is the promiſe itſelf which is traverſable. But herein a (*c*) difference is taken between a conſideration of a promiſe which is executed, and a conſideration which is executory; that the one is not traverſable, but the other is. Cro. Eliz. 201. Roll. Rep. 43. 401. Carth. 82.

(*c*) The difference between a promiſe upon a conſideration executed and executory is, that in that executed you cannot traverſe the conſideration by itſelf, becauſe it is paſſed and incorporated, and coupled with the promiſe. Hob. 106.

In trover and converſion the converſion is traverſable; for it is the ſubſtance of the action, and the tort ſuppoſed in him, and ſo may well be traverſed; for if one finds goods, but doth not convert them, no action lieth. Cro. Eliz. 97. *per* Coke; but for this *vide* tit. Trover and Converſion.

[In debt for an annuity, it appeared upon oyer of the deed, that the defendant covenanted to pay it, (if the ſame were perſonally demanded by the plaintiff,) whereupon the defendant traverſed the demand. The plaintiff demurred: and *per curiam*—The grant is ſubſtantive, and ſo is the covenant ſuſtantive, and the demand in this action is not traverſable, whatever it might have been, if an action had been brought upon the covenant; but we think it would not be traverſable in that caſe, as it is contained in a parentheſis in the deed.] Hope v. Colman, 2 Wilſ. 221.

In debt on an obligation of 100 *l.* dated 12 *Julii* 10 *Car.* 1. with condition for the payment of 58 *l.* at the end of ſix months; the defendant Cro. Jac. 501. Nevilon v. Whitley.

defendant pleads the ſtatute 21 *Jac.* 1. (*c.* 17.) of uſury: The plaintiff replies that he lent the 50 *l.* for a year, and that the defendant ſhould pay 8 *l.* for the forbearance for a year; and that, by the ſcrivener's miſtake, it was made payable at the end of half a year. The defendant rejoins, that the lending was only for half a year, and that he was to pay for it 8 *l.* for that time; and traverſeth, that upon the ſaid 12 *July* it was agreed the loan ſhould be for one entire year, or that he ſhould forbear it for a whole year. It was held, that this traverſe in the rejoinder, making the day parcel of the iſſue, was ill; and that the agreement only was traverſable.

Co. Lit. 282. Style, 382. Leon. 39. 2 Leon. 79. Roll. Rep. 265. 395.

In treſpaſs for goods carried away, or battery, or falſe impriſonment, if the defendant plead that he is not guilty in the manner as the plaintiff ſuppoſes, and it be found that he is guilty at another day, or in another town or county than the plaintiff ſuppoſes, yet he ſhall recover; for in tranſitory actions the defendant ſhall not traverſe the county or town where the fact is laid, without ſome ſpecial cauſe of juſtification, which is ſo local that it cannot be alleged in another place; as, where a conſtable of a town in another county arreſts a man for a breach of the peace, in which caſe, if an action be brought againſt him, he ſhall traverſe the county, and all other places, ſaving the town whereof he is conſtable (*a*): ſo, where the defendant juſtifies for damage-feaſant, *&c.*

(*a*) Cro. Eliz. 667. S. P. adjudged.

Cro. Eliz. 184. Cowleigh v. Edwards.

In falſe impriſonment for impriſoning him at *Briſtol*, the defendant juſtifies, for that he arreſted him at *Glouceſter* by virtue of a commiſſion of rebellion, *abſque hoc*, that he was not guilty at *Briſtol*; and it was moved that the traverſe was not good, the cauſe of juſtification not being local, and therefore he might have juſtified in that place where the action was brought; otherwiſe, if the commiſſion had been to arreſt him at *Glouceſter*; and of this opinion was *Wray*.

Cro. Eliz. 705. Peacock v. Peacock.

In treſpaſs for an aſſault and battery laid in *London*, the defendant pleaded, that the plaintiff entered into his houſe in *Waltham* in the county of *Eſſex*, and that he *molliter manus impoſuit* to put him out of his houſe, *abſque hoc*, that he is guilty *extra Waltham*: and this was held a good traverſe, the cauſe of juſtification, *viz.* the defence of his houſe, being local: *ſecùs*, if the juſtification had been perſonal and tranſitory, and ſuch as might have been alleged in any place.

Cro. Jac. 44, 45. Wadhurſt v. Damme.

In treſpaſs laid *apud Edinbridge in comitat. Cant.* for killing his dog, the defendant pleaded that *J. S.* was ſeiſed in fee of a warren in *D.* in the ſame county, whereof he is and then was warrener, and that his dog was divers times killing conies there, and therefore, finding him there *tempore quo*, &c. running at conies, he there killed him, *abſque hoc*, &c. that he is guilty *apud Edinbridge prout*, &c. And on demurrer it was objected, that he had traverſed the place only, *&c.*, and had not traverſed all other places: But the court held, that the traverſe was good, his cauſe of juſtification being local, and that he needed not allege any more than that place.

Treſpaſs

Treſpaſs of aſſault, battery, and wounding in *London*; the defendant juſtifies in the county of *Norfolk*, by virtue of a warrant from the ſheriff of *Norfolk*, upon a writ of *latitat*, *quæ eſt eadem tranſgreſſio*, &c., *abſque hoc*, that he is guilty in *London*, *vel alibi extra comitatum Norf.* On demurrer one objection was, that he had juſtified and alſo traverſed, which he ought not to have done: But the court held it well enough; for the juſtification being in another county, the county whe ein the action is brought ought to be traverſed; and the plaintiff may maintain the action and iſſue, if he will, or he may traverſe the defendant's plea, at his election. Cro. Jac. 372. Bateman v. Woodcock. Cro. Eliz. 868. S. P. adjudged.

If a man bring an action of treſpaſs for breaking his cloſe on a certain day, if the defendant plead a releaſe of actions, he ſhall traverſe all treſpaſſes after; if a feoffment, he ſhall traverſe all treſpaſſes before; if a licence, all before and after. Hob. 104. Carter, 207. Sid. 293-4. Sand. 14. Lev. 241. 307.

2 Mod. 68. That where the juſtification goes to a time and place not alleged by the plaintiff, there muſt be a traverſe of both.

In treſpaſs laid to be done 1 *May*, the defendant pleads a releaſe made to him 1 *Junii*, and traverſes, *abſque hoc*, that he was guilty at any other time after the firſt of *June*; and this was held an ill traverſe; for the day not being material in treſpaſs, he ought to have traverſed, *abſque hoc*, that he was guilty before or after 1 *Junii*. 3 Bulſ. 209. Roll. Rep. 406. S. C. Amſon v. Walcot.

If in treſpaſs for entering a houſe the defendant ſays, that it was the freehold of *J. S.* and juſtifies 27 *Eliz.*, a year before the treſpaſs ſuppoſed, and traverſes the time before 27 *Eliz.* but ſays nothing as to the time after; yet the traverſe is good; for when he pleads his freehold, or the freehold of another, it ſhall be intended ſo to continue, unleſs the contrary be ſhewn, and therefore no need of traverſing the time after. Cro. Eliz. 87. Higham v. Reynold.

Herein alſo this difference hath been agreed, that where a general action is brought, in which the time is not material, there, upon a traverſe to the fact charged upon the defendant, he muſt add *abſque hoc*, that he was guilty either before or after; but, where the thing traverſed is not to the point of the action, (though the caſe may be ſo, that, if it happened before or after, the action might have lain,) the party need not add *abſque hoc*, that he did it before or after, and this, whether the traverſe comes in of the plaintiff's part or the defendant's. Sid. 234. Keb. 680. 822.

In caſe upon ſeveral promiſes, the ſtatute of compoſition of two thirds was pleaded in bar; but the plaintiff ſhewed the contract to have been ſince the time of the ſtatute, which the defendant did not traverſe in his plea, as he ought to have done; and therefore judgment was given for the plaintiff; for if you vary from the time in the declaration, and make ſuch variance material, you ought to traverſe the time in the declaration. 7 Mod. 16. Beverly v. Pim.

Treſpaſs and impriſonment laid the firſt of *May*, 17 *Car.* 2. The defendant juſtifies, as ſheriff of *Coventry*, to arreſt him for a breach of the peace made upon him in the execution of his office, for which he arreſted him, and carried him before the mayor; and traverſed Lev. 216. Law v. King.

traverſed all the time before he was ſheriff, or afterwards; and the traverſe was adjudged good, though it was objected to be too (*a*) large.

(*a*) If the traverſe be taken more narrow than it need, being to the prejudice of the party, no jeofail. 2 Lev. 81.——But, where the traverſe contains more than is alleged in the breach, it is not good. 3 Lev. 167.

Cro. Eliz. 260. Wood v. Butts.

If in ejectment the defendant pleads a ſurrender of a copyhold by the hands of *J. S.* then ſteward of the manor, and iſſue is joined, *abſque hoc*, that he was ſteward; this is naught, for the traverſe ought to be general, that he did not ſurrender; for if he were not ſteward, the ſurrender is void: ſo, of a ſurrender pleaded into the hands of the tenant of the manor.

3 Lev. 113. Bridgwater v. Bythway.

In battery, the defendant pleads a judgment obtained by *A.* his father, and an execution thereupon, whereon the goods of *J. S.* were taken in execution; and that the plaintiff aſſaulted the bailiffs, and would have reſcued the goods; whereupon in aid of the bailiffs, and by their command, the defendant *molliter manus impoſuit* upon the plaintiff to prevent his reſcue of the goods. The plaintiff replied *De injuriâ ſuâ propriâ, abſque hoc*, that the defendant by command of the bailiffs, and in aid of them, to prevent a reſcue of the goods, *&c.* whereupon the defendant demurred generally: and upon argument it was reſolved, *1ſt*, That the replication in traverſing the command of the bailiffs was not good, for he might of himſelf do that to prevent the reſcue, which is a tort and breach of the peace. *2dly*, The defendant's plea is ill, for the action was brought as for a battery at *D.*, and the defendant juſtifies at *S.* in the ſame county, whereas the bailiffs have authority through the whole county, and therefore the cauſe of juſtification in the ſame county not local; ſo that he ſhould have conformed and juſtified in the ſame place, being the ſame county where the plaintiff declared; and if the place had been material, he ought to have traverſed all other places within the ſame county; *& ſic quâcunque viâ datâ* the plea was held ill.

Morewood v. Wood, 4 Term Rep. 157.

[To an action of treſpaſs in the common called *A.* the defendant pleaded that *A.* and *B.* commons lie open to each other, and then preſcribes for a right in both commons. It was holden, that the plaintiff could not traverſe part only of the preſcriptive right claimed by the defendant, the preſcription in *A.*, but muſt traverſe the *whole* preſcription, for all preſcriptions are entire; and when they are pleaded, the adverſe party cannot deny a part only but muſt either demur or traverſe the whole.

Griffith v. Williams, 1 Wilſ. 338.

To an action of treſpaſs the defendant juſtified, under a preſcriptive right to a duty, and alſo a preſcriptive right to diſtrain for it. The plaintiff traverſed the preſcription for the duty, but not the preſcriptive right to diſtrain; and upon demurrer for that cauſe, the replication was holden good.

Palmer v: Ekins, 2 Str. 817.

To an action of covenant by an aſſignee for rent arrear, the defendant pleaded, that the leſſor made a conveyance in fee before the leaſe, and traverſed, that he was afterwards ſeiſed in fee. This traverſe was adjudged to be bad for its generality, as it tied the plaintiff up to prove an eſtate in fee, when any other would do.]

In

In replevin the defendant makes conuſance as bailiff to *J. S.*, plaintiff pleads, that he took them *de injuriâ ſuâ propriâ, abſque hoc*, that he was bailiff to *J. S.* To which it was demurred: and after argument the traverſe was held to be well taken; and a (*a*) difference obſerved between an action of treſpaſs *quare clauſum fregit*, and an action of treſpaſs for taking cattle or replevin: in the firſt caſe, if the defendant juſtifies an entry into the cloſe by command, or as bailiff to one in whom he alleges the freehold to be, the plaintiff ſhall not in his replication traverſe the command; becauſe it would admit the truth of the reſt of the plea, *viz.* that the freehold was in *J. S.* and not in the plaintiff; which would be ſufficient to bar his action, whether the defendant was empowered by *J. S.* to enter or not; for it is not material that the defendant has done a wrong to a ſtranger, if it be none to the plaintiff: but in the other two caſes, if the defendant juſtifies taking the cattle as bailiff to *J. S.*, in whom he lays a title to take them, as for a diſtreſs, or other cauſe, there, it may be material to traverſe the command or authority; for though *J. S.* had right to take the cattle, yet a ſtranger who had no authority from him, will be liable; ſo that both parts of the defendant's plea in this caſe muſt be true, and therefore an anſwer to any part is ſufficient: ſo, in treſpaſs for taking goods; *aliter*, in treſpaſs *quare clauſum fregit*.

Salk. 107. pl. 1. Trevilian v. Pyne. (*a*) For this *vide* Cro. Eliz. 14. Roll. Rep. 46. 2 Leon. 215. Yelv. 148. Comb. 471.

In replevin the defendant made conuſance as bailiff of *J. S.* for a rent-charge; the plaintiff in bar ſays, that he took the diſtreſs without the privity or command of *J. S.*, and that ſuch a day after the diſtreſs *J. S.* came firſt to have notice, *& deadvocavit captiones prædictas*: the defendant demurred generally. *Et per cur.* —The bar is naught, for he ſhould have traverſed his being bailiff; and he was ruled to replead accordingly, and to mend his bar, paying coſts, and go to trial upon iſſue, bailiff or not.

3 Lev. 20. Dobſon v. Douglas.

If on a preſentment for not repairing a highway, it is alleged, that the defendant is chargeable *ratione tenuræ quarundam terrarum parcell. dictæ peciæ terræ*, &c. *dicta communi alta via regia incluſ. & incrochiat.*; the traverſing the *ratione tenuræ* is ſufficient, without anſwering to the encroachment, being the principal point to be traverſed.

2 Sand. 160. Rex v. Stoughton.

A traverſe muſt be taken to ſome matter alleged; and therefore where in falſe impriſonment the defendant juſtified by proceſs out of an inferior court, and the plaintiff replied, that the cauſe of action accrued out of the juriſdiction, *abſque hoc*, that it accrued within the juriſdiction; the traverſe was adjudged ill, being of a matter not (*b*) alleged before; but it was held, that this being only an immaterial traverſe, no advantage could be taken of it on a general demurrer, and that then the reſidue of the replication ſhould ſtand good.

Lutw. 935. 1560. (*b*) Mere matter of ſuppoſal is not traverſable, no more is matter alleged out of due time, nor matter immaterially alleged. 2 Salk. 628. pl. 2. Ld. Raym. 349. ——But whatever is neceſſarily underſtood, intended, and implied, is traverſable, as much as if it were expreſſed. 2 Salk. 629. pl. 6.

In caſe againſt a ſheriff for taking inſufficient bail to the intent to deceive him of his debt; the (*c*) intention to deceive is not traverſable.

Sid. 96. (*c*) That matter of intendment is not traverſable. Style, 383. Leon. 50. S. P. Nor cauſe of ſuſpicion. 3 Bulſt. 284.

In

Show. 271. In ejectment, ancient demeſne was pleaded in bar; plaintiff replied, that the lands are pleadable at common law, and traverſed, that the tenements are parcel *de antiquo dominico*; and it was adjudged ill on demurrer; becauſe he ſhould have traverſed, that the manor was ancient demeſne, or, that theſe tenements were held of the manor.

(*a*) That where the declaration is ſpecial, the defendant ſhall have liberty to traverſe the ſpecial matter.

In an action of (*a*) covenant a perſon cannot take a traverſe in mitigation of damages, but muſt help himſelf upon (*b*) evidence; and the traverſe muſt be to the (*c*) point of the action: as, in covenant for payment of rent, the plaintiff ſays, that there were ſeven years' rent behind; the defendant cannot traverſe two of theſe years being behind, but muſt plead covenants performed *.

Carth. 82. (*b*) That in many caſes the matter may be ſpecially traverſed; which probably might have been given in evidence upon the general iſſue. Carth. 82. (*c*) In treſpaſs, that which comes under the *ita quod*, for aggravation of damages, need not be traverſed. Lev. 283.——* How can he plead covenants performed, whether rent is or is not in arrear?——If there is not any rent in arrear, the defendant ſhould plead rent not in arrear.——If rent is in arrear, he ſhould move the court to ſtay proceedings, on payment of all rent in arrear, and coſts: If there is any other breach of covenant aſſigned, plaintiff may go on for that.

Lev. 193. Dring v. Reſpaſs. (*d*) That it would have been good after verdict. Hob. 244. Hutt. 20. (*e*) A traverſe muſt not be multifarious, but to a ſingle point. 3 Lev. 40, 41.—Traverſe muſt not be implicated.

In debt on a judgment obtained 1 *May*, 14 *Car.* 2. before the mayor and bailiffs of *Norwich*, at a court then held according to the cuſtom of the ſaid city, the defendant pleads, that the court there, according to the cuſtom, *&c.* is held before the mayor, *abſque hoc*, that he recovered at the court held the ſaid 1 *May*, before the mayor and bailiffs, according to the ſaid cuſtom. And upon (*d*) demurrer, the traverſe was held ill in traverſing a matter of record which is not to be tried *per pais*, and in (*e*) joining the matter of the cuſtom, which is triable *per pais*, with the matter of record; but he ought to have pleaded *nul tiel record*, which would have made an end of all, or that there was not any ſuch cuſtom, and have tried it *per pais*: it was likewiſe held, that making the day parcel of the iſſue made the traverſe ill.

Skin. 63, 64.

2 Lev. 174. Gold v. Cutler.

Debt upon an obligation to the ſheriff, conditioned to appear *octabis Martini ad reſpondend.*, &c. Defendant pleaded the ſtatute 23 *H.* 6. *c.* 9. and that he was taken and impriſoned *virtute brevis retorn. quinden. Martini*, and that the obligation was taken for eaſe and favour. The plaintiff replied, *Auter brief retorn. octabis Martini*, and that he was taken and impriſoned upon that, *abſque hoc*, that he was in priſon *virtute brevis retorn. quindena Martini*. The defendant demurred generally. *Saunders* argued, That the traverſe was ill and immaterial; for it matters not whether the writ was returnable *quindena Martini*, or not, but he ſhould have concluded *et hoc paratus eſt verificare*, and left the defendant to traverſe the writ returnable *octabis Martini*; and upon this traverſe no good iſſue can be taken; for it is not material whether any writ was returnable *quindena Martini*, or not; the only material thing to maintain the goodneſs of the obligation is this, that the writ was returnable *octabis Martini*. *Sed per curiam*—If the traverſe be immaterial, the defendant waiving that ſhould have traverſed the writ's being returnable *octabis Martini*; but the

the traverſe is well enough in this caſe, it being taken to the moſt material thing pleaded in bar to avoid the obligation. They therefore gave judgment for the plaintiff.

In debt on a bond made by a priſoner to an under-ſheriff, conditioned to pay 60 *l.*, the defendant pleads the ſtatute 23 *H.* 6. *c.* 9. of ſheriffs' bonds, and that this bond was made for eaſe and favour, and ſo void by the ſtatute. The plaintiff replies, that it was for the better ſecurity of money due to himſelf, and traverſeth the eaſe and favour: and herein it was adjudged for the defendant; for though the traverſe be good, yet the inducement being ill, in not ſaying that it was *pro bono & vero debito*, the plaintiff cannot recover. Comb. 245. Foden v. Haines.

If in an action on the caſe for ſtopping three windows, the defendant juſtifies the ſtopping of two of them, and traverſes the ſtopping of three windows; the traverſe is ill, for the inducement goes only to part, *viz.* the ſtopping of two windows; and yet the traverſe goes to all three, which ought not to be; for if the defendant had ſtopped only two, yet in caſe the plaintiff ſhall recover damages (*a*) *pro tanto*; and therefore the defendant ought to have pleaded, as to the ſtopping of one window, not guilty, and as to the other two to have juſtified, and then every part of the injury alleged by the plaintiff had been put in iſſue. Yelv. 225. Bulſt. 116. Sand. 268. S. C. cited, and like point adjudged.

(*a*) That in an action for damages, and in which the plaintiff is to recover in proportion to his loſs, every part is to be put in iſſue. 2 Sand. 206.

In aſſault the defendant juſtified, for that he, being maſter of a ſhip, commanded the plaintiff to do ſome ſervice in the ſhip, which he refuſing to do, he *moderate caſtigavit* the plaintiff, *prout ei bene licuit*. The plaintiff maintains his declaration; *abſque hoc, quod moderate caſtigavit*: After verdict for the plaintiff, it was moved in arreſt, that the iſſue was not well joined; for *non moderate caſtigavit* doth not neceſſarily imply that he did beat him at all, and ſo no direct traverſe to the defendant's juſtification, which *immoderate caſtigavit* would have been; but *de injuriâ ſuâ propriâ abſque aliquâ tali cauſâ* would have been the moſt formal replication; but it was held to be well enough, being after verdict *. Vent. 70. Aubrey v. James. Sid. 444. 2 Keb. 623. S. C.

* But the general replication would have been better, as it would have obliged the defendant to prove the whole of his plea.

In debt upon a bond entered into, *Eliz. Perkins*, who was the plaintiff's wife, he, as her adminiſtrator, brought the action; the defendant pleads, that he delivered the bond to one *Eliz. Perkins*, *quæ obiit ſola & innupta, abſque hoc*, that he delivered it to *Eliz. Perkins*, the plaintiff's wife. To which it was demurred ſpecially; for if it be taken, that there are two of the name, the defendant ſhould have pleaded *non eſt factum* †, for it amounts to no more; or at leaſt he ought to have induced his plea, that there were two *Eliz. Perkins*'s; but this traverſe is deſigned to bring the marriage in queſtion, which is not to be tried; wherefore the court gave judgment for the plaintiff. Vent. 77. Gifford v. Perkins. Sid. 450. 2 Keb. 633. S. C. adjudged.

† How could *non eſt factum* be an anſwer to the bond, when produced in court, though in poſſeſſion of a perſon not entitled to recover upon it?—Might not defendant have pleaded generally, admitting the bond to be his, but that it was not given to the *E. P.* mentioned in the declaration, but to another *E. P.*? Indeed now, by virtue of the ſtat. 4 Ann. c. 16. § 4. he might plead *non eſt factum*, and a ſpecial plea.

In

Carth. 125. Beake v. Kent, 2 Mod. 63. S. C.

In *aſſumpſit* againſt an executrix, ſhe pleads ſeveral judgments, and that ſhe hath not aſſets *ultra*. The plaintiff replies, that *judicia prædicta*, &c. were kept on foot by fraud. The defendant maintains her bar, and traverſes, that all or any of the judgments were kept on foot by fraud. And on demurrer it was objected, that the defendant ought to have rejoined ſeverally to every judgment, and not to include all three judgments in one general traverſe: but it was held, that this general form of pleading was good, it being no diſadvantage to the plaintiff; for if iſſue had been joined that all the judgments had been kept on foot by fraud, and if it had been found that one of them alone had been kept, &c. by fraud, this iſſue had been found for the plaintiff; becauſe the plea was falſe in part, and for that reaſon the whole is falſe *.

* The traverſe ſhould have been that all or any, *or either*, &c. The next paragraph is not in point againſt this poſition.

2 Salk. 629. pl. 5. White v. Bodinam.

Leſſee for years brings covenant againſt the leſſor, declaring upon a demiſe and covenant for quiet enjoyment, and aſſigns for breach, that the leſſor did enter upon him, and ouſt him of the premiſes; the defendant pleads that he entered to diſtrain for rent arrear, *abſque hoc*, that he ouſted him *de præmiſſis*; to which the plaintiff demurred, thinking the traverſe ill; becauſe, if he had ouſted him of any part of the premiſes, he had a good cauſe of action; therefore he ſhould have traverſed, *abſque hoc*, that he ouſted him of the premiſes, or any part thereof: But *per cur.*—The plea is well enough in this caſe; for if the plaintiff will join iſſue upon the matter of the traverſe, and prove the ouſter of any part, the iſſue will be for him; and the court took a diverſity between pleading the general iſſue, as in debt you muſt plead *non debet nec aliquam inde parcellam*, and a ſpecial iſſue, as this is.

## (I) Pleas in Bar, their Sufficiency and Certainty: And herein,

### 1. That the Plea muſt be proper, and adapted to the Action.

Co. Lit. 285. 303. Hob. 162.

HEREIN it is laid down as a general rule, that every man muſt plead ſuch pleas as are pertinent and proper for him, according to the quality of his caſe, eſtate, and intereſt.

Hard. 332. of pleading *non eſt factum*, *vide infra*.

As, in an action of debt upon a bond or other ſpecialty, the defendant cannot plead *nil debet*: it is otherwiſe in debt founded upon a matter *in pais* only, as, upon a preſcription, or upon a deed, that is not requiſite to maintain the action.

Cro. Jac. 377. Wingfield v. Bell. † Payment at or after the day, may now be pleaded by virtue of the ſtat. 4 Ann. c. 16. § 12.

Therefore, if an action of debt be brought on a bond or ſingle bill, and the defendant plead payment without an acquittance under ſeal, this, though it be found for him, will not entitle him to judgment; for the obligation is in force till it is diſſolved *in ligamine quo ligatur* †.

Keilw. 147. (*a*) But, in debt upon the grant

So, in debt for the arrears of an (*a*) annuity granted for life, *nil debet* is no good plea; for the action is merely founded upon the deed, ſince without it no action can be maintained; and though

though by the death of the grantee the nature of the action is changed, the annuity being determined, yet this proves not but that the action is founded upon the deed. of a rent-charge, *nil debet* is a good plea,

because the plaintiff hath other remedy to levy it, viz. by diſtreſs. Otherwiſe, upon the grant of a bare annuity, for there being no remedy by diſtreſs, the grant muſt be avoided by matter of as high a nature, viz. by acquittance. Hard. 33.

Where the action is founded upon a penal ſtatute, it hath been adjudged that not guilty is a good plea. Cro. Eliz. 257. Goulſ. 39.

Noy, 56. 2 Inſt. 651. Moor, 914. pl. 1293. [Certain it is, that the plea of not guilty to debt on a penal ſtatute is not ſuch a nullity, as will warrant the plaintiff in ſigning judgment. 1 Term Rep. 462.]

So, in debt upon the 2 & 3 *E. 6. c.* 13. for not ſetting forth tithes, it hath been held, that not guilty or *nil debet* are good pleas. 2 Inſt. 651. and Hob. 218. S. P. adjudged.

In debt for the arrears of a rent-charge by will deviſed to the plaintiff's wife for life, againſt the adminiſtrator of the occupier of the land, it hath been adjudged, that (*a*) *nil detinet* is a good plea; for a will is no deed, nor wants any delivery; and in this caſe it was ſaid, that the action was not ſo much grounded upon the will itſelf as upon the ſtatute, by which men are enabled by will to diſpoſe of their lands and rents iſſuing thereout. Hard. 332. Wilſon's caſe. (*a*) Where the teſtator could not plead *nil debet*, his executor ſhall not plead *nil detinet*. 2 Mod. 266.

In debt for rent, if it be by deed, the proper plea is *non eſt factum*; but if it be without deed, the defendant may plead *non dimiſit*, nothing in arrear, or that he never entered: alſo, by the better opinion of the (*b*) books, if the rent be due by indenture, the defendant may plead *nil debet*; for an indenture does not acknowledge a debt like an obligation, ſince the debt accrued by ſubſequent enjoyment. Hard. 332. (*b*) For which *vide* Hetl. 54. Dyer, 14. 4 Leon. 18. Vent. 41. Mod. 3. Sid. 423. Palm. 117.

Salk. 209. pl. 1. Ld. Raym. 170. [So, in debt for rent reſerved by deed, *riens in arrere* is a good plea. Cowp. 588.]

It is ſaid, that not guilty is a good plea to any misfeaſance whatſoever (*c*), though formerly in actions for nonfeaſance not guilty was not pleaded, but they pleaded ſpecially, and traverſed any ſpecial point alleged in the declaration; and not guilty to ſuch actions was not pleaded till after the time of the caſe of (*d*) *Yalding* v. *Fay*. (*c*) 3 Mod. 324. *per cur.* Skin. (*d*) Moor, 355. where the caſe was; the plaintiff declared on a cuſtom that the parſon ſhould find a bull and a boar, to which the defendant, *proteſtando* that there was no ſuch cuſtom, pleaded not guilty; on demurrer it was held, that not guilty was no plea to an action for a nonfeaſance, being two negatives, which cannot make an iſſue; but the court held, that to an action for a misfeaſance it was otherwiſe. Cro. Eliz. 569. S. C. & *vide* Palm. 393. 2 Roll. Rep. 368.

In *aſſumpſit*, the defendant pleaded not guilty, iſſue thereon, and verdict that he was guilty, and that he aſſumed in manner and form as declared; and it was moved in arreſt, &c. that not guilty was no iſſue in this caſe, and the finding farther that he aſſumed is void, not being in iſſue; but *Wyndham* and *Twiſden* being only in court held it cured at leaſt by the verdict, and *Wyndham* held that not guilty (*e*) was a good plea, and iſſue in *aſſumpſit*, it being a treſpaſs on the caſe. Lev. 142. Elrington v. Doſhant. (*e*) But in the caſe of Marſhal v. Gibbs in B. R. Mich. 9 G. 2. it was ruled to be ill on demurrer, though good after verdict, according to this caſe. 2 Stra. 1022. S. C.

2 Brownl. 273. Hare v. Savile, adjudged.

In an action of covenant for non-payment of rent, the defendant cannot plead levied by diſtreſs, for that is a confeſſion it was not paid at the day, for it could not be diſtrained for till after the day. But it was agreed that the covenant alters not the nature of the rent (*a*), but that nothing behind, or payment at the day, is a good plea.

(*a*) But this in 1 Brownl. 91. *per cur.* was held a bad plea, for that by it the defendant confeſſed the covenant broken, and it tended but in mitigation of damages.

Trin. 5 G. 2. in B R. Meard v. Phillips. 2 Str. 906. S. C.

*Nil debet* was pleaded to an action brought on a covenant for a forfeiture, and on demurrer the plea was held ill.

Keb. 305. Noy, 46. Hob. 187.

In trover there is no plea, but a releaſe or not guilty, for every plea in juſtification is but tantamount.

[The defendant may plead the ſtatute of Limitations, Lutw. 99.] *& vide* title Trover and Converſion.

2 Salk. 516. pl. 7. Ld. Raym. 217. Brown v. Corniſh.

In *aſſumpſit* and *quantum meruit* for 20 *l.* the defendant pleaded *onerari non debet*, becauſe he paid the money at the time, *&c. Et hoc paratus eſt verificare;* and it was held by *Holt*, that *onerari non debet* was no plea here, becauſe the defendant allows the promiſe to be a good promiſe, but avoids it by a matter of diſcharge *ex poſt facto*, and therefore in this caſe he ſhould have pleaded *actionem non:* but, where the matter of the plea ſhews there never was a good cauſe of action, *onerari non debet* may be proper; as, in debt on a bond, the defendant may plead *onerari non debet quia riens per diſcent.*

Roll. Abr. 121, 122. Cro. Car. 116. Hetl. 114.

In account, the defendant may plead, that he was never receiver, agent, factor, or bailiff to the plaintiff; or, if charged as bailiff, he may plead, that he was only hired as his ſervant to drive his plough, or, he may plead a releaſe, or a ſubmiſſion to arbitration.

Roll. Abr. 123. *& vide* Yelv. 202.

So, he may plead in bar, that after the receipt of the ſum of which the account is demanded, by the mediation of their friends it was agreed between them, that the defendant ſhould make an obligation of 100 *l.* for the 100 *l.* received, and the profit thence to ariſe; which obligation he did make and deliver accordingly to the plaintiff; for the acceptance of the obligation deſtroys the duty, and the ſum in demand is thereby as ſtrongly releaſed as by a releaſe of all actions.

Dyer, 22. 145. 6 Co. 7. Ferrer's caſe. 4 Leon. 91. Style, 353. 410.

But it is no good plea in bar to an action of account, that the defendant hath made payment of the money which he received, or that he hath made ſatisfaction, or that the defendant hath given him a receipt or an acquittance for the ſum received; for theſe pleas, being matters that ſhew he was once accountable, are only to be made uſe of before the auditors.

Cro. Eliz. 830. Treſham v. Ford, adjudged.

If in account upon receipt by the hands of *J. S.* the defendant plead, never his receiver, *&c.*, and the jury find that he was his receiver of ſuch a ſum, *&c.*, and the defendant plead before the auditors that he was poſſeſſed of ſeveral obligations, in which the ſon of the plaintiff was bound to the defendant, and that *J. S.* paid him this money in ſatisfaction of thoſe bonds, and that thereupon he delivered to him the ſaid bonds to the uſe of the plaintiff, which

which he after accepted; this is no good plea, for it is no more than *not his receiver*, which is found and adjudged againſt him.

In an aſſiſe, the general iſſue is *nul tort, nul diſſeiſin*; and therefore in an aſſiſe of an office it is no plea to ſay, that there is no ſuch office, for that amounts to no more than ſaying, that he did not diſſeiſe him. Noy, 223. & *vide* tit. Aſſiſe.

In an attaint, the petit jury can plead no plea, but ſuch as may excuſe them of the falſe oath. Keilw. 130.

In an information in nature of a *quo warranto* againſt a perſon, to know by what authority he exerciſed the office of portreve of a borough, *non uſurpavit* is no plea, which appears from the nature of the charge, which is for him to ſhew by what warrant or authority, &c., to which that plea is no anſwer. 10 Mod. 211. 299. The Queen v. Blagden.

In debt by baron and feme the defendant pleaded (*a*) *ne unques accouple in loyal matrimony*, and on demurrer it was held an ill plea; becauſe it puts it upon trial by certificate, which admits a marriage, but not *ſecundum leges eccleſiæ*, and therefore he ſhould have pleaded no marriage in fact, which muſt have been tried *per pais*. Show. 50. Allen & ux. v. Grey. (*a*) That this is no plea but in dower or appeal, *vide* tit. Baſtardy.

In waſte the general iſſue is *nul waſt*. So, reparation of waſte before the writ brought is a good plea in waſte, as is a ſpecial nontenure. 2 Inſt. 302. 306. Noy 93. 3 Leon. 203. & *vide* tit. Waſte.

In an action of waſte for cutting down 300 oaks, the defendant, as to 200, pleaded that the houſes let to him were ruinous, &c. and he cut them down, and keeps them to employ about reparation *tempore opportuno*; and on demurrer this plea was held ill. Cro. Eliz. 593. Gorges v. Stanfield.

Every defendant may plead in a *quare impedit* the general iſſue, which is *ne diſturba pas*; becauſe the plea doth but defend the wrong wherewith he ſtands charged, and leaves the plaintiff's title not only uncontroverted, but in effect confeſſed; and the plaintiff may, upon that plea, preſently pray a writ to the biſhop, or (at his choice) maintain the diſturbance for damages. Hob. 162. Vaugh. 58. cited.

At common law plenarty before the writ of *quare impedit* brought was a good plea: *ſecùs*, of plenarty pending the writ: but, by the ſtatute *Weſt.* 2. (13 *Ed.* 1. *ſt.* 1.) *c.* 5. plenarty is no plea in a *quare impedit* or *darrein preſentment*, unleſs it be by the ſpace of ſix months before the writ brought: alſo, plenarty by ſix months is no bar againſt the king, according to the rule *nullum tempus*, &c. 2 Inſt. 360. *vide* title Quare Impedit.

In a *quare impedit*, where the incumbent pleads the preſentment of a ſtranger, there, he ought to ſhew that the ſtranger had a title, and that he was ſeiſed of the advowſon, &c., or that he was ſeiſed of a manor, &c., to which, &c. But, where he pleads, that he was in for ſix months by the preſentment of the plaintiff himſelf, or by collation, by lapſe, by the ordinary, there, he need not make any title. Noy, 30. Liſter v. Cramel.

2. That the Plea must be good in Substance; and therein, of Matter of Inducement, and that which is the Gist of the Defence.

(a) Note: That what is substance and what not, must be determined in every action according to its nature. (b) A verdict cures

As the plaintiff's action must have all essentials necessary to maintain it, so the defendant's bar must be (a) substantially good, that is, the essence or gist of the plea must be such as, if found for the defendant, the court, according to the rules of law, must dismiss, or give judgment for him. But, if the gist of the bar be naught, it cannot be cured even by (b) a verdict found for him. If indeed it be bad only in form, a verdict will cure it; and if the gist be traversed, all collateral circumstances will be intended after a verdict.

not only such defects as may be called artificial defects, and come within the purview of the several statutes of Jeofail, but natural defects, or the omissions of the parties in their allegations, which must be presumed to have been given in evidence to the jury, otherwise they could not have found a verdict for the party. *Vide* title Amendment and Jeofail, that these statutes do not help substance. 2 Salk. 521. pl. 25.

Cro. Eliz. 268. Pendelbury v. Elwell.

(c) The plea ought to be according to the demand. Hob. 327. 3 Lev. 375.

The defendant's plea must fully (c) answer the count or declaration; as, where in assault, battery, and wounding, the defendant pleaded that he was constable of *D.*, and for such a misdemeanor of the plaintiff he laid his hands on him, and carried him to the stocks, *quæ est eadem transgressio*; on demurrer it was adjudged for the plaintiff, because the defendant had not either justified or pleaded not guilty as to the wounding. But, if one pleads that the hurt which the plaintiff had was of his own assault, this is a good answer to all.

Cro. Eliz. 812. Whitnel v. Cook.

In replevin the defendant as bailiff to *P.*, who was seised of the third part of the place, *&c.*, justifies for damage-feasant; the plaintiff saith that a stranger was seised of the other two parts, and by his licence he put in his cattle; the defendant saith *de injuriâ suâ propriâ absque tali causâ*, &c., the plaintiff demurs; and it was adjudged no plea, but he ought to answer to the special matter in the bar.

Lev. 16. Thompson v. Noel.

So, where in covenant the plaintiff declared, that he, the plaintiff, had covenanted with the defendant to go with a ship to *D.* in *Ireland*, and there to take in 280 men from the defendant, and to carry them to *Jamaica*; and the defendant covenanted to have the 280 men there ready, and to pay for the carriage of them 5*l.* a man, and said, that the defendant had not the 280 men ready, but that he had 180, and those he took and carried, and the defendant had not paid for them; the defendant pleaded, that he had the 280 men ready, and tendered them to the plaintiff, and that he would not receive them, but said nothing to the carrying of 180 men, nor to the non-payment for them; as this was not a plea to the whole, but to the carrying only, judgment was given for the plaintiff on a demurrer.

11 Co. 6. b. 2 Leon. 174. Godb. 55.

If as to part the defendant joins issue, but says nothing to the rest, and this issue is found for the plaintiff, he shall have

judgment. But (*a*), if the matter is pleaded to the whole, though in fact but an anſwer to part, this is a bad plea, and not helped by the ſtatute. Roll. Rep. 161. Cro. Jac. 353.

Hob. 187. Goulſ. 109. Bulſ. 25. Carter, 51. 3 Lev. 39. (*a*) Hard. 331.——If many words contain one thing in ſignification, if he anſwers to them in ſubſtance, it is good. Cro. Eliz. 256.

In an action of treſpaſs on the caſe brought by a commoner againſt a ſtranger for putting his cattle in the common, *per quod communiam in tam amplo modo habere non potuit*, the defendant pleads a licence from the lord to put his cattle there, but does not aver there is ſufficient common left for the commoners, this is no good plea; for though it may be objected the plaintiff may reply thereto; yet, being the very giſt of the action, the defendant ſhould have pleaded thereto. 2 Mod. 6. Smith v. Feverell. 1 Freem. 190. S. C.

In debt upon an obligation conditional, the defendant cannot plead in bar matters in diſcharge of the obligation, but he muſt plead it in diſcharge of the ſum contained in the condition of the obligation; for it is not a debt ſimply by the obligation, but the performance or breach of the condition makes it a debt; for the obligation is guided by the condition, ſo that if the condition be not diſcharged, the obligation remains in force. Yelv. 192. Cro. Jac. 254. Neal v. Sheffield.

In debt upon a bond, it is no plea, that the plaintiff accepted a new bond, in ſatisfaction of the old, for that is no ſatisfaction actual and preſent, as it ought to be. Hob. 68. Lovelace v. Cockatt.

In debt upon an obligation of 10*l.*, recited to be for rent, entry and ſuſpenſion, is no plea; becauſe it only anſwers a recital in the condition, which is not material, and not the condition itſelf. Hob. 130. St. John v. Diggs.

The condition of an obligation was, that if *A.* pay 20*l.* at *Michaelmas* next, and 20*l.* at *Eaſter* after, ſo 20*l.* at every of the ſaid feaſts ſo long as *A.* ſhall live, or until *B.* ſhall be preferred to a benefice of 40*l. per ann.*, that then, *&c.* In an action of debt upon this obligation, the defendant pleaded that *B.* was preferred, *&c.*, before *Michaelmas* next; and held no good plea on demurrer; for, take it which way you will, he ought to pay the 20*l.* at the ſaid two feaſts that are expreſsly ſet down, for they are abſolute. Noy, 64. Counteſs of Warwick v. the Biſhop of Litchfield.

In debt upon an obligation the condition was, if ſuch lands be proved to be parcel of the manor of *D.*, then the plaintiff may enjoy them without interruption of the defendant, that then, *&c.*, the defendant pleads that they were not proved to be parcel of the manor, and it was thereupon demurred; and it was inſiſted that he ought to have pleaded, that they were not parcel of the manor, ſo as proof thereof might have been in that action; and of that opinion was the whole court. Cro. Jac. 232. Elve v. Sabe, adjudged.

In an action on the caſe againſt a common bargeman, for goods delivered to him to carry to ſuch a place, *&c.*, if he pleads, that he was diſcharged of keeping, without ſaying of carrying them, it is not good. Hob. 18.

In debt upon a bond conditioned to perform covenants, one of which was for payment of money upon making aſſurances, the defendant pleaded, he paid the money ſuch a day, but did not mention when the aſſurance was made, that it might appear to the 2 Mod. 33. Durk v. Vincent.

court the money was immediately paid purſuant to the condition; and for that reaſon the court were all of opinion the plea was not good.

2 Vent. 156. Brown v. Rands.

In debt upon an obligation, conditioned to permit the obligor's wife (whom he intended to marry) to diſpoſe of his perſonal eſtate, the defendant the obligor pleaded *quod conditio ejuſdem ſcripti nunquam infracta fuit per ipſum ad aliquod tempus hucuſque; & hoc paratus eſt verificare:* And on demurrer the court held the plea naught, and that for ſaving the bond, it was neceſſary to ſhew he had performed the condition.

2 Mod. 176. Harman's caſe.

But, where in covenant the breach aſſigned was, that the defendant did not repair, and he pleaded generally *quod reparavit, & de hoc ponit ſe ſuper patriam;* this was held good after a verdict.

March, 77.

If, in a *quantum meruit* for medicines, the defendant pleads, that he had paid to the plaintiff *tot & tantas denariorum ſummas*, as the ſaid medicines were worth, without ſhewing what ſum in certain he hath paid, this is no good plea*.

* He ſhould have pleaded *non aſſumpſit*.

March, 100.

If in *aſſumpſit* the plaintiff declares, that the defendant did aſſume and promiſe to pay the plaintiff ſo much money, and alſo to carry away certain wood before ſuch a day; the defendant, as to the money cannot plead that he paid it; and as to the carriage of the wood *non aſſumpſit;* for the promiſe being entire cannot be apportioned.

2 Mod. 43. Mod. 205. S. C. Milward v. Ingram.

If the plaintiff declares upon an *indebitatus aſſumpſit*, and upon a *quantum meruit*, and the defendant pleads, that after the ſaid ſeveral promiſes made, and before the action brought, the plaintiff and defendant came to an account concerning divers ſums of money, and that the defendant was found in arrear to the plaintiff in 30 *l.*, and thereupon in conſideration that the defendant promiſed to pay the ſaid 30 *l.*, the plaintiff promiſed likewiſe to releaſe and acquit the defendant of all demands; this is a good plea, for by the account the firſt contract is merged.

[But an account without payment or releaſe is ſurely no bar in this caſe.

Mayor, &c. of Scarbro' v. Butler, 3 Lev. 237. And an *inſimul computaſſet* with payment amounts to the general iſſue. Com. Dig. tit. Pleader, (2 G. 2).]

Raym. 449. 2 Jon. 158. Caſe v. Barber.

If the plaintiff declares upon an *indebitatus aſſumpſit* for 100 *l.* and upon an *inſimul computaſſet* the ſame day for another 100 *l.* and the defendant pleads, that the ſaid ſeveral ſums of 100 *l.* are for one and the ſame cauſe of action, and for one ſum of 100 *l.* only, and not for ſeveral ſums; and that after the time of the ſaid ſeveral promiſes made, the defendant, by order of the plaintiff, paid to one *B.* 30 *l.* in part of payment and ſatisfaction of the ſaid money in the declaration mentioned, and in full payment and ſatisfaction of the reſidue of the ſaid money, did become bound to the plaintiff in a bond of 120 *l.* conditioned for the payment of 65 *l.* to the plaintiff at a certain day in the condition ſpecified, which 30 *l.* and bond the plaintiff accepted, *&c.;* this is a good plea; for though it is no plea to ſay the ſeveral *narr.* are for one ſum only, and ſo to go no further, yet, when the defendant pleads over, that the very ſum demanded is ſatisfied, this is a good plea; and if the ſeveral 100 *l.* were diſtinct ſums, the plaintiff might have

have replied ſo, and taken iſſue thereupon: but, when he admits there was but 100 *l.* due, and that ſatisfied, the plea is good.

In treſpaſs for taking ſeveral goods, the defendant juſtified for ſeveral amerciaments aſſeſſed in a court-baron; but, becauſe he did not ſhew an affeerment by the affeerors, judgment was given for the plaintiff. 3 Lev. 19. Coniers v. Frank. [So, Stephens v. Haughton, 2 Str. 847.]

In treſpaſs for pulling down a gate, treading graſs, *&c.*, the defendant as to pulling down the gate juſtified, that time out of mind he had a paſſage *per & trans* the yard, and that a gate was erected upon the paſſage, ſo that he could not paſs with his beaſts, wherefore he broke and pulled down the gate, *&c.* And on demurrer to this plea, it was objected, that the defendant could not juſtify the pulling down and breaking of the gate, not having ſhewn that it was locked or nailed, ſo that he could not paſs. *Sed per curiam*—Having pleaded that the gate was put there, ſo that he could not uſe the paſſage, it ſhall be intended that it was locked or nailed, or the way thereby ſtraitened that he could not paſs, and the plea therefore good. 3 Lev. 92. Sprigg v. Neal.

In debt upon an obligation the defendant pleads, that he delivered it as an eſcrow; *& hoc paratus eſt verificare;* this held a vicious plea, for he ought to ſhew to whom he delivered it; and alſo he ought to conclude his plea (*a*), *Et iſſint nient ſon fait.* Vent. 9. (*a*) *Vide* 1 Vent. 210.

If in an action for the following words, *Thou art a bankrupt*, the defendant pleads, that ſuch a day and year the plaintiff became a bankrupt, and ſo juſtifies, but does not allege that he continued a bankrupt; this is no good juſtification, for it ſhall not be preſumed that he continued ſo. Cro. Jac. 371. Upſheer v. Betts.

If in an action for theſe words, *She is a thief to you and to me, and hath ſtolen* 20 l. *from me, and* 40 l. *from you*, the defendant pleads, the plaintiff is a thief, and ſtole two hens from the defendant; this is no good plea; for it does not anſwer the particular charge in the declaration, and the laſt words are as material to be anſwered as the firſt. Cro. Jac. 676. 2 Roll. Rep. 414. Hilſden v. Mercer.

If the plaintiff declares, that whereas ſhe was a woman of good fame and reputation, *&c.*, the defendant ſaid of her, *She is a common whore*, &c. *per quod*, &c. and the defendant pleads, that at the time when the words were ſpoken the plaintiff was not of an honeſt reputation, as in the declaration is alleged; this is no good plea. Style, 118. Starchy's caſe, adjudged upon a demurrer to the plea.

If the defendant pleads a proper plea, though it is not full, it is aided by the ſtatute; and therefore in all caſes where iſſue is taken upon an inſufficient plea in bar, which would have been ill upon demurrer, it is held, that after a verdict the defendant ſhall not take advantage thereof. 5 Mod. 226. ſaid *arguendo*.

Therefore in treſpaſs, where the defendant pleaded a concord in bar, but not with ſatisfaction, iſſue being taken upon the concord, the plea was held ill, for want of ſatisfaction being pleaded; yet it was not merely void, becauſe concord was a good plea to ſuch an action, though not ſo fully pleaded as it might *. Cro. Eliz. 778. Roll. Abr. 225. Moor, 696. 5 Mod. 226. cited.

* So ruled on error being brought

Hob. 326. Reynolds v. Buckle.

So, in debt for rent upon a leaſe for years, entry is a proper plea, but not good, without ſaying he did expel and hold him out; yet, if iſſue be taken upon *non intravit*, and found for the defendant, he ſhall have judgment.

Cro. Jac. 673. Johns v. Ridler.

In ejectment the defendant pleaded, that one *Ridler* was ſeiſed in fee, and made a leaſe to him for five years, by virtue whereof he was poſſeſſed, until the leſſor of the plaintiff entered and diſſeiſed him, and made a leaſe to the plaintiff, that thereupon he re-entered and ejected him, *prout ei bene licuit*. The plaintiff replied, that the leſſor was ſeiſed in fee, and leaſed to him, and the defendant ouſted him, *abſque hoc*, that he did diſſeiſe the defendant: Upon which iſſue was joined, and found for the plaintiff; and though this iſſue was vain, it being impoſſible that a leſſee for years ſhould be diſſeiſed; yet the defendant ſhall not take advantage of ſuch an ill plea; but having confeſſed a leaſe made to the plaintiff, and it being found that he did not diſſeiſe the defendant, judgment ſhall be given for the plaintiff: but, if there had been a verdict for the defendant, he could not have judgment; for then the jury would have found againſt the law, that a termor was diſſeiſed.

### 3. Of general Pleading to avoid Prolixity; and therein, of affirmative and negative Pleas.

Co. Lit. 303. 8 Co. 133. Plow. 123. 126. 129. (*a*) Salk. 8. 5. Keitw. 95. 40 E. 3. 30.

It ſeems, that formerly great certainty and exactneſs was required in ſetting forth all the particulars in a declaration, as likewiſe in pleading the performance of conditions and covenants; as, (*a*) in a bond for performance of covenants, it was held neceſſary to demand oyer of the condition, and likewiſe of the covenants, and to plead particularly the performance of each of them. This created great inconveniencies in overloading the proceedings with a recital of uſeleſs facts; and therefore this rule hath in the modern practice received a relaxation; and it is now ſettled, that where the matters to be pleaded tend to infiniteneſs and multiplicity, whereby the rolls may be incumbered in the length thereof, the pleading ſhall be general.

Raym. 400. Aglionby v. Towerſon, adjudged.

As, if in an *aſſumpſit* the plaintiff declares, that whereas there was a certain diſcourſe between the plaintiff and defendant, concerning a marriage to be had between the nephew of the plaintiff and the niece of the defendant, and thereupon the defendant, in conſideration the plaintiff would do his endeavour and labour to perſuade his nephew to marry the niece of the defendant, did aſſume and promiſe to pay the plaintiff, *&c.*; and avers, that ſuch a day, and divers other days and times *omnibus modis quibus poterat conatus fuit & elaboravit ſuadere* his ſaid nephew to marry the defendant's ſaid niece, *&c.*; this is a good declaration, without ſhewing in particular how he did his endeavour; for if he ſhould ſet forth his ſeveral ſpeeches to his nephew in the praiſe of the young lady, or the advantages of a married life, *&c.*, the record would be too long.

So,

So, in an *assumpsit* the plaintiff declares, that in consideration the plaintiff would find and provide for a sick man all such necessaries as he should want, the defendant assumed and promised to pay, *&c.*; and avers, that he had found him necessaries, amounting to such a sum, *&c.*; this is a good declaration, without shewing in particular what those necessaries were, for that would make the record too prolix. 3 Bulst. 31. Roll. Rep. 173. Cripe v. Bainton.

In *assumpsit* for labour and medicines in curing the defendant of a distemper, *&c.* who pleaded, *infra ætatem*; the plaintiff replied it was for necessaries generally: And upon demurrer to this replication, it was objected, that the plaintiff had not assigned in certain how or in what manner the medicines were necessary; but it was adjudged, that the replication in this general form was good. Carth. 110. Huggins v. Wiseman, *& vide* tit. Infancy, letter (I).

So, where trover was brought for a library of books *, it was held to be good without expressing what they were; because to set down the particular books would make the record too prolix; and in this case (*a*) *Plow.* was cited, where a man pleaded, that he was knight of the shire *per majorem numerum*, and held to be good. Vent. 114. Emery's case. (*a*) Bulkeley's case cited, also Raym. 9. * *Sed qu. de hoc?* He might have declared of a certain number of books: but surely nothing can be more uncertain than the term *library*; as what may be a very proper library for a gentleman in one art or profession may be a very improper one for another, &c.

So, in an action on the case for setting an house on fire, *per quod*, amongst divers other goods, *ornatus pro equis amisit.* After verdict for the plaintiff, it was objected, that this was uncertain; but the objection was disallowed by the court. And in this case Justice *Windham* said, that if he had mentioned only *diversa bona* it had been well enough; as a man cannot be supposed to know the certainty of his goods when his house is burnt; and that, to avoid prolixity, the law will sometimes allow such a declaration. Mich. 16 Car. 2. in B. R. Prior v. Dawkes. Keb. 825. S. C.

[So, in an action on a bond entered into by the agent of a regiment conditioned to pay to the colonel, commissioned and non-commissioned officers, *&c.* all such sums as he should receive from the paymaster general, it is not necessary in assigning a breach to enter into the detail, and state the respective proportions each person was entitled to, and the various deductions out of the whole pay upon various accounts.] Cornwallis v. Savery, 2 Burr. 772.

As to general and particular pleading there are many distinctions, which may be reduced to this rule, that a certainty or generality in pleading is required, according to the nature of the subject-matter pleaded. And this has begotten the distinction between (*b*) negative and affirmative pleas; as, if a man is bound to perform all the covenants of an indenture, if they are all in the affirmative, he may plead performance thereof generally, and is not obliged to exhibit to the court a performance of each of them; for this would overload the proceedings with a recital of all the covenants, whereas one only might be in controversy between the parties. Co. Lit. 303. Leon. 136. Keilw. 95. Palm. 70. Lev. 303. Sid. 215. 2 Vent. 156. (*b*) Mode, and other circumstances of quality, time, and place, are requisite in affirmative pleas, none of which are necessary in negatives. Show. Parl. Cases, 97. and several authorities there cited.

But,

Co. Lit. 303. Moor, 856. Cro. Eliz. 691. Sid. 87.

But, if ſome of the covenants are in the negative (*a*), the defendant muſt plead ſpecially; for a negative cannot be performed: therefore, on a ſpecial demurrer the defendant's plea would be bad; *aliter*, on a general demurrer.

(*a*) But, if the negative covenants are all void and againſt law, and the affirmative good and lawful, he may plead performance generally, and the court ſhall take notice that the negative covenants are void and againſt law. Moor, 850. Godb. 212. Hob. 12.

Show. Parl. Ca. 9. *arguendo.*

Even in affirmatives our law allows of general pleading, where particulars would be many; as, in a bond for performance of covenants, upon an apprentice's indenture, for finding him meat, drink, waſhing, lodging, and other neceſſaries, held, that *invenit* meat, drink, waſhing, lodging, *& alias res neceſſarias*, is a good plea, though uncertain what or how much; and the reaſon is not only becauſe it is in the words of the covenant; (for that reaſon doth not always hold; for many times you muſt ſhew how, and are forced to vary from the words of the covenant in a breach; as, in the caſe of quiet enjoyment, the breach muſt allege how, and by whom, and under what title the man was diſturbed;) but there is another reaſon, becauſe the particulars would be many.

Co. Lit. 303. Palm. 70. Cro. Eliz. 560. Leon. 311.

Where ſome of the covenants are in the disjunctive, there, the defendant cannot plead performance generally, becauſe both the alternatives are not to be performed; and by pleading performance generally, he does not ſhew in certain what is performed by him; and therefore this is bad on a ſpecial demurrer, which ſhews the want of that certainty: but, where the plaintiff does not demur for want of ſuch certainty, it ſhall be intended that the defendant performed one of them, and therefore good.

Savil, 120, 121.

If the condition of an obligation be to perform the award of *J. S.*, and he award the obligor to pay 100 *l.* or to procure a ſtranger to be bound in 200 *l.*, *&c.*, the defendant may plead performance generally; becauſe one part is void, and it will be intended that he pleads performance of that part which he was bound to perform, and not the other part.

Cro. Eliz. 870. Waller v. Croot.

If in debt upon an obligation, conditioned that if the obligee ſhall enjoy ſuch lands till the full age of *J. S.*, and if *J. S.* within one month after his full age makes an aſſurance thereof to the obligee, then, *&c.* the defendant pleads, that *J. S.* is not yet of full age; this plea is not good, without ſhewing the obligee hath enjoyed the lands in the mean time; for the condition is in the copulative.

Dyer, 229. Hob. 69. 170.

Where the covenants are to do a matter of law, as to (*b*) convey, diſcharge an obligation, ratify, or to confirm, *&c.*; there, it muſt be pleaded ſpecially; becauſe, being a matter of law to be performed, it ought to be exhibited to the court, to ſee if it be well performed, who are judges of the law, and not a jury, who are judges of the fact only.

(*b*) If the condition be to convey an eſtate, in pleading it muſt be ſhewn by what manner of conveyance it was done. Leon. 72. 2 Leon. 39. 2 Mod. 240. Godb. 36.——So, if the condition be to ſhew a ſufficient diſcharge of an annuity, in pleading performance it muſt appear what manner of diſcharge it was, that the court may adjudge whether ſufficient or not. 9 Co. 25. Hob. 107.——In debt upon an obligation, conditioned to deliver all evidences concerning ſuch lands, the defendant muſt plead, that he hath delivered ſuch and ſuch charters, which are all the charters concerning the land. Keilw. 95. But *per* Cro. Eliz. 859. he may plead, that he hath delivered all, &c., and the contrary in ſome particulars ought to be ſhewn on the other ſide; *per curiam.*

Where

Where the covenants are matters of (*a*) record, the performance must be shewn specially; because it must appear to be done by the record, and is not to be tried by a jury on the general issue. Co. Lit. 303. b. (*a*) As to levy a fine. Cro. Jac. 560. 2 Roll. Rep. 159.

If in debt upon an obligation, conditioned that the plaintiff shall enjoy certain lands, discharged, or otherwise saved harmless (*b*) from all incumbrances, the defendant pleads, that the plaintiff had enjoyed the lands discharged and kept indemnified from all incumbrances; this plea is naught; for being in the affirmative it ought to have been shewn how: but, if he had pleaded in the negative, *non fuit damnificatus*, it had been otherwise. 2 Co. 4. Manser's case, and the like point in Winch, 9. Cro. Jac. 363, 364. Leon. 71. March, 121. Keilw. 80

(*b*) If the condition be to save harmless from all bonds entered into for the obligor, *exoneravit & indem. conservavit* is no plea without shewing how. Cro. Eliz. 916. adjudged, but that he need not shew from what bonds he saved him harmless; and Cro. Eliz. 433. *per* Gaudy, there is a diversity when the condition is to discharge from a particular thing, and when from a multiplicity of things, for in the last case it is sufficient to plead generally. [If to debt upon bond conditioned to indemnify the plaintiff, the defendant plead *quod indemnem conservavit*, without saying how; this is well enough, if not shewn for cause of demurrer. White v. Cleaver, 2 Str. 681. *Sed vide* Hillier v. Plympton, 1 Str. 422.]

Where the bar is in the negative, it is impossible for the plaintiff to go to an issue, for a negative cannot be proved; and therefore the plaintiff must assign a breach, by replying in the affirmative, on which issue may be properly taken: as, if a condition of a bond is, that the defendant shall not deliver possession to any person but the lessor, or to such persons as shall lawfully evict them; the defendant pleads he did not deliver the possession to any but such as lawfully evicted him; here, it comes on the plaintiff's side to assign a breach, and shew that he delivered the possession to some person that had not lawfully evicted him; because, the condition being in the negative, the defendant's plea must necessarily be in the negative also, and the plaintiff, to assign a breach, must assign a fact directly opposite to such negative condition. Lev. 83. Pullen v. Nicholas.

So, if an obligation be to perform an award, and the defendant plead no award made, it is not sufficient for the plaintiff to shew an award made in his replication, unless he shews also a breach; because the defendant's plea is in the negative, and the plaintiff, by replying in the affirmative, does not shew the obligation to be broken; for the shewing such an award leaves it uncertain whether it was performed or not; and his having shewn that there was an award subsisting, does not make it appear that he was entitled to the money, unless he also shews that the award was broken. *Vide* title Arbitrament.

The condition of a bond was, that the obligor should render an account of the goods of *William Narril* deceased, which came to his hands, and make an equal dividend between him and the obligee; the defendant pleads, no goods came to his hands; the plaintiff must reply what goods came to his hands, and farther assign the breach that he did not account for them; because the plaintiff, by replying the goods came to the defendant's hands, leaves it on his own shewing indifferent to the court whether he be entitled to the penalty of the obligation or not, unless he goes farther, and shews that the defendant did neither account nor divide them. Sand. 102. Hayman v. Gerrard.

If

Cro. Jac. 359. 2 Bulſ. 267. S. C. Halſey v. Carpenter.

(a) If in debt upon an obligation, conditioned to pay 30 *l.* to *A. B.* and *C. tam cito* as they ſhall come to the age of twenty-one years; the defendant pleads that he paid thoſe ſums *tam cito* as they came of age; this is no good plea; for the time, place, and manner of performance ought to be ſhewn in certain, ſo that a certain iſſue might be taken upon it. Adjudged upon a ſpecial demurrer.

(a) If the condition be to ſurrender a copyhold, the defendant muſt not plead generally, that he hath ſurrendered it, but muſt ſhew when the court was held. Winch, 11. adjudged. ——If the condition be, that the obligee ſhall enjoy an office according to letters patent, the defendant muſt not plead *in hæc verba*, but ſhew the effect of the letters patent, and the enjoyment accordingly. Hob. 295.

2 Mod. 33. Duck v. Vincent.

If in debt upon an obligation conditioned to perform covenants, one of which was for the payment of money upon the making an aſſurance, the defendant pleads that he paid the money ſuch a day, but ſaith not when the aſſurance was made; this is naught; for it ought to appear, that the money was immediately paid purſuant to the covenant.

Cro. Eliz. 749. Mints v. Bethel.

In debt upon an obligation, conditioned that the defendant at all times, upon requeſt, ſhould deliver to the plaintiff all the fat and tallow of the beaſts which ſhould be killed or dreſſed by the defendant, his ſervants, or aſſigns, before ſuch a day; the defendant may plead, that upon every requeſt to him made he did deliver to the plaintiff all the fat and tallow of all beaſts, *&c.* without ſhewing how many beaſts were killed or dreſſed, or what quantity of fat he delivered; for if the pleadings were not ſo contrived as to purſue the covenants, the defendant would be obliged to fill the pleadings with multitudes of uſeleſs deliveries, which might not be controverted by the plaintiff; whereas the plaintiff, by aſſigning a particular breach in the non-delivery at any one time, may bring the whole matter in queſtion.

Cro. Eliz. 749. cited between Sands and Maleverer. * *Sed qu.* If he may not ſay he received divers ſums, to the amount of ſuch a ſum in groſs, and that he rendered an account thereof?

But here we muſt take notice of another diſtinction, *viz.* That when the condition conſiſts of matters to be done that lie within his own knowledge, though they conſiſt of great variety, yet the defendant cannot plead generally, but muſt ſhew the particular performance of all matters in his plea; as, if the condition be, that the defendant, bailiff of the plaintiff's manor, ſhould render an account of all the rents of the manor he has received before ſuch a day; if the defendant plead he has accounted for all the ſums before ſuch a day, it is ill; but he muſt ſhew the particular ſums, becauſe it lies within his own knowledge only *.

Sid. 215. Woodcock's caſe. † *Qu.* See note preceding. A much ſhorter iſſue might be taken. Suppoſe he pleaded he delivered briefs to all churches, collected all the money, amounting in the whole to ſo much, and no more, and that

So, if the condition be, that the defendant ſhall deliver briefs to all churches within ſuch a time, and ſhall collect the money given upon them, and ſhall deliver it over to the plaintiff; there, the defendant cannot plead generally, that he has delivered the briefs, collected the money, and delivered it over to the plaintiff; but he muſt particularly ſhew what briefs were delivered, what ſums were collected, and that he delivered them over to the plaintiff, becauſe ſuch particular facts lie within his own knowledge only †.

that he delivered the ſame to the plaintiff. If not true in either of the particulars, it might eaſily be falſified by the plaintiff: he might ſay he did not deliver briefs to all churches, for that he omitted ſuch a church; or that he did not collect the money, but omitted to collect ſuch a ſum; or that he collected more than alleged, to wit, ſo much, and did not deliver the whole to the plaintiff; or that he did not deliver the money collected to the plaintiff, or any part; or not all, only ſo much.

If the condition be, that the defendant pay the plaintiff all manner of coſts and charges that *J. S.* ſhall charge the plaintiff with, for carrying on a ſuit; the defendant plead he did pay all manner of coſts and charges; this is ill, becauſe it relates to one ſingle point, which may and ought to be ſhewn in certain, in order that the plaintiff may take iſſue upon it. Lutw. 419.

[If the condition of a bond be, that *A.* ſhall not embezzle any money that ſhall be intruſted to him, or that *in any way* ſhall come to his hands on account of his maſter, it is neceſſary to ſtate in the breach, that a particular ſum of money was embezzled, and how, or from whom it was received.] Jones v. Williams, Dougl. 213.

A bond to pay from time to time a moiety of all ſuch monies as from time to time he ſhould receive; payment of a moiety generally, without ſhewing the particulars in certain, was held a good plea, becauſe it is of what he ſhould receive from time to time; otherwiſe, if theſe words had been omitted, becauſe in that caſe there would be a ſtuffing of the rolls with the multitude of particulars. Sid. 334. Church v. Brunſwick.

In an action on the caſe againſt the defendant, who promiſed, that in conſideration the plaintiff would diſcharge a third perſon then under arreſt, that he would pay the money; it was alleged *in facto* that he *exoneravit*, &c.; this was held ſufficient without ſhewing how; for that may be done by compoſition, *&c.*, and without deed. Cro. Eliz. 913. King v. Hobbs.

So, in debt upon a bond conditioned to perform the award of *J. S.*, if it is awarded that a ſuit in Chancery by the defendant againſt the plaintiff ſhall ceaſe, and the plaintiff ſtand acquitted *de quâlibet materiâ in eâdem contentâ*, the defendant may plead *quod ſtetit inde quietatus*, without ſhewing how, or that he *in facto* diſcharged him; for it was not intended that an actual diſcharge ſhould be given, but that by the arbitrament he ſhould be acquitted. Cro. Jac. 339. Roll. Rep. 8. 2 Bulſ. 93. Freeman v. Sheen.

In debt upon a bond, the condition whereof was to free and keep harmleſs the plaintiff, of and from all coſts and damages that may ariſe by reaſon of a law ſuit, *&c.*, the defendant pleaded *non damnificatus* generally; and on demurrer to this plea it was held good *, becauſe the condition was to ſave the plaintiff harmleſs from ſomething that was uncertain at the time of making thereof, viz., from the coſts and charges of the ſuit, that no coſts might be recovered againſt him: but, if it had been to ſave harmleſs from a particular thing †, there, ſuch a negative plea generally would not have done, becauſe the defendant ought to ſhew how he had indemnified the other. 5 Mod. 243. Harris v. Pett.

* The particulars of the damnification ſhould have been ſhewn by the plaintiff in his replication.

† *Vide infra.*

In caſe upon an agreement, in which the defendant promiſed to aſſign all the profits which accrued by a voyage made by a ſhip, *&c.*, the breach aſſigned was, that the defendant *non performavit agrea-* Skin. 344. pl. 13. Knight v. Keech.

*agreementum prædict.*: upon a verdict and judgment in *C. B.* for the plaintiff, error was brought in *B. R.*, where it was insisted that the breach was too general and uncertain: but *per cur.* had this been even on demurrer, it would have been good, but being after a verdict it is beyond question, for the plaintiff would not have damages given if he had not proved a good breach; and, here, the agreement is single, *ff.* to assign; so the non-performance is in the non-assignment, and it being negative, and in the words of the agreement, the judgment was affirmed.

3 Mod. 252. Mather v. Mills. In debt on a bond conditioned to acquit, discharge, and save harmless a parish from a bastard child, the defendant pleaded *non damnificatus* generally; and on demurrer it was held, that being in the negative he need not shew how, and it not appearing on the whole record that the parish was damnified, judgment was given for the defendant.

Stubbs v. Clough, 1 Str. 227. [In debt upon bond conditioned to perform articles, it appeared by the plea, that the articles were an agreement, that the plaintiff should furnish the defendant with ale and beer to be sold in his house at such prices, and that he should take it of nobody else, but might be at liberty to take any other liquors (malt liquors only excepted); and what should not be paid for at breaking up the trade, and were undrawn, should be taken back. The defendant pleaded performance. The plaintiff replied, that by the same articles it was further agreed, that what should be drawn should be paid for, and that there was such a quantity of liquors unpaid for. On demurrer by the defendant, it was said, that by the breach it does not appear the liquors unpaid for were malt liquors; and as other sorts are mentioned, the plaintiff should have been more particular; especially in the case of a bond, where he is to subject the defendant to a penalty. And of that opinion was the court, who cited the case of the *African Company* v. *Mason*. That was a bond, conditioned, reciting that the defendant was their receiver at *Bristol*, if therefore he do well and truly account for all sums by him received, then the bond to be void: the breach was, that he received so much money, and did not account for it; and because it appeared by the recital in the condition to be only about transactions of a particular nature, the general assignment of the breach was holden ill. So, is 2 *Saund.* 411.]

10 Mod. 227. Gilb. Rep. 238. S. C.

## 4. Of Surplusage and Repugnancy in Pleading.

Co. Lit. 303. Plow. 232. 502. Co. 42. 19 H. 6. 30. 32. Sand. 282. If either party, plaintiff or defendant, allege more than is necessary to introduce new matter repugnant and contradictory to what went before, in any point not material, this will not vitiate the pleadings, according to the maxim *utile per inutile non vitiatur*; and such redundant or repugnant part shall be rejected, especially after a verdict: so, though there be a repugnancy in any material point, and this be not aided after verdict, yet, if it appear, that the verdict was given on a different part of the declaration, or, if the plaintiff release such repugnant part, judgment shall be given for him.

In

In debt on an obligation the defendant pleads payment of 50 *l.*, 14 *Jun.* 11 *Jam.* according to the condition; the plaintiff replies *quod non ſolvit* 50 l. *prædict.* 14 *Auguſt*, *Ann.* 11. *ſuprad. quas ad eundem diem ſolviſſe debuiſſet; & hoc*, &c., the verdict found *quod non ſolvit prædict.* 14 *Junii prout* the defendant had alleged: the objection here was, that no iſſue was joined, becauſe they do not meet in the time the money was paid; but the word *Auguſt* being plainly ſurpluſage, (for when he ſaid *quod non ſolvit prædict.* 14 *die*, it is a ſufficient traverſe without the word *Auguſt*, and *Auguſt* is plainly repugnant to the word *prædict.*, for *prædict.* refers to *June*,) ſuch ſurpluſage, being a repugnancy to what was before material, was idle and void. Cro. Jac. 549.

In treſpaſs the bill was filed *Hil.* 18 *Jac.*, ſetting forth that the defendant 2 *January* 17 *Jac.* beat the plaintiff's ſervant, *per quod* the plaintiff *ſervitium per magnum tempus*, ſſ. *a prædict.* 20 *Martii ſuprad. uſque primum diem Martii extunc prox. ſequen perdidit*; on a *nihil dicit* a writ of inquiry was awarded, and 10 *l.* damages; but the defendant had judgment, becauſe the giſt of the action is for the uſe of the plaintiff's ſervice, and the battery is but inducement, and the loſs of the ſervice is not *ex neceſſitate rei* relative to the battery; for the ſervant might fall ill ſome time after the battery, and the plaintiff having laid a different month from the battery, there is nothing in the record to determine the court to the 20th of *January*, and to rectify the month of *March* as repugnant; and if the loſs or the ſervice ſtands on the month of *March* 17 *Jac.* until *March* following, it takes three months of the time elapſed after the time of the action brought, for which the jury was not authorized to give damages. Cro. Jac. 618. Hanbury v. Ireland.

But, in debt upon a bond, conditioned, that if the plaintiff did not depart out of the defendant's ſervice without his leave, *&c.*, then if he paid the plaintiff 100 *l.* within 28 days upon demand, the bond ſhould be void; the defendant pleaded that the plaintiff 4 *Maii* 30 *Eliz.* departed out of his ſervice, and without his leave; the plaintiff replied that 6 *Septemb.* in the ſame year ſhe departed with leave, and that afterwards 4 *Octob.* ſhe demanded the 100 *l.*, which the defendant refuſed to pay, *abſque hoc*, that ſhe departed without leave; it happened that the demand was laid to be 4 *Octob.* and the writ was teſted 18 *Octob.*, ſo that there were not 28 days between the demand and the action brought, yet the plaintiff had judgment; though upon her own ſhewing ſhe brought the action 14 days too ſoon; for the iſſue was upon the departure, and the demand in the replication was altogether immaterial, and therefore was rejected as ſurpluſage. 4 Leon. Moning v. Warley.

If in ejectment the plaintiff declares on a leaſe made to him the third of *May*, and that the defendant *poſtea*, ſſ. 1 *Maii* ejected him, this is good after verdict; for by the *poſtea* it appears that the defendant committed a tort on the plaintiff's title, and when he lays a repugnant day, it is as if he had laid none; and if no day be laid, it ſhall be intended after verdict that the tort was committed before the action; for it would be very foreign after verdict, to intend, that the action was brought by the ſpirit of prophecy for a wrong Yelv. 94. Carth. 288, 289. *& vide* Lev. 194, 195. Like point, & *vide* title Ejectment.

a wrong to be committed afterwards; and beſides, the jury could not take cognizance of any fact done ſince the action brought, for that was not in iſſue.

Cro. Jac. 377. Coddington v. Wilkin. Carth. 95. S. P. & *vide* Show. 28. where it is held that this would not be good on demurrer.

In treſpaſs for entering his cloſe 10 *Julii* 44 *Eliz. contra pacem dominæ reginæ Eliz. & domini regis nunc*, after verdict this was moved in arreſt of judgment, and held that theſe words *domini regis nunc* were but ſurpluſage.

Vent. 103. Ward v. Rich.

If an action be brought, and the plaintiff conclude his declaration with a *contra formam ſtatuti*, and there happen to be no act of parliament in the caſe, the words *contra formam ſtatuti* ſhall be rejected as ſurpluſage.

Salk. 212. pl. 2. Ld. Raym. 149. 12 Mod. 122. Comyns, 26. pl. 18. Holt, 661. pl. 1. Carth. 382. 5 Mod. 307. Comb. 420. S. C. Bennet v. Talbot.

So, in treſpaſs for entering his cloſe and treading down his graſs and corn, and hunting there, the defendant being an inferior tradeſman, *contra pacem domini regis, & contra formam ſtatuti inde proviſ.*; in this caſe, though ſeveral treſpaſſes are alleged, the laſt of which only is within the ſtatute, and the concluſion of the count is *contra formam ſtatuti*, which in a grammatical conſtruction goes to the whole count; yet, as in law it goes only to the hunting, it therefore may be applied to the latter part, and rejected as to the reſt for ſurpluſage.

The King v. Hall, 1 Term Rep. 320.

[In an information upon a ſtatute, if the proſecutor is not obliged to negative the exceptions in the ſtatute, and yet negatives ſome of them, that part of the information ſhall be rejected as ſurpluſage.]

Salk. 24. pl. 7. Ld. Raym. 669. Comyns, 115. pl. 79. 12 Mod. 510. Palmer v. Stavely. Mod. 42. Sid. 306. 2 Keb. 615. S. P.

In *aſſumpſit* for money had and received by the defendant for the plaintiff, *ad uſum* of the defendant; and verdict upon *non aſſumpſit* for the plaintiff; on motion in arreſt of judgment the court held, that theſe words, *ad uſum* of the defendant, ſhould be rejected, being inſenſible and repugnant; and then the promiſe is for money had and received by the defendant for the plaintiff, which is well.

Hill v. Fleming, Ca. temp. Hardw. 341.

[In an action of aſſault againſt *A.* and *B.*, if *A.* confeſſes, and *B.* pleads that he and *A.* is not guilty, and iſſue is joined, and *B.* is found guilty, the words referring to *A.* may be rejected.]

Salk. 213. pl. 4. Nevil v. Soper.

In covenant againſt an apprentice the plaintiff aſſigned for breach, that the apprentice, before the time of his apprenticeſhip expired, and *durante tempore quo ſervivit*, departed from his maſter's ſervice; the defendant demurred and had judgment; becauſe the declaration was repugnant, for it ſhould have been *durante tempore quo ſervire debuit*.

Salk. 213. Lawley v. Arnold.

So, in treſpaſs for taking and carrying away his timber and bricks *ſuper terram jacent. erga confectionem domus de novo ædificat.*; the court held this inſenſible; for they could not be materials towards building a houſe already built.

Noy, 145. Valentine v. Penny.

Treſpaſs *quare clauſum fregit & ſolum fodit*; the defendant juſtifies, that he and his anceſtors, and all thoſe whoſe eſtate he had in

in a cottage, have uſed to have common of turbary to dig and ſell *ad libitum*, as belonging to the houſe, *&c.* and adjudged an ill plea, being repugnant in itſelf; for a common appertaining to a houſe ought to be ſpent in the houſe, and not ſold abroad: alſo, ſuch a common, as is aboveſaid, is an intereſt and a frank-tenement.

If an annuity, common of paſture, common of eſtovers, or the like, be granted for life or years, *&c.* the reverſion may be granted without attornment; and therefore to plead it is ſurpluſage, and more than needs; becauſe in none of them is there any tenure, attendance, remainder, or payment out of land. Co. Lit. 312. a.

In an avowry for a rent-charge, the defendant made title to *Jan. Stiles*, with whom he married *anno* 1603, and becauſe at *Mich.* 1597, 20*l.* was arrear, and not paid to him and his wife, avowed *Hil.* 7 *Jac.* Adjudged a good avowry; for the ſaying it was arrear to him and his wife was but ſurpluſage, when the contrary appears, he not being married then. Cro. Jac. 282. Bowles v. Poor. Bulſt. 135. S. C. & *vide* Hob. 208. Moor, 887. like point.

If an acceptance of rent of an aſſignee be pleaded, *quod receperunt & acceptaverunt de prædict.* J. S. *redditum ſicut fertur ſuperius reſervat.*, viz. *ſex denarios de redditu prædict.*; this is repugnant, becauſe it is in a point perfectly material; and it is repugnantly pleaded, becauſe it is ſaying he received the whole rent, and yet received but part of it, which is in ſubſtance a different thing; and the *ſex denar.* is no ſurpluſage, becauſe it is the certain ſum that is alleged to be accepted; and therefore the acceptance is not in the form only. Sand. 298. 305.

If a man makes ſeveral demands in one declaration, and in the *toto ſe attingunt* miſcaſts the whole ſum, and makes it more than what is contained in the ſeveral articles demanded: this ſhall not vitiate the declaration, becauſe the caſting up one total is mere ſurpluſage, and that total not agreeing with the parts, ſuch diſagreeing ſurpluſage cannot hurt; for it is plainly the miſtake of the clerk, in computing the demand aright, and not of the party, in ſhewing any particular demand otherwiſe than he ought. Latch. 175. Noy, 44. Yelv. 5.

[So, in debt on a ſimple contract, the declaration hath been holden to be good, though the aggregate amount of the ſeveral ſums in the different counts fell ſhort of the ſum demanded in the recital of the writ, and the breach was aſſigned in the non-payment of the ſum demanded in the writ.] M'Quillin v. Cox, 1 H. Bl. 249.

But, if a man brings a plaint in an inferior court, and the declaration ſets forth particular demands, which over-run the ſum mentioned in ſuch plaint, though never ſo little, and the jury give a verdict according to the ſums mentioned in the declaration; this is erroneous; for the plaint in that court is in nature of a writ, and is the original and foundation of the whole proceedings; and if the declaration, verdict, or judgment, are for more than is contained in the writ or plaint, though it be never ſo little, by the ſame reaſon they may go to larger ſums *in infinitum*; and then the plaint or writ would be no direction for the future proceedings of the court. Yelv. 5. Noy, 44. Latch. 175. *& vide* 1 Sand. 282. that the plaintiff may remit ſuch overplus declared for.

5. That the Pleading ought to be direct and not argumentative.

Co. Lit. 303. a. (a) A plea in bar, that deſtroys the plaintiff's action only argumentatively, is not good. Yelv. 223.

(a) Every plea muſt be direct, and not by way of argument or rehearſal.

Dyer, 42, 43. 2 Co. 3. & vide 1 Lev. 194.

If a man be bound by obligation to warrant lands, and in an action on this bond the defendant plead, that the plaintiff *pacificè gaviſus eſt*, &c. this is naught, being only argumentative; for he ſhould have pleaded, that he did warrant the lands, & *non damnificatus*.

Dyer, 118.

To ſay *quod indentura teſtatur quod dimiſit* is an ill plea; for he ought to ſhew that he demiſed *de facto*.

2 And. 179. (b) So, in a *quare impedit*, defendant cannot plead that *A.* is incumbent, and not *B.*, without a traverſe that *B.* is incumbent, being only argumentative, *ſſ. A.* is incumbent, *ergo B.* is not. 2 And. 179.——In treſpaſs againſt divers defendants, they plead, that one of the defendants was dead before the writ purchaſed; the plaintiff replies, that he was alive; this is naught, without adding *& ſic nient morte t* ſo, if villenage be pleaded, replication, that he is frank-free, without adding *nient villein*, is naught. 19 H. 6. 4.

In a *formedon in reverter*, the demandant counts of a gift to baron and feme in tail, and that they are dead without iſſue, the defendant cannot plead, that the gift was to them in (b) fee, without traverſing the gift in tail, being only argumentative.

7 E. 4. 16. 2 And. 179, 180.

So, if a *ſci. fa.* be brought againſt a parſon for the arrears of an annuity recovered againſt him, and the defendant plead, that before the writ brought he had reſigned into the hands of the ordinary, who accepted thereof; this is no good plea, for he ought to have pleaded, that he was not parſon the day of the writ brought.

4 Mod. 405. Derrier v. Arnaud.

In *aſſumpſit* the defendant pleaded, that the plaintiff was *alienigena in regno* Franciæ *ſub ligeantia adverſarii dom. regis*, &c. *oriundus*: And on demurrer to this plea, the exception to it was, that this was not a direct affirmative, that the plaintiff was *alienigena*, in that it ſhould have been *natus*, and not *oriundus*; but ſome precedents being cited out of *Raſtal*, where the word *natus* was ſupplied with *oriundus*, the plea was held good.

Lev. 121.

A plea, that he is now a ſubject, intended a natural one, and that he was always ſo.

Lev. 184. Browning v. Litton. (c) *Super ſe aſſumpſit*, without ſaying to whom, where the law raiſes the promiſe, will be well enough, but not in the caſe of a ſpecial promiſe. Sid. 292. 2 Keb. 57. Cro. Eliz. 703.

In *aſſumpſit* againſt an executor, on the promiſe of his teſtator, he pleaded *non aſſumpſit*; and after verdict for the plaintiff, it was objected, that it did not appear by the plea (c) who did not aſſume: But *per cur.*—It ſhall be intended of the teſtator, for here is no charge of any aſſuming by the executor.

Latch. 125. Baker's caſe.

So, in debt againſt an executor on the bond of his teſtator, the defendant pleaded *non eſt factum ſuum*; and it was adjudged, that *ſuum* ſhould be intended teſtator.

2 Salk. 686. Henley v. Walſh.

If a horſe be taken as a ſtray, and the owner ſay, he demanded the horſe *proferendo ſatisfactionem*; this is ſufficient, and a direct affirmation, as in the caſe of *warrantizando vendidit*.

If

If a man plead, that he entered *come* or as heir to ſuch a one; this is poſitive enough: So, if a man juſtify as bailiff or ſervant; this is not barely argumentative, but as poſitive and direct, as if he had alleged that he was heir, bailiff, or ſervant. 5 H. 7. 1, 2. Dyer, 132.

If the condition of a bond be to ſtand to the award of *J. S.* ſo that the award be made on or before the 16th of *March*, and no award be pleaded, and the plaintiff reply, that after the making the bond, and before the action brought, *ff. prædict. 16 die Martii*, they made an award; the (*a*) *ſcilicet* is a direct affirmation that the award was made within the time limited by the condition, and may therefore be traverſed. Sand. 169. (*a*) The word *licet* is not a bare implicative, but is an expreſs averment. 3 Leon. 67. Plow. 127.

——*Eo quod* is an affirmative: ſo is *et quia*, *quod cum*, &c. and may be traverſed. Lev. 194. 1 Saund. 117.

## 6. Negative Pregnant.

It has been laid down as a rule, that every plea ought to be direct, and not by way of argument; and that therefore iſſue cannot be joined on a negative pregnant, or an affirmative pregnant with a negative, *i. e.* ſuch a negative as ſuppoſes or implies an affirmative, or ſuch an affirmative as implies a negative; as *ne dona pas per le fait* implies a gift by parol, and therefore the iſſue ought to have been *ne dona pas modo & forma*. And this kind of pleading is held to be ill on a (*b*) demurrer; becauſe the plea, &c. is not a certain affirmative or negative of any ſingle point in queſtion; but, being only an error in phraſe, it is aided after verdict. Co. Lit. 126. a. 303. a. Doct. pl. 256. 2 Leon. 197. Leon. 136. Stile, 309. Bro. tit. Negative Pregnant, 12 Fitz. Iſſue 88. [There ſeems to be this ſort of affinity between an argumentative plea and a negative pregnant; that as the latter is a negative pregnant with an affirmative, ſo is the former an affirmative pregnant with a negative; and the cure for both is, in moſt caſes, to add, or, at leaſt, to ſubſtitute, a direct denial of the ſubſtance and git of the plea or declaration which is to be anſwered. 3 Reeve's Hiſt. 435.] (*b*) There muſt be a ſpecial demurrer to a negative pregnant, that is, a negative plea which doth alſo contain in it an affirmative; and to an argumentative plea, that is, a plea which concludes nothing directly, but only by way of argument or reaſoning; for the court will intend every plea good, till the contrary appears. Lil. Reg. 437.

In treſpaſs for cutting his trees, the defendant pleads, that it was by the command of the leſſor to give them to a ſtranger; the plaintiff replies, that he did not cut the trees by his command; this was held a negative pregnant, and that he ſhould have pleaded *ne commanda pas*. 21 H. 6. 46, 47. Doct. pl. 256.

After iſſue joined the defendant pleaded a releaſe of the plaintiff *puis darrein continuance*; the plaintiff replied, that it is not his deed *puis darrein continuance*; this is a negative pregnant, becauſe it implies the deed to be his, though not executed at the time alleged by the defendant. 21 H. 6. 9. Doct. pl. 256.

In caſe againſt an hoſt, for that the plaintiff's goods were embezzled by his default, he pleaded, that they were not loſt by his default; this is a negative pregnant, and he ſhould have pleaded the ſpecial matter (*c*). 22 H. 6. 38, 39. Doct. pl. 256. [(*c*) More properly the general iſſue.]

In caſe for burning the plaintiff's houſe by the negligent keeping of his fire, the defendant pleaded, that the houſe was not burnt by the negligent keeping of his fire; this is a negative pregnant. 28 H. 6, 7. Doct. pl. 256. *Quære.*

5 H. 7. 9. Doct. pl. 257. If a defendant plead, that the cattle died in a pound overt by the default of the plaintiff, and the plaintiff reply, that they did not die by his default generally; this is a good plea: but if he say, that they did not die in a pound overt, this is a negative pregnant.

3 H. 6. 37, 38. Doct. pl. 257. In treſpaſs the iſſue joined was, that *J. N.* the defendant did not diſſeiſe the plaintiff to the uſe of *W. P.* &c., and held a negative pregnant; but had he pleaded *non diſſeiſivit modo & forma*, it had been good to all intents and purpoſes.

36 H. 6. 22. Doct. pl. 257. In a writ of entry *ſine aſſenſu capituli*, *ne alien pas* is a negative pregnant: ſo, of an entry for the alienation of tenant for life.

22 H. 6. 38. Doct. pl. 237. In treſpaſs the defendant juſtifies, by reaſon that the particular tenant aliened the reverſion in fee to him; the plaintiff traverſes, that he did not alien in fee: this is no good iſſue, but a negative pregnant; for if he aliened but for another's life, his entry is lawful.

2 Lil. Reg. 212. He in reverſion brings a writ of entry *in caſu proviſo*, upon an alienation made by the tenant for life, ſuppoſing that he has aliened in fee, which is a forfeiture of his eſtate; the tenant comes and pleads, that he hath not aliened in fee: this is a negative, wherein is included an affirmative; for though it be true that he hath not aliened in fee, yet it may be he hath aliened in tail, which is alſo a forfeiture of his eſtate.

Carter, 221. Warcup v. Symonds adjudged. (*a*) Where a plea, that a houſe, &c. If an executor pleads ſeveral judgments, and that he hath not aſſets *ultra*; and the plaintiff replies, they are kept on foot by fraud; and the defendant rejoins, they are not kept on foot by fraud, *&c.* but doth not ſay, nor any or either of them; the rejoinder is naught, for (*a*) there is a negative pregnant.

was not burnt for want of good cuſtody of his fire, is a negative pregnant. Bro. tit. Negative Pregnant, 3. Fitz. Iſſue, 88. ——Saying that you accepted not the obligation in ſatisfaction, implies that he gave you the obligation, which is a negative pregnant. Stile, 309.

Cro. Jac. 87. Min. v. Cole. If an action of treſpaſs be brought for entering into a man's houſe, and the defendant plead, that the daughter licenſed him to enter, by which he entered; the plaintiff reply, *quod non intravit per licentiam ſuam*; though this replication be a negative pregnant, (for it ſeems rather to confeſs the licence than to deny it,) yet the verdict having found the licence, the dubiouſneſs of phraſe is now removed, and the truth appears by the verdict.

Cro. Car. 312. Gill v. Glaſs. So, in debt for rent on a leaſe, the defendant pleads *quod nihil habuit in tenementis tempore dimiſſionis*; and the plaintiff replies, *quod habuit in tenementis*, without ſhewing what eſtate; though this had been bad on a demurrer, becauſe, by not ſhewing what eſtate he had, it is pregnant of this negative, that he had not ſuch an eſtate by which he had power to demiſe, yet after verdict it is good, where the truth appears that he had ſuch an eſtate that he could demiſe.

Lev. 83. Pullen v. Nicholas. In debt on an obligation to perform covenants in an indenture of leaſe made by the plaintiff to the defendant, whereby the defendant covenanted, that he would not deliver the poſſeſſion to any

any but the leſſor, or to ſuch perſons as ſhould lawfully evict him; the defendant pleads, that he did not deliver the poſſeſſion to any but ſuch as lawfully evicted him: And on demurrer to this plea it was objected, that the ſame was ill, and a negative pregnant; and that he ought to have ſaid, that ſuch a one lawfully evicted him, to whom he delivered the poſſeſſion; or that he did not deliver the poſſeſſion to any: But the court held the plea purſuing the words of the covenant good, being in the negative; and that the plaintiff ought to have replied, and aſſigned a breach; and therefore judgment was given againſt him.

7. That Things muſt be pleaded according to their Operation in Law.

The grant or conveyance of one jointenant to his companion muſt be pleaded as a releaſe; for one jointenant cannot enfeoff his companion, becauſe they are already both ſeiſed *per mie et per tout*; and this manner of conveyance paſſing by livery cannot operate ſo as to give him what he already has: but, though a releaſe be the proper conveyance from one jointenant to another, yet, if the jury find, that the one jointenant did grant or convey to another, this amounts to a releaſe; for they having found the ſubſtantial part, the court is to apply the words according to the operation they have in law: but every ſuch conveyance muſt be pleaded as a releaſe. Co. Lit. 193. b. 200. b. Sid. 452. 2 Sand. 96. Vent. 78. Raym. 187.

So, if tenant for life grant his eſtate to him in reverſion; this is a ſurrender, and muſt be pleaded accordingly, being the operation it hath in law. 4 Mod. 151, Comb. 190.

If *J. S.* plead the grant of a rent from his father in this manner, *viz.* that in conſideration of love and affection, and 5 *l.*, he *conceſſit & aſſignavit*, &c., and there is neither attornment nor enrolment of the deed; this cannot paſs as a grant at common law, nor as a bargain and ſale for want of enrolment; and though it (*a*) amount to a covenant to ſtand ſeiſed, being in conſideration of love and affection, yet it ought to have been (*b*) ſo pleaded, being the operation it hath in law. 2 Vent. 149. 260. 266. Lade v. Baker and March. 4 Mod. 149. 3 Lev. 241. S. C.

(*a*) A man may bargain and ſell to his ſon, but then the conſideration of money ought to be expreſſed, and it ought to have all the other circumſtances of a bargain and ſale; yet if it hath not, and the conſideration of love and affection is expreſſed, it will amount to a covenant to ſtand ſeiſed. 7 Co. 40. Bedel's caſe. 2 Co. 24. Cro. Eliz. 314. and *vide* Vent. 137. Lev. 56. Mod. 173. Croſs v. Scudamore. (*b*) The word *dedi* or *conceſſi* may amount to a grant, to a feoffment, to a gift, leaſe, releaſe, confirmation, or ſurrender; and it is in the election of the party to uſe it to which of theſe purpoſes is moſt agreeable to his intereſt, and therefore he may plead it as either. Co. Lit. 301. b. 4 Mod. 150. cited.

All neceſſary circumſtances implied by law in a plea need not be expreſſed; as, in pleading a feoffment, livery and attornment are implied; *ſecùs*, in a grant. Co. Lit. 303. Yelv. 135. Plow. 149, 150.

In pleading a countermand to a ſubmiſſion to arbitration, it need not be alleged, that the party gave notice to the arbitrators, for without that it is no countermand; and therefore if no notice be given, iſſue may be joined upon the point, *quod non revocavit*. 8 Co. 82.

Co. Lit. 353. b.

If a diſſeiſee plead, that he could not enter for fear, he muſt ſhew ſome juſt cauſe of fear, that the court may judge of the reaſonableneſs of an apprehenſion of danger to his perſon; but in a ſpecial verdict, if the jurors find, that the diſſeiſee did not enter for fear of corporal hurt, it is ſufficient, and it ſhall be intended that they had evidence for what they find.

Comb. 403. Ld. Raym. 154. 2 Salk. 676. pl. 3. Carth. 411. Trygarn v. Fletcher.

The defendant made conuſance as bailiff to *Jane Griffith*, that *Robert Griffith* was ſeiſed in fee, and deviſed to *Thomas Griffith* in tail, and that a common recovery was ſuffered againſt him, to the intent that *Jane* ſhould have a rent of 40 *l. per ann.* after the death of *Thomas*; and that there was a deed for the recovery declaring the uſes, *&c.*, which was held to be ill pleaded; for he ſhould not have ſet forth the deed, but have pleaded according to the conſtruction of law, that the recovery was to ſuch uſes at the time.

4 Co. 22. (*a*) That he was ſeiſed *ſecundum conſuetudinem manerii* does not neceſſarily import a copyhold.

The admittance of a copyholder, as well upon a deſcent as ſurrender, may be pleaded as a grant, to avoid the inconvenience which would follow, if the copyholder ſhould be forced in pleading to ſhew the firſt grant; for that was either before the time of memory, and ſo not pleadable, or within the time of memory, and (*a*) then the cuſtom fails.

3 Bulſt. 230. Roll. Rep. 211. 2 Vent. 144.

4 Co. 22. b.

So, he may allege the admittance of his anceſtor as a grant, and ſhew the deſcent to him, and that he entered, without ſhewing any admittance of himſelf.

4 Co. 22. (*b*) Without ſhewing of whoſe grant, Cro. Jac. 103. adjudged

But he cannot plead, that his father was (*b*) ſeiſed in fee at the will of the lord by copy of court-roll of ſuch a manor, according to the cuſtom of the manor, and that he died ſeiſed, and it deſcended to him; for in truth his intereſt in judgment of law is but a particular intereſt at will.

naught upon a general demurrer, Cro. Car. 190. *per totam curiam*; though the ſon had there ſhewn, that after the deſcent he was admitted: But by three Judges, it is but a fault in form, and the iſſue being taken upon a collateral matter, and found for the plaintiff, it is helped by the ſtatute of jeofails.—But, if *A.* pleads the grant of the reverſion of a copyhold after the death of *B.* tenant for life, he need not ſhew the beginning of the eſtate of *B.*, nor by whom granted; for it is not the title of *A.*, but matter of inducement only. Cro. Jac. 52. 2 Vent. 182.

Hard. 366. 2 Lev. 194. *vide* title Leaſes.

If one licenſe another to enjoy ſuch a houſe or land till ſuch a time, this amounts to a preſent and certain leaſe or intereſt for that time, and may be pleaded as ſuch, though it may be alſo pleaded as a licence; and if it be pleaded as a leaſe for years, and traverſed, the leſſee may give the licence in evidence to prove it.

And. 307. Cro. Eliz. 352. Roll. Abr. 939. Dowle v. Jeffries.

If an obligee in a bond covenants not to ſue the obligor, this amounts to a releaſe, and may be pleaded as ſuch: but, if the covenant is that he will not ſue him before ſuch a day; this reſts only in covenant, and the party, if ſued, can only have an action of covenant.

Noy, 5. Show. 321. S. C. cited.

*A.* having a rent-charge iſſuing out of three acres, *B.* purchaſed two acres thereof, and *A.* covenanted and granted to and with *B.* not to diſtrain in theſe two acres for the rent. *Glanvil*, contrary to *Anderſon*, held it a releaſe; and the court held, that if it be a releaſe, the tenant of the other acre may plead it, for thereby the rent was extinct.

If

If two are bound in an obligation, and the obligee releaſes to one of them, provided the other ſhall not take benefit of this releaſe, the proviſo is void, and the other ſhall take advantage of the releaſe, if he can get it to ſhew. Lit. Rep. 190. Everard v. Herne.

If two are jointly and ſeverally bound in an obligation, and the obligee by a deed covenants and agrees not to ſue one of them, this ſeems to be no releaſe, but that he may ſue the other. Cro. Car. 551. March, 95. Dennis v. Pain.

If the obligee covenants and grants to and with the obligor, that during ninety-nine years he will not put the bond in ſuit; this is only a covenant, upon which an action will lie, but it cannot be pleaded in bar of the bond: but where the covenant is, that the obligee will not at any time hereafter put the bond in ſuit; ſuch covenant is pleadable in bar as a releaſe; and in the argument of this caſe it was allowed by all, that if a letter of licence contains the following words, *viz.* that if the creditor ſues within ſuch a time his debt ſhall be forfeited, ſuch licence is pleadable in bar. Carth. 63, 64. 2 Salk. 573. pl. 1. Show. 46. Alloffe v. Scrimſhire. [1 Term Rep. 446.]

## 8. Of Colour in Pleading.

Colour is a feigned matter, which the defendant or tenant uſeth in his bar when an action of treſpaſs or an aſſiſe is brought againſt him, in which he gives the demandant or plaintiff a ſhew that he hath a good cauſe of action, whereas in truth he hath not, but only a colour and face of a cauſe; and it is uſed to the end that the determination of the action ſhould be by the judges, and not by the jury, and therefore colour ought to be matter of law, or doubtful to the *lay gents*. 2 Lil. Reg. 273. *Vide* 10 Co. 91. in Dr. Leyfield's caſe. [See 3 Reeve's Hiſt. 438.]

In an aſſiſe, when the defendant pleaded only a colourable bar, that is, ſuch a bar as ſhewed ſome title in the demandant, they proceeded to take the aſſiſe at large, which was in this manner: the aſſiſe ſhewing no title in the plaintiff, the defendant would ſhew his own enfeoffment or inveſtiture, but becauſe ſuch feoffment was only evidence that there was no diſſeiſin, it would amount to the general iſſue without colour; and therefore the defendant urged, that the plaintiff obtained by virtue of an inveſtiture, on which the ceremony of livery had never paſſed, and the validity of ſuch inveſtiture, being a queſtion of law, was not to be anſwered by the jury, and therefore the plea of his own inveſtiture, which alone would have been only evidence of no diſſeiſin, joined to the plaintiff's title, which turned on a queſtion of law, drew the cauſe from the jury to the court; and this obliged the plaintiff to ſhew by what inveſtiture he claimed, and then the aſſiſe was taken at large on the title of the plaintiff; which was done, that the plaintiff's title might appear on record, and the plaintiff be confined to give evidence touching that title, that the jury might not wander from that evidence; and that, if they did, they might the more eaſily be convicted in an attaint. 2 Inſt. 411. Booth, 214. 10 Co. 90. Doct. pl. 72. &c. 10 Co. 91.

In an aſſiſe, if the tenant pleads, that he demiſed the lands to the demandant for years, this is no good plea; becauſe the com- Keilw. 103.

plaint is of a diſſeiſin of a freehold, and the tenant gives the demandant no colour to have an aſſiſe.

Keilw. 103. If in an aſſiſe the tenant pleads in bar, that his father was ſeiſed and died, and that he as ſon and heir entered, and gives colour to the demandant; and he replies, that he himſelf was ſeiſed, till by the father of the tenant diſſeiſed, and that he made continual claim, and after the death of the father re-entered, and was ſeiſed, till, &c., it is a good replication, and yet his title is founded on his own poſſeſſion only.

Co. Ent. 652. Doct. pl. 73. In treſpaſs, if the defendant juſtifies the taking of the cattle damage feaſant, he need not give any other colour to the plaintiff; for by this juſtification he acknowledges the property to be in him.

Dyer, 365. Co. Ent. 79. Raſt. Ent. 254. In ejectment the plaintiff's title in his declaration muſt be anſwered; and it is not ſufficient barely to give colour, as in treſpaſs, or an aſſiſe *.

* In ejectments the modern practice is, to plead the general iſſue, the defendant entering into a rule to confeſs leaſe, entry, and ouſter, by which means the title only is in queſtion between the parties.

10 Co. 88. Colour ought to have the following qualities: *1ſt*, It ought to be a matter doubtful to the jury; as, where the defendant ſays, that the plaintiff comes by colour of a deed of feoffment, where nothing paſſed by the deed; this is a good colour, being a doubt to the *lay gents* whether the land paſſed by this feoffment without livery. *2dly*, It ought to have continuance, though it wants effect; as, where the defendant gives colour by colour of a deed of demiſe to the plaintiff for the life of *J. S.*, who, before the treſpaſs, was dead; this is not any colour, for this doth not continue; but he ought to ſay, that he claims by virtue of a deed of demiſe made to him for his life where nothing paſſed by that. *3dly*, It ought to be ſuch colour, as, if it were effectual, would maintain the nature of the action, as, in aſſiſe, to give colour of freehold, &c.

Raſt. Ent. 277. Co. Ent. 673. 10 Co. 90. In treſpaſs if the defendant pleads a fine *ſur conuſance de droit*, levied by the anceſtor of the demandant, he ſhall not give colour although this be but executory: otherwiſe, if he pleads, that his anceſtor granted the reverſion after an eſtate for life or years.

10 Co. 90. Doct. pl. 77. The reaſon why colour ſhall be given in a writ of entry, *ſur diſſeiſin*, writ of entry in nature of an aſſiſe, in aſſiſe, treſpaſs, &c., is to make a certain iſſue: but when the ſpecial matter of the plea totally bars the plaintiff, no colour is neceſſary: and therefore in pleading a warranty, an eſtoppel, or fine with proclamations, no colour is neceſſary.

22 H. 6. 50. When a man pleads to the writ, or to the action of the writ, no colour ſhall be given.

Doct. pl. 77. Where the defendant entitles himſelf by act of parliament, no colour is to be given.

10 Co. 90. Doct. pl. 77. Where letters patent are pleaded, the defendant ought to plead colour by former letters patent in this form, *ſcilicet colore quarundarum literarum patentium fact. prædict.* the plaintiff, &c., *ubi nil tranſivit*, and not that the plaintiff claims *colore conceſſionis ſive dimiſſionis*, &c.

He

He who juſtifies for wreck, waifs, ſtrays, need not give colour. Doct. pl. 78.

So, he who juſtifies for tithes ſhall not give colour; for although any perſon ſevers them from the nine parts, yet they belong to the parſon. 10 Co. 91.

In treſpaſs, if the defendant pleads, that the freehold is in *J. S.*, or that *J. S.* is ſeiſed in fee as of his demeſne, and that he by the command of *J. S.* &c., he need not give colour; for though the fee or the freehold be in *J. S.*, yet the plaintiff might have an intereſt for years, as, a leaſe in the premiſes. But, where the defendant makes a ſpecial juſtification in him, in whoſe right as ſervant, *&c.*, there, he ought to give colour: as, if he pleads that *J. S.* was ſeiſed, and enfeoffed him, in whoſe right, *&c.*, there, he ought to give colour; for in this caſe it cannot be preſumed that the plaintiff has any intereſt in the land. 22 H. 6. 50. 18 E. 4. 3. 10 Co. 89 b. That if in treſpaſs the defendant juſtifies as ſervant to *J. S.* he need not give colour. Lutw. 1343. *& vide* Cro. Eliz. 76.

In forcible entry the defendant may plead, that he was ſeiſed until diſſeiſed by the plaintiff, and this is good without giving colour. Raſt. Ent. 62. 21 H. 6. 39.

In aſſiſe the defendant juſtifies by virtue of a leaſe for years, he need not give colour, inaſmuch as he does not plead in bar of the aſſiſe, nor does he take the freehold on himſelf. Dyer, 246.

In treſpaſs the defendant pleads, that the plaintiff claims *colore feoffamenti*, by which nothing paſſed, this is not good colour, for he ought to have pleaded *colore chartæ feoffamenti*. 2 Roll. Rep. 140.

Where the defendant derived a title to himſelf by divers meſne conveyances, and gave colour to the plaintiff by one who was laſt named in the conveyance, this was held naught; and that he ſhould have given colour by him who was firſt named in the conveyance. 2 Roll. Rep. 140.

In treſpaſs for entering the plaintiff's houſe, and taking and carrying away his goods, the defendant pleaded, that before the treſpaſs ſuppoſed one *A.* was poſſeſſed of the ſaid goods, and the ſaid goods being in the houſe of the plaintiff, the ſaid *A.* ſold them to the defendant, by force whereof he was poſſeſſed, and being ſo poſſeſſed came to the plaintiff's houſe, *&c.* and by aſſent and licence of the plaintiff's wife he entered into the houſe, and carried away the goods; and this plea was held naught, there being no colour given the plaintiff, and the licence given by the wife not material, nor ſufficient for juſtifying an entry: but in this caſe it was held, that the want of colour is but matter of form, which muſt be taken advantage of on demurrer. 3 Leon. 266. Taylor v. Fiſher.

In treſpaſs for taking and carrying away a hundred loads of wood the defendant juſtifies, for that *J. S.* was poſſeſſed of them *ut de bonis propriis*, and the plaintiff claiming them by colour of a deed of gift afterwards made, took them; and the defendant retook them; and it was thereupon demurred, becauſe the colour given to the plaintiff is a good title for the plaintiff, and confeſſeth the intereſt in him; for colour ought to be ſuch a thing, which is good colour of title, and yet is not any title; as, a deed of a leaſe for life, becauſe it hath not the ceremony of livery; ſo, the grant of the reverſion is not good without attornment; Cro. Jac. 122. Radford v. Harbyn.

but

but a deed of goods and chattels, without other act or ceremony, is good; ſo, of colour by a leaſe for years, or by letters patent.

## 9. Of pleading Non-tenure and Diſclaiming.

Doct. pl. 129. Bridg. 72, 73. Dyer, 227.

The plea of *non-tenure*, or that the defendant holdeth not the lands mentioned in the plaintiff's count or declaration, is chiefly uſed in (*a*) real actions, and is ſaid to be general or ſpecial: General, where the party denies ever to have been tenant to the lands in queſtion; ſpecial, where he alleges, that he was not tenant at the time of the writ purchaſed.

(*a*) So, in debt on a leaſe, *non-tenure* is a good plea.

4 H. 6. 5. Doct. pl. 129.

(*b*) 36 H. 6. 6. Mod. 181.

At (*b*) common law, if the tenant had pleaded *non-tenure* as to part, it would have abated all the writ; but by the ſtatute of 25 *E.* 3. *c.* 16. it is enacted, that by the exception of *non-tenure* of parcel, no writ ſhall be abated, but only of that parcel whereof *non-tenure* was alleged.

Doct. pl. 128.

When the tenant pleads *non-tenure* to the whole lands demanded, he need not ſet forth who is tenant; but when he pleads *non-tenure* as to part, he muſt ſet forth who is tenant of the other part, and muſt (*c*) aver that he himſelf was not tenant *die impetrationis brevis*.

(*c*) Pleading *non-tenure* at the time of the writ purchaſed is ſufficient, without adding *nec unquam poſtea*, Doct. pl. 128.—with what certainty, Mod. 181.

Cro. Eliz. 233. Leonard v. Bacon.

If iſſue be joined on a plea of *non-tenure*, and it be found by verdict, that before the writ purchaſed the tenant enfeoffed divers perſons with an intent to defraud him who had cauſe of action, and notwithſtanding ſtill took the profits; this finding is ſufficient to entitle the demandant, the feoffment being void by the (*d*) ſtatute 13 *Eliz.* *c.* 5.

(*d*) For which *vide* tit. Fraud.

Mod. 181. Fowle v. Doble.

If a formedon be brought of 140 acres lying in three vills, and the tenant plead *non-tenure* of 100 acres, he need not ſet forth in which of the vills the 100 acres lie.

6 Co. 10. a. Doct. pl. 129.

If on a plea of *non-tenure* for the whole the writ abate, the demandant ſhall not have a new writ by journies accounts, otherwiſe, if it abate only on a plea of *non-tenure* for part.

33 H. 6. 2. Doct. pl. 128.

In a *præcipe*, after jointenancy pleaded, the defendant, to another writ, cannot plead *non-tenure*, for by his former plea he hath affirmed himſelf to be tenant: but, had the firſt writ been brought againſt a huſband, and the ſecond againſt the huſband and wife, ſhe might have pleaded *non-tenure*, being a ſtranger to the firſt action.

Doct. pl. 129. 10 H. 6. 22.

In a writ of entry in the nature of an aſſiſe againſt huſband and wife, the huſband ſays, that the wife was not tenant of the land the day of the writ purchaſed, *nec unquam poſtea*, and held a good plea.

Mod. 250.

As to *non-tenure*'s being a plea in bar or in abatement, this difference hath been taken, *viz.* That *non-tenure*, which goes to the *tenure*, as, when the tenant denies that he holds of the demandant, but ſays that he holds of ſome other perſon, is in bar; but *non-tenure*

*tenure*, that goes to the *tenancy* of the land, as, where he pleads that he is not tenant of the land, goes in abatement only.

A general *non-tenure* is not a good plea to a *ſcire facias* upon a judgment in a perſonal action, becauſe it falſifies the plaintiff's return; but in a *ſcire facias* to have execution of a judgment in a real action one may plead *non-tenure* againſt the return of the ſheriff, becauſe of the high regard the law has to the freehold. 2 Roll. Rep. 54. Roll. Rep. 302. Cro. Eliz. 872. 6 Mod. 226. 2 Ld. Raym. 854. Salk. 40. pl. 9. 2 Salk. 679. pl. 7.

But a ſpecial *non-tenure* may be pleaded to a *ſcire facias* upon a judgment in a perſonal action; as, to a *ſcire facias* on a judgment for debt or damages againſt tenant for years, he may plead that he has only a term for years. Owen, 134. 3 Lev. 205.

In a formedon in reverter, if the tenant pleads *non-tenure* generally, the demandant may maintain his writ, that he is tenant, though he can recover no damages; adjudged by all the court, and that (*a*) *Lit.* and *Co.* were not to be intended of a ſimple plea of *non-tenure*, but of *non-tenure* with a diſclaimer, as the pleadings were uſually in *Littleton's* time; for upon the ſimple plea of *non-tenure*, ſuppoſing the tenant hath no freehold but a reverſion in fee, the demandant ſhall not be reſtored to the fee, for nothing is diſowned by the ſimple plea of *non-tenure* but only the freehold, which may be true, and yet he may have the reverſion in fee; but when the tenant diſclaims, or pleads *non-tenure* and diſclaims, the demandant ſhall be reſtored to the whole, becauſe he hath diſclaimed the whole. 3 Lev. 330. Hunlock v. Peter. (*a*) Co. Lit. 102. 361.

## 10. Pleading *Hors de ſon Fee.*

*Hors de ſon fee* is an exception to avoid an action brought for rent-ſervices, &c. iſſuing out of lands by him who pretends to be the lord; for if the defendant can prove that the land is without the compaſs of his fee, the action falls. Doct. pl. 216. Bro. tit. *Hors de ſon Fee.* And. 237.

If the writ comprehends certainty of title, as in *Mortd'anceſtor*, formedon in the deſcender or remainder, *hors de ſon fee* is no plea; otherwiſe, in a writ of entry *ſur diſſeiſin;* or in an aſſiſe of rent; but in an aſſiſe, if the party makes title, *hors de ſon fee* is no plea. Bro. *Hors de ſon Fee*, pl. 9. 5 E. 4. 6. 27 H. 8. 7. Dyer, 311.

In treſpaſs or reſcue *hors de ſon fee* is no plea, without ſhewing of whom the land is held. 6 E. 4. 4. Doct. pl. 216.

In a ceſſavit *hors de ſon fee* is no good plea, becauſe the tenure is traverſable. 2 Inſt. 296.

If a ſtranger claims a ſeigniory, and diſtrains and avows for the ſervices, the tenant may plead that the tenancy is *extra feodum*, &c. of him, that is, out of the ſeigniory, or not holden of him; but he cannot plead *extra feodum*, &c. unleſs he takes the tenancy upon himſelf. Co. Lit. 1. b. 1 Mod. 104. cited, and there ſaid by the Ch. J. that this rule is to be intended in caſes of an aſſiſe, and ſo were all the books cited in Co. Lit. for proof of this opinion.

In an avowry the tenant cannot plead *ne unques ſeiſe* of ſuch ſervices generally, becauſe he leaves no remedy for the lord either by avowry, or by writ of cuſtoms or ſervices; and therefore, if he is a tenant 9 Co. 34. b.

a tenant in fee-ſimple, he ought either to diſclaim or plead *hors de ſon fee*.

2 Mod. 103, 104. Sherrard v. Smith. (a) So, in an avowry, a ſtranger may plead generally *hors de ſon fee*, and ſo may tenant for years. 2 Mod. 104. *per cur.*

If in (a) treſpaſs for taking goods the defendant juſtifies by command of the lord of the manor, of whom the plaintiff held by fealty and rent, and that for non-payment of the rent he took them *nomine diſtrictionis*; the plaintiff may reply, that the *locus in quo eſt extra, abſque hoc, quod eſt infra feodum*, &c.; adjudged upon a ſpecial demurrer, it being ſhewn for cauſe that the plaintiff had not taken the tenancy on himſelf.

## 11. Eſtoppels in Pleading.

Co. Lit. 352. a.

There are three ſeveral kinds of eſtoppels, by matter of record, by matter in writing, and by matter in *pais*. 1*ſt*, By matter of record, *viz.* by letters patent, fine, recovery, pleading, taking of continuance, confeſſion, imparlance, warrant of attorney, admittance. 2*dly*, By matter in writing, as by deed indented, by making an acquittance by indenture or deed poll, by defeaſance by indenture or deed poll. 3*dly*, By matter in *pais*, as by livery, by entry, by acceptance of rent, by partition, by acceptance of an eſtate.

Co. Lit. 352. Every eſtoppel ought to be a preciſe affirmation of that which makes the eſtoppel. Co. Lit. 305——Eſtoppels are odious in law; and although all parties to an indenture are bound by the words thereof, becauſe they agree to it, yet that muſt be intended of material words, and not of all minute and deſcriptive words and circumſtances.——A matter alleged that is not traverſable ſhall not eſtop. Co. Lit. 352. a.——An eſtoppel is not taken notice of unleſs relied on in pleading. Mod. 201.——An eſtoppel cannot be pleaded with a traverſe. 2 Mod. 37.

Every eſtoppel, becauſe it concludes a man to allege the truth, muſt be certain to every intent, and is not to be taken by argument or inference.

9 H. 6. 60. (b) If a deed be enrolled of record, the party is eſtopped to ſay that it is not his deed, or that it was not acknowledged by him. Leon. 184. 3 Leon. 84. Comb. 248. & *vide* title Bargain and Sale. (c) If one of my name levies a fine of my land, I may confeſs and avoid the fine by ſhewing the ſpecial matter which ſtands with the fine. Cro. Eliz. 531. & *vide* tit. Fines.——Where one ſhall be eſtopped to ſay, that a writ iſſued after the *teſte*. Lutw. 334.——But whether it may not be ſo found by verdict, *vide* Lev. 173. Sid. 271. 1 Keb. 930. 2 Keb. 32. Bailey v. Bunning. [In the caſe of Combe and Pitt, it is ſettled that the actual day of ſuing out the writ may be ſhewn in pleading. 3 Burr. 1423. &c.]——Whether the defendant ſhall be eſtopped to ſay, that the plaintiff's teſtator was dead when a writ was ſued out in his name. Lutw. 254.——Where one ſhall be eſtopped by praying oyer of a record or deed. Lutw. 1644. Salk. 7. pl. 17.

By matter of (b) record all parties are eſtopped, ſo that a man ſhall not be received to take an averment (c) directly contrary to a record.

Co. Lit. 352. b.

When the truth is apparent in the ſame record, the adverſe party ſhall not be eſtopped to take advantage thereof, for he cannot be eſtopped to allege the truth when it appears of record.

Stile, 395. Bayle v. Scarborough.

If *A. B.* is outlawed by the name of *A. B.* Eſq. and comes in *gratis*, and reverſes it for want of proclamations, he ſhall not be eſtopped to ſay afterwards that he was a knight and no eſquire.

(d) 7 Mod. 38. Salk. 3. pl. 7. S. C. (e) But then it muſt be

If one puts in bail by a wrong name (d), he ſhall be concluded thereby, as was agreed *per cur.* in the caſe of (e) *Smith* v. *Villars*; and in a civil action he need not join in the recognizance; and in the

the caſe of the Earl of *Banbury*, who was indicted by the name of *George Knowles*, Eſq. though by the courſe of the court he ought to have joined in the recognizance; yet, becauſe if he had entered into one by the name of *G. K.* it would have been an eſtoppel upon him, he was indulged to bring others who gave bail for him by the name of *G. K.* Eſq. for their act could not conclude him. pleaded as an appearance. Salk. 8. pl. 19.

Where one brought a writ of error upon judgment in dower againſt him, and aſſigned for error that he was within age *, and appeared by attorney, and iſſue being joined upon the nonage, and found for the plaintiff in error, the defendant therein would have ſtaid judgment, becauſe in the aſſignment of error it was alleged that 7 *Sept.* 20 *Car.* 2. he was of the age of fourteen & *non amplius*, and the writ of error was brought 4 *July* 26 *Car.* 2. and in *Michaelmas* term following, and error aſſigned by attorney, when he could not be of the age of twenty-one, according to his own allegation; but the ſubſtance of the iſſue being whether he was within age, and the *viz.* no material part of the iſſue, it was held no eſtoppel. 2 Jon. 170. Skin. 10. pl. 10. Raym. 456. Morgan v. Vaughan. * If infant plaintiff appears by attorney and has verdict, judgment not to be reverſed. 21 Jac. 1. c. 13.

Matters alleged by way of ſuppoſals in counts ſhall not conclude or eſtop, otherwiſe it is after judgment given; and though after nonſuit the ſuppoſal in the count ſhall not conclude, yet the bar, title, replication, or other pleading of either party, which is preciſely alleged, ſhall conclude after nonſuit †. Co. Lit. 352. † If plaintiff is nonſuit, is he not in the ſame ſituation as if he had never inſtituted the ſuit; and does not a plaintiff frequently ſubmit to a nonſuit for the purpoſe of bringing another action, in which the former record cannot be given in evidence?——Lord Coke can only mean in thoſe caſes where a nonſuit is peremptory, which are very few, as in appeals in *favor. vitæ*, &c. &c. and in attaint, &c. after appearance.

Regularly, a ſtranger ſhall not be bound by nor take advantage of an eſtoppel. Co. Lit. 352. a.

Privies in blood, as heir, privies in eſtate, as the feoffee, leſſee, &c., privies in law, as lords by eſcheat, tenant by the curteſy, tenant in dower, the incumbent of a benefice, and others that come under by act in law or in the *poſt*, ſhall be bound by and take advantage of eſtoppels. Co. Lit. 352. a.

Where the record of the eſtoppel runs to the diſability or legitimation of the party, there, all ſtrangers ſhall take benefit of that record, as, outlawry, excommengement, profeſſion, attainder of *præmunire*, baſtardy, mulierty, and it ſhall conclude the party, though they be ſtrangers to the record. Co. Lit. 352. a. Keilw. 180.

But of a record concerning the name of the perſon, quality or condition, no ſtranger ſhall take advantage, becauſe he ſhall not be bound by it. Co. Lit. 352. a. Keilw. 96. 180.

If *A.* leaſes by indenture to *B.*, to begin after the expiration of a leaſe to *D.*, in covenant brought by *B.* againſt *A.*, he is eſtopped to ſay there is no ſuch *D.*; and though the common rule is, that a recital is not an eſtoppel, yet, where the recital is material, as here, it is otherwiſe. 2 Leon. 11. *vide* Vent. 84. Vaugh. 82.

If by indenture between *A.* and *B.* reciting that *A.* was ſeiſed in fee of certain lands, *A.*, in conſideration of a marriage to be had between Allen, 79. Newton v. Weeks.

between her ſon and *B.*, grants a rent out of thoſe lands to *B.* to begin after the death of her ſon, and covenants to pay it; in an action againſt *A.* upon this covenant ſhe cannot plead that ſhe had nothing in the land at the time of the covenant, but that a ſtranger was ſeiſed thereof, both becauſe ſhe was eſtopped by the deed, and the covenant extends to it as an annuity.

Hil. 7 G. 1. in B. R. Atkinſon v. Coatſworth, & *vide* Show. 58. Carth. 76. Holt, 210. pl. 1.

If *A.* being a leſſee for years makes an under-leaſe to *B.* by indenture, and *B.* covenants with *A.* to perform all the covenants in the original leaſe to be performed by *A.* his executors, &c., in an action upon this covenant *B.* will be eſtopped to ſay there are no covenants in the original leaſe.

Roll. Abr. 408. 872. Juel's caſe. Cro. Eliz. 757. L. P. Sand. 316. Mod. 15. L. P.

If the condition of an obligation be to perform all covenants contained in ſuch an indenture, in debt upon the obligation, the defendant (*a*) cannot ſay that there is no ſuch indenture, becauſe he is eſtopped.

(*a*) But he may ſay there are no covenants, Mod. 15.——But then he will confeſs the obligation to be ſingle, and the plaintiff upon demurrer ſhall have judgment. Lev. 3. adjudged, & *vide* Lev. 45. Raym. 27.

Roll. Abr. 872-3.

If the condition of an obligation hath reference to a particular to be done, or in which a generalty is to be done, the obligor ſhall be eſtopped by it to ſay, that there is no ſuch particular thing; as, if the condition of an obligation be to releaſe all the right that he hath for life in *Black Acre*, he ſhall be eſtopped to ſay, that he hath not any right for life in *Black Acre*, becauſe this contains a particular.

(*b*) For this diverſity *vide* Cro. Eliz. 362. Owen, 110. Poph. 114. Moor, 405. Brownl. 117. Yelv. 226.

But, if the condition of an obligation contains (*b*) a generalty, a man ſhall not be concluded to ſay, that there is no ſuch thing; as, in debt upon an obligation, of which the condition is to perform all agreements now ſet down by *J. S.*, the defendant may ſay, that no agreement was then ſet down by *J. S.* becauſe this comprehends a generalty. 2 Bulſ. 19. Latch, 125. Cro. Jac. 375. Dal. 28. Show. 59.

Dyer, 3. Savil, 90.

If the condition of an obligation be to pay (*c*) all ſums of money in which *T. S.* ſtands bound by his deed obligatory to *T. H.* of and for the behoof of the children of *W. S.* according to the will of, &c., he ſhall be eſtopped to ſay, that *T. S.* never ſtood bound by any deed obligatory for the uſe of the children of *W. S.*

(*c*) So, if the condition be to pay all ſuch ſums as he was bound to pay by his ſeveral obligations, according to Moor, 23. pl. 79. but in Dal. 28. it is a *qu.* being general.

Moor, 420. pl. 578. Paramour v. During.

In debt upon a bond conditioned to pay (*d*) all legacies that *J. S.* had given by his will, the defendant ſhall be eſtopped to ſay, that *J. S.* made no will; but he may ſay that *J. S.* gave no legacy by his will.

(*d*) Where the condition was to give *J. S.* all the goods bequeathed to him by his father, the defendant ſhall be eſtopped to ſay he had no goods bequeathed. Godb. 177.

Cro. Eliz. 362. Poph. 114.

In debt upon an obligation conditioned for payment of 37*l.* for rent reſerved on a demiſe of copyhold lands for 40 years, according

according to ſuch articles indented, the defendant ſhall be eſtopped to ſay he had nothing in the lands demiſed; though objected, if he had nothing in the land, then he ought not to be paid the rent. Moor, 405. Owen, 110. S. C. Stroud v. Willis.

In an action upon a bond conditioned to pay 10*d.* weekly for keeping a baſtard, according to an order made by the juſtices, the defendant is eſtopped to ſay, there is no ſuch order. Noy, 79. Latch, 125. Germin v. Randall.

In debt upon a bond conditioned that (*a*) whereas *A.* had commenced ſeveral ſuits in the *K. B.* againſt *B.* if *B.* ſhould appear, and make anſwer thereto, then, *&c.* the defendant cannot ſay that *B.* appeared, and was ready to anſwer, but there was no action there depending againſt him, for he is eſtopped ſo to ſay. Cro. Eliz. 756. Dyer, 196. S. C. in margin, Willoughby v. Brook.

(*a*) Where it was recited that *J. S.* claimed to have a leaſe, and the condition was to ſave harmleſs from all claims of *J. S.* the defendant could not plead *J. S.* had no leaſe. 3 Leon. 118.

In debt upon a bond, conditioned that whereas the plaintiff had carried 12,000 billets for the defendant to *D.* if the defendant ſhould pay the plaintiff after the rate of 17 *s. per* 1000, then, *&c.* the defendant cannot plead that the plaintiff did not carry 12,000 billets to *D.* for he is eſtopped to deny it. Allen, 52. Stile, 103. S. C. Hart v. Buckminſter.

If in an action upon a bond againſt one as executor of *Edmund Shephard,* upon *oyer* prayed it appears that the words are *me Edwardum* * *S. teneri,* &c. and that he ſubſcribed it by the name of *Edm. S.* (which was his true name), and upon *non eſt factum teſtatoris* pleaded, it is found to be the deed of the ſaid *Edm. S.*, yet the plaintiff ſhall not have judgment, the truth appearing on the record; for *Edward* and *Edmund* are two diſtinct names, and the (*b*) ſubſcription by the name of *Edm.* being no part of the bond, is not material. Cro. Jac. 640. Godb. 283. S. C. Maby v. Shephard.

* The declaration might have been with an *alias,* or that *Edmund,* by the name of *Edwardum,* bound himſelf, or he may be eſtopped. *Vide infra.* (*b*) That if a man binds himſelf by a wrong name, he ſhall be eſtopped to avoid it. *Vide* Dyer, 279. Leon. 322. Moor, 897. Cro. Jac. 261. 558. Lutw. 894. & title Miſnomer.

If *A.* gives a bond by the name of *B.* and is ſued by the name of *B.* and pleads the miſnomer, the plaintiff may reply that he made the bond by the name of *B.* and eſtop him by demanding judgment if againſt his own deed he ſhall be admitted to ſay his name is *A.* Salk. 7. pl. 17. Linch v. Hook.

If *A.* enters into a bond to *B.* conditioned that *A.* ſhall uſe and maintain *C.* his wife; in an action upon this bond *A.* ſhall not be eſtopped to ſay that *B.* was married to *D.* (who is yet living) before ſhe married *A.*, and ſo *A.* cannot uſe and maintain her as his wife, for he confeſſes and avoids, becauſe ſhe might notwithſtanding be called in common ſpeech or named his wife in writing. Mich. 39 Eliz. Prat v. Phanner.

If in an action for 5 *l.* by the leſſor upon a covenant to pay ſo much for every acre of meadow ploughed, he lays the ploughing of an acre of lands called *Lane's Meadows* (there being other meadows leaſed) the defendant may plead that the lands in the indenture leaſed, there called *Lane's Meadows,* are not meadow, but time out of mind arable; for though all parties to an indenture are bound by the words thereof, yet it muſt be intended of material Mich. 11 G. 1. in B. R. Skipwith v. Green.

material words, and not ſuch as are deſcriptive only; and if the cloſes had been leaſed as containing 500 acres, yet the defendant would not have been eſtopped to ſay there were not ſo many.

Lev. 43. Sid. 44. Raym. 21. S. C. If one gives an acquittance under his (*a*) hand and ſeal for rent due at a day, he ſhall be eſtopped thereby to demand rent due at a day before.

Palmer v. Stannage, and 3 Co. 65. Dyer, 271. And. 14. Bendl. 186. Moor, 87. L. P. (*a*) If not under his hand and ſeal it is no eſtoppel, but evidence only. Comb. 59.

Lev. 43. (*b*) May have covenant after. But yet if one avows for rent due at a day, he ſhall not be eſtopped to (*b*) avow for rent due at a day after.

Comb. 59, 60.

Comb. 446. ruled by Holt at Guildhall. If upon a writ of error it be aſſigned for error, that the plaintiff died before the trial, and iſſue thereupon taken, the plaintiff in error, by his pleading to the action, is eſtopped to give in evidence that the plaintiff died before the action brought; but the defendant in error pleading *quod adhuc in plenâ vitâ exiſtit, & hoc*, &c. lets the plaintiff looſe from the eſtoppel.

12. Pleading with a *Profert*, and demanding Oyer: And herein,

1. In what Caſes there muſt be a *Profert* or *Monſtrans de fait.*

[(*c*) The general rule was underſtood to be as here ſtated, that a deed could not be pleaded without a *profert*. But it hath lately been adjudged, that an inſtrument may be pleaded, as loſt by time or accident, or as deſtroyed by *fire*, or the like, without *profert*; for *lex non cogit ad impoſſibilia*, and no human prudence can render deeds of perpetual exiſtence. 3 Term Rep. 151.] 2 Lil. Reg. 210. 382. (*d*) 6 Co. 36. 10 Co. 93. Hob. 255. Style, 459. 2 Salk. 498. pl. 5. 2 Ld. Raym. 1076. Salk. 76. pl. 18. 6 Mod. 244.

Where the plaintiff declares upon a deed, or the defendant pleads a deed, it muſt regularly be with a *profert in curia* (*c*), to the end the adverſe party may at his own charge have a copy of it, without which he is not bound to anſwer. And the (*d*) reaſon why deeds muſt be ſhewn or produced to the court is, becauſe it is the proper office of the court to judge of the ſufficiency of them, to ſee that they are duly executed, and without razure or interlineation, and whether they are abſolute, conditional, or revocable.

6 Co. 38. Bellamy's caſe, Bulſt. 119. Cro. Car. 143. (*e*) But, though a thing will paſs without deed, yet, if the party pleads a deed, and makes title thereby, he muſt come with a *profert*. 2 Mod. 64. A deed therefore that is (*e*) requiſite *ex inſtitutione legis* muſt be ſhewn in court, though it concerns a thing collateral, and conveys or transfers nothing; as, in caſe of attornment by a corporation, which muſt be by deed, there, the deed muſt be ſhewn: *ſecus*, where it is *ex proviſione hominis*; as, where the condition of a leaſe is, that the leſſee ſhall not aſſign but by deed, and not by parol, there, he may plead the aſſignment, without ſhewing the deed; an aſſignment by parol being ſufficient, had it not been provided againſt by covenant.

Style, 459. *per* Glin, C. J. In (*f*) all caſes, where a thing cannot be demanded but by deed, the deed muſt be produced.

(*f*) But in a motion for a prohibition granted on letters patent, the ſuggeſtion need not be with a *profert*. 2 Show 33.

But of things executed, or eſtates determined, a deed need not be ſhewn; as, a licence which is executed, though of its own nature it cannot be without deed. 6 Co. 38. Cro. Jac. 102. 3 Lev. 205.

So, if in treſpaſs againſt a bailiff, he juſtifies by virtue of a warrant, without any *profert* thereof, this is ſufficient; for the warrant, being executed and returned to the ſheriff, is determined: but it is ſaid to be otherwiſe in a juſtification for a rent-charge or ſuch things as have continuance. Cro. Jac. 372. Bateman Woodcock, Roll. Rep. 221. S. C.

So, the grantee of the next avoidance to a church, having preſented, need not ſhew the deed of grant to him, being a matter executed. Dodderidge, & *vide* Dyer, 29. pl. 194. Roll. Rep. 221. *per* Coke and Like point.

So, where in replevin the defendant juſtified by a condemnation before the juſtices of peace upon the ſtatute of exciſe, for the non-entry of ſtrong waters, and a warrant made thereupon to levy 20*s.* ſet for a fine; and exception was taken thereto, becauſe there was no *profert hic in curia* of the warrant; the court ſaid, the ſtatute does not require that the warrant be under hand and ſeal, but only in writing, and no writing is to be pleaded, unleſs it be a deed: and they held further, that this being executed need not be ſhewn. 3 Lev. 205. Ailſbury v. Harvey.

Alſo a perſon, who comes in by act or operation of law, need not produce the deed, or plead with a *profert in curia*; as, tenant in dower: ſo, of tenant by ſtatute-ſtaple or merchant, who may take advantage of a rent-charge without ſhewing the deed. Co. Lit. 225. Jenk. 305. Cro. Car. 209. 5 Co. 75.

So, if a guardian in chivalry in right of the heir had entered for a condition broken, he might have pleaded the eſtate to have been on condition, without ſhewing any deed; becauſe his intereſt was created by law. Co. Lit. 225. b.

But the lord by eſcheat, though his eſtate be created by law, ſhall not plead a condition to defeat a freehold, without ſhewing it; becauſe the deed belongs to him. Co. Lit. 226. a.

So, tenant by the curteſy ſhall not plead a condition made by his wife, and a re-entry for a condition broken, without ſhewing the deed; for though his eſtate be created by law, yet the law preſumes that he (*a*) had the poſſeſſion of the deeds and evidences belonging to his wife. Co. Lit. 226. a. (*a*) 10 Co. 94. S. P. and may detain them for his life.

In debt upon an obligation aſſigned by the commiſſioners of bankrupts, without ſhewing the obligation; upon which there was a demurrer; it was adjudged to be good enough, becauſe the party came in by act in law, and had no means to obtain it without ſhewing the obligation in court. Cro. Car. 209. Gray v. Fielder.

[For the ſame reaſon, the indorſe of a promiſſory note indorſed over by an adminiſtrator, need not make a *profert* of the letters of adminiſtration. 3 Wilſ. 1.

In replevin, the defendant avowed for rent deviſed to him in mortmain by the cuſtom of *London* by teſtament. *Fulthorp* demanded oyer of the teſtament. *Per Strange*—It belongs to the executor; as a feme, who demands dower of the rent granted to her baron, ſhall not ſhew the deed, for it belongs to the heir.] Br. Oy. de Rec. pl. 10.

(a) 10 Co. 94. laid down as a maxim. One need not produce a deed in pleading, which is made to a third person, and which he has no means to come by. 2 Show. 418. 3 Lev. 83. Moor, 870. Plow. 149.

Where a man is a (a) stranger to the deed, and doth not claim any thing comprised in the grant, nor any thing out of it, or claim any thing in right of the grantee, as bailiff or servant, there, he shall plead the patent or deed, without shewing it.

Hob. 302. Holland v. Shelley. (b) He who is privy, as lessee for years, feoffee, &c. cannot plead a deed without shewing it. Bro. Monstrans, pl. 61. Co. Lit. 267. 317.

Grantee of the next presentation was outlawed, and the church became vacant; the lord of the manor, who was entitled to the goods and chattels of persons outlawed, brought a *quare impedit*, and it was resolved, that the plaintiff being in *in le post*, and not (b) privy to the grant in any wise, need not shew the deed of grant to the person outlawed.

Cro. Car. 441. Stockman v. Hampton. But for this *vide* Dyer, 277. Cro. Jac. 217. Jon. 377. Noy, 145. and Carth. 316. S. P. determined for the following reasons. 1st, Because the deed doth not belong to him who is only *cestui que trust*. 2dly, Because he hath no remedy in law to get possession of the deed. 3dly, He is in merely by operation of law, and not in the *per*.

Where a person pleads, that he claims by virtue of a feoffment to uses, or that *J. S.* being seised in fee, covenanted with *A.* and *B.* to stand seised to the use of such and such persons, and that the lands came and belong to him by virtue of such covenant, he need not produce the deed; for the deed doth not belong to him, though he claims thereby, but to the covenantees: also, he is in by force of the statute of uses, by operation of law; as tenant in dower, tenant by statute-staple, *&c.* are.

Lutw. 481. Crotch v. Grotch.

In debt against an executrix for 10 *l.* the plaintiff declared upon an obligation, conditioned to pay 5 *l.* to *A.* to the use of *M.* his daughter, at a time limited in a certain indenture; the defendant pleads, that the indenture was made between her testator and one *J. S.*, by which the plaintiff enfeoffed *J. S.*, to the use of the testator, and his heirs, and that the testator covenanted to pay 5 *l.* to the plaintiff within two months after the death of *W. R.*, which *W. R.* is yet alive; the plaintiff demurred; because the defendant did not produce the indenture: But the court held, that the plea was good without it, because the defendant was a stranger to the deed; and it does not belong to her, but belongs to the feoffees, and she has no means to enforce them to produce it, and the court will not impose an impossibility: that she was still more entitled to favour, being an executrix.

Cro. Jac. 292. 2 Lil. Reg. 202.

Where a man justifies under a deed only as servant, and claims no title himself, nor hath any interest therein, but the title and interest is his master's; yet he ought to shew the deed, for it is the substance of the title, and without shewing it he cannot justify.

Cro. Jac. 317. *& vide* Style, 15.

So, where the defendant justified as a servant to the queen's patentee for years, and by his command, but did not bring into court the patent; the plea was held naught; for that he deriving his title from the patentee, not by act in law, but by his command, he ought to shew the patent, as well as he who claims under the patent by assignment;

aſſignment; but he who claims intereſt under an act in law (becauſe he had no means to compel the patentee to ſhew it) may juſtify without ſhewing it.

So, where a ſervant juſtifies for tithes by leaſe, yet, coming in by title and privity, he ought to ſhew it, as well as his maſter; and he cannot plead the entry into another's ſoil without making a good title there, which ought to be by ſhewing the leaſe. Cro. Jac. 360. 2 Lil. Reg. 202.

In an aſſiſe the tenant pleads a feoffment of the anceſtor of the plaintiff unto him, *&c.* and the plaintiff ſaith, the feoffment was on condition, *&c.* and that the condition was broken, and pleads a re-entry, and that the tenant entered and (*a*) took away the cheſt, in which the deed was, and yet detains the ſame; he ſhall not in this caſe be enforced to ſhew the deed. Co. Lit. 226. a. (*a*) If the party who would plead the deed, has it not, he ought to move the court, and the court will order him the deed, or a copy of it. Sid. 50.

In debt upon a bond, conditioned for the performance of the covenants in an indenture, the (*b*) defendant ought to ſhew the indenture; and the entry always ſuppoſes it to be brought into court by him, though the court will ſometimes (*c*) compel the plaintiff to give a copy thereof to the defendant, if he ſwears he never had a part thereof, or hath loſt it; but this is done *ex gratia curiæ*, and not *ex debito juſtitiæ*. But where in ſuch action, after oyer of the bond and condition, it was entered upon the roll, that the defendant prays oyer of the indenture, *& ei legitur*, This indenture, *&c.* and the defendant pleaded, *&c.*, it was adjudged upon a general demurrer, that this manner of pleading was good in ſubſtance, though not formal; for it ſhall be intended the true indenture, and that it was in court, though by the record it did not appear to be ſo. But *per curiam*, If it had been on a ſpecial demurrer, it had been naught. Sand. 8, 9. Jevons v. Harridge. (*b*) He cannot plead performance without ſhewing it. Allen, 72. Vent. 37. Mod. 266. (*c*) That if it be loſt, the court will compel the party to ſhew his counterpart, and he to plead thereto, otherwiſe they will grant an imparlance. Cro. Jac. 426. Sid. 386. 2 Keb. 430.

When one is bound by bond to perform covenants in an indenture, in an action upon the bond, the defendant, in order to diſcharge himſelf, ought to ſhew the deed to the court, that they may ſee what the covenants are; for he cannot ſhew that he has performed all, without ſhewing what he was to perform; and therefore he ought to recite the indenture, whereof he is ſuppoſed to have a counterpart, in his plea; but if he never had a counterpart, or had loſt it, upon oath thereof the court will compel the plaintiff to give him a counterpart, in order to ſet it out for his defence. 6 Mod. 237. *per curiam.*

But, where an action was brought upon a ſpecial agreement contained in a note, and a rule was made to ſhew cauſe why the plaintiff ſhould not give the defendant a copy; upon cauſe ſhewn the rule was diſcharged; becauſe the contract, upon which the action was founded, was a parol contract, of which the note was only evidence, and therefore the defendant ought not to have a copy *. Salk. 215. pl. 3. Hill v. Aland. * But perhaps if there was good reaſon to ſuſpect a forgery, the court might make a rule compelling plaintiff or his attorney to leave it with the Maſter for inſpection, or to produce it to defendant and his witneſſes, that they might inſpect it.

Bro. Monſtr. p. 134. [If a man who ought to ſhew a deed, do not ſhew it, but only a confirmation, it is not good. *Quod nota bene.*]

2 Bulſt. 228. Style, 193. 264. Cro. Eliz. 217. Where a deed is only inducement to the action, it need not be pleaded with a *profert*.

Jon. 377. Cro. Jac. 43. 70. Cro. Car. 442. Roll. Rep. 13. 328.

Palm. 387. Cro. Jac. 673. Slackman v. Weſt. 3 Mod. 52. S. C. cited; and for which *vide* Yelv. 201. Brown. 220. Cro. Jac. 371. 2 Mod. 277. As, where a leſſee for years claimed a way to his houſe by a *que eſtate*, without ſhewing the deed; this was held ſufficient by three juſtices againſt one, becauſe the leſſee has not the deed; and it is but a conveyance to the action, which is grounded on the diſturbance done to him in his poſſeſſion: but, if he had claimed a rent or common in groſs, which could not paſs without deed, it had been otherwiſe; for there, he could not ſhew *que eſtate*, without ſhewing the deed, how he came by the eſtate.

Dougl. 5. n. [If a plaintiff deſcribe himſelf as adminiſtrator, where he has no occaſion to do ſo, a *profert* of the letters of adminiſtration is unneceſſary.]

*Vide* Cro. Jac. 32. Cro. Eliz. 217. Hob. 301. Moor, 885. It was formerly, and before the ſtatute 16 & 17 *Car.* 2. *c.* 8. held, that the not pleading a deed with the *profert* was matter of ſubſtance, and that ſuch omiſſion made the judgment (*a*) erroneous.

Cro. Car. 190. (*a*) Where the want of a *profert* was made good or diſpenſed with by the plea of the adverſe party. Hutt. 54.

(*b*) For which *vide* Sid. 249. Salk. 497. Lutw. 1353. 6 Mod. 135. But now by the 8th chapter of the ſaid ſtatute it is enacted, "That after verdict judgment ſhall not be ſtaid or reverſed for "default of alleging the bringing into court any bond, bill, or "other deed mentioned in the pleadings, or of any letters teſta- "mentary, or of adminiſtration." Since this ſtatute, it hath been (*b*) held only matter of form.

And by the 4 & 5 *Anne*, *c.* 16. "No advantage or exceptions "ſhall be taken for want of a *profert in cur.*, &c., but the court "ſhall give judgment according to the very right of the cauſe, "without regarding any ſuch omiſſion and defect, except the "ſame be ſpecially and particularly ſet down and ſhewn for cauſe "of demurrer."

Carth. 69. Boſworth v. Ridgley. In a *ſcire facias* by an executor, the clauſe of *profert hic in curia literas teſtamentarias* may be inſerted in the middle as well as in the concluſion of the writ.

Shepherd v. Shorthouſe, 1 Str. 412. [Where the probate of a will is loſt, a *profert* may be made of an exemplification of it.]

## 2. Of demanding Oyer.

Bro. *Oyer de faits*, 15. (*c*) To demand oyer of an obligation is not only for the defendant's attorney to deſire the plaintiff's attorney to read the obligation to him, as the word ſeems to import, or to have a ſight of it, but that he may have a copy of it, that his client may conſider by it what to plead to the action. 2 Lil. Reg. 226. ——[And the party, of whom oyer is demanded, is bound to carry it to the adverſe party. 2 Term Rep. 40.]—— Oyer of a deed or record is always to be had by him who is to be charged by it, and not by him who pleads it; and he who pleads or declares upon it muſt (*d*) ſhew it.

(*d*) But the defendant

defendant may, if he pleaſes, plead without demanding oyer of it; and if he once plead, he cannot after waive his plea and demand oyer. 2 Lil. Reg. 226. — — Where there ought to be oyer, the party, if he has demanded it, is not bound to plead without it. 6 Mod. 28. [2 Str. 1186. 1 Wilſ. 16. Where a deed is in the hands of a third perſon, the court will oblige him to give oyer, and produce it. 2 Str. 1198.]

If a man (*a*) enters into an obligation by a wrong name, no advantage can be taken thereof, without demanding oyer of the deed. 6 Mod. 303.

(*a*) If the defendant would take advantage of a wrong original, he muſt demand oyer of it. 4 Mod. 246. [But it is now ſettled, that if the defendant demand oyer of the original writ, the plaintiff is not bound to attend to it, but may proceed as if no ſuch demand had been made. Boats v. Edwards, Dougl. 227. Ford v. Burnham, Barnes, 340.]

Articles of agreement indented were pleaded, and replication was, that in the ſaid articles it is further covenanted, without demanding oyer of the deed; and the court held it ill pleading, and gave judgment *niſi*. Keb. 513. For according to Hutt. 33. they cannot plead and ſhew the counterpart.

In treſpaſs the defendant juſtifies for common, and ſets forth letters patent of the king *hic in curia prolat.*; which plea the plaintiff accepts, without demanding oyer of the letters patent, but after he demanded oyer of them; but denied *per curiam*; and the prothonotaries ſaid, that he is not obliged to ſhew them, if not required at the acceptance of the plea. Paſch. 26 Car. 2. in C. B. Mathews v. Alderton. [A party is not obliged to give oyer of letters patent. 1 Term Rep. 149.]

Oyer of the deed cannot be demanded but during the time it is in court, and that is all the term wherein it is produced, and then it may be entered *in hæc verba*; and there may be a demurrer or iſſue upon it: but it cannot be done of another term, becauſe the deed is then out of the court (*b*). 5 Co. 76. Lutw. 1634. 2 Lil. Reg. 267.

[(*b*) That is, if it be not denied; for in that caſe, the law doth adjudge it to be in the cuſtody of the party to whom it belongs: but if it be denied, then it ſhall remain in court until the plea is determined, and if it eventually turn out not to be the plaintiff's deed, it ſhall be deſtroyed. See the above authorities and Co. Lit. 231. b. But letters teſtamentary, or of adminiſtration, are not ſuppoſed to remain in court all the term; for the plaintiff may have occaſion to produce them elſewhere. 2 Salk. 497. 12 Mod. 590. S. C.]

If the defendant pleads a former action depending in the ſame court in abatement, and the plaintiff craves oyer of the record, if it is not given in convenient time, *viz.* the next day, the plaintiff may ſign judgment. Carth. 452. Ld. Raym. 347. Theobald v. Long, and Carth. 517. S. C. where this is ſaid to be the quickeſt method of proceeding.

[If the defendant plead a judgment or other matter of record in the *ſame* court, he muſt give a note in writing of the term and number-roll whereon ſuch judgment or matter of record is entered and filed; or, in default thereof, the plea is not to be received. But in ſtrictneſs oyer is not demandable of a record. And, it ſeems, not of an act of parliament. Keilw. 96. Carth. 454. 1 Ld. Raym. 347. 550. 2 Str. 823. R. T. 5 & 6 G. 2. B. R. Dougl. 476. 1 Term Rep. 149.

The time allowed for the defendant to give oyer of a deed, &c. to the plaintiff, is two days excluſive after it is demanded. If it be not given in that time, the plaintiff may ſign judgment as for want of a plea (*c*). If given, the plaintiff ſhall have the ſame time to reply after it is given, as he had at the time it was demanded (*d*).] Carth. 454. 2 Term Rep. 40.

(*c*) 6 Mod. 122.

(*d*) R. T. 5 & 6 G. 2. B. R.

If in debt on a bond for performance of an award the defendant pleads no award, and the plaintiff ſets forth an award, with a *profert hic in curia*, and the defendant craves oyer, and then de- Salk. 72. pl. 9. Ld. Raym. 715. Forcland v.

Marygold, adjudged, & *vide* Style, 459. See 12 Mod. 534.

murs for variance between the award set out in the replication and the oyer, and the variance appears material, the defendant must have judgment: otherwise, if the variance had been as to those parts in which the award was void. And though in debt on an award the plaintiff need not set forth more than makes for him, yet it is otherwise in debt on a bond; for there the plaintiff must reply the whole award; and if such replication be without a *profert*, the defendant may reply *nul tiel agard*.

Lil. Reg. 267. 6 Mod. 27. 233. 2 Show. 310. pl. 321.

After imparlance oyer cannot be demanded, because the imparlance is to another term: but, if it be by bill in *B. R.* (*a*) it may, though not in the Common Pleas.

[(*a*) This must be understood of a *special* imparlance to another day in the same term.]

Sid. 308. (*b*) 2 Lutw. 1644. *contr.*

When oyer of a deed is prayed, it is intended that the deed is in court, and the *ei legitur*, or reading of it (*b*), is the act of the court.

3 Salk. 119. pl. 2. (*c*) When upon oyer of the deed it is entered, the whole case appears to the court as fully as

When a deed is pleaded with a *profert hic in curia*, the very deed itself is by intendment of law immediately in the possession of the court; and therefore when oyer is craved, it is of the court, and not of the party; and (*c*) after oyer is craved the deed becomes parcel of the record, and the court must judge upon the whole (*d*); and the demand of oyer is a kind of plea (*e*), and may be counterpleaded.

if the deed had been in the plea. Hob. 217. Show. Parl. Ca. 221. [(*d*) And this, though it were not strictly demandable at the time of granting it. Dougl. 460. (*e*) As it is a kind of plea, it should regularly be made before the time for pleading is expired. Fowler v. Dyer, Mich. 20 G. 3. Tidd's Pr. 347.]

Carth. 513.

If the defendant prays oyer of the bond and condition, and it is entered *in hæc verba*, the condition becomes parcel of the plaintiff's declaration, and it is not part of the defendant's plea.

Trin. 27 Car. in B. R. Mayor and Commonalty of London v. Goree. 2 Lev. 142. 3 Keb. 491. S. C.

Debt for the duty of scavage, and declares upon a patent of *Ed.* IV., defendant imparls, and after demands oyer of the letters patent; upon which the plaintiff demurs. *Per cur.*—The demurrer is ill; for the defendant having demanded oyer, &c., he ought either to have it, or to be ousted of it by the rule of court; but there cannot be a demurrer upon the demand; he ought to have counterpleaded the demand of the oyer, and the judgment of the court would have been, that he should answer *sine auditu*, &c., and it was resembled to an *aid prier*, in which the plaintiff cannot demur, but must counterplead (*f*).

[(*f*) It seems, however, that

the plaintiff, if he would contest the oyer, may either counterplead it, or strike out the rest of the pleading and demur; on which the judgment of the court is, either that the defendant have oyer, or that he answer without it; on the latter judgment the defendant may have a writ of error; for to deny oyer where it ought to be granted is error, but not *e converso*. 2 Salk. 497. 2 Ld. Raym. 970. 2 Str. 1156. 1 Will. 16.]

Weavers' Company v. Forrest, 2 Str. 1241. Simmonds v. Parmenter, 1 Will. 97. Wallace

[It hath been said, that the defendant is not bound to set forth the oyer in his plea; and that if he do not, the plaintiff may pray an enrolment, and so make it part of his replication. But it is now holden, that if the defendant after praying oyer of a deed do not set forth the whole of it, the plaintiff may sign judgment as for want of a plea, or the court will quash it, for that by craving oyer

over the defendant undertakes to set out the whole *verbatim*; and if he do not so, the plea is bad. v. Duchess of Cumberland,

4 Term Rep. 370. Slater v. Horne, E. 34 G. 3. B. R. Tidd's Pr. 309. S. P. See also Barnes, 327. S. P.

Where the defendant in an action on a bond, after craving over, and setting it out truly, pleaded payment, on which the plaintiff took issue, and served the defendant's attorney with a rule to abide, &c., and gave notice of trial; and afterwards the defendant returned the paper book, setting out a false oyer of the bond, and pleading as before, on which the plaintiff enrolled the true condition, and demurred; the court ordered all the proceedings to be struck out, that the plaintiff should have judgment and the defendant's attorney should pay all the costs.] Ferguson v. Mackreth, Hil. 24 G. 3. B. R. cited in 4 Term Rep. 371. note.

## 13. Pleading a Recovery in a former Action.

It is a maxim in law, *quod nemo bis vexari debet si constat curiæ quod sit pro unâ & eâdem causâ*; so that regularly a bar in a real or personal action by judgment, confession, verdict, or demurrer, is a perpetual bar, and may be pleaded to any new action of the same or like nature. 6 Co. 7. Hob. 4, 5. Vent. 170.

But herein there is a diversity between real and personal actions; for though in the latter, as debt, account, &c., the bar is perpetual; yet in real actions there is this distinction, that a bar in one real action is not a bar to an action of a higher nature; and therefore if a man is barred in an assise of *novel disseisin* he may have a *monstrans de droit, assise de mortd'ancestor, ayel, besail, entry sur disseisin a son ancestor*; and this is said to be in favour of inheritances. 6 Co. 7. & *vide* tit. Ejectment.

So, if a man is barred in a *formedon in descender*, he may bring a *formedon in remainder* or *reverter*. 5 Co. 33. a. 2 Mod. 43.

If a man is barred in an action of trespass for the taking of goods, this cannot be pleaded in an appeal of robbery, being of a higher nature. Bro. Estoppel, 217. 4 Co. 43.

Where *A.* robbed *B.* of 3000 *l.* of money in bags, for which he was afterwards indicted and convicted, and afterwards *B.* brought trespass against *A.* for taking the said monies, who pleaded the indictment, by the *procurement* of the plaintiff, and the conviction in bar, but did not shew that the plaintiff had given evidence for the conviction; for this reason the bar was held insufficient; for otherwise he shall not have restitution, and the allegation of *procurement* is not sufficient; & *ea de causa* judgment was given for the plaintiff, and not for the matter in law, for that was against him. Noy, 82. Lane, 144. Markham v. Cobb.

If a man grants a rent to another, payable at a certain day, and covenants to pay the rent accordingly, if the grantee afterwards recovers in an action of covenant for the non-payment of the rent (*a*), this will be a bar for any action after for the rent (*b*); for in the action of (*c*) covenant he shall recover all the rent in damages. Roll. Abr. 353. Strong v. Watts.

(*a*) So, a recovery or bar in an *assumpsit* will be a good bar in debt for the same thing. 4 Co. 94. Yelv. 84. Cro. Jac. 110. Cro. Eliz. 240. (*b*) But in *assumpsit* the defendant cannot plead an account brought for the same money to which he had rendered his law; because damages are recovered in *assumpsit*, but not in an account. Moor, 458. But *quære*; & *vide* Cro. Jac. 110. (*c*) So, where an action is brought upon a special *assumpsit* to pay Cro. Car. 425. Cro. Eliz. 57.

5 Co. 32, 33. Robinſon's caſe. Cro. Jac. ---. S. C. by the report of which it appears, that he did not know that he was executor; and there ſaid, that the rule in perſonal actions, once barred and always barred, muſt be intended where it is a bar to the right, not where the action is only miſconceived.—And ſo in 6 Co. 8. where the S. C. is cited, and 2 Mod. 319.——So, where judgment is given upon the manner, not the matter of the plea. 2 Lev. 210.——If a man brings treſpaſs for taking his horſe, and is barred in that action, yet if he can get the horſe into his poſſeſſion, the defendant is without remedy; for notwithſtanding the recovery, the property is ſtill in the plaintiff. 2 Mod. 319. *per cur.*

If *A.* and the other executors of *B.* bring debt upon a bond, and the defendant pleads, that before the purchaſe of this writ, the ſaid *A.*, as adminiſtrator to *B.*, brought debt upon the ſame bond againſt the defendant, who then pleaded, that *B.* made executors, who adminiſtered, *&c.*, and the plaintiff then replied, that adminiſtration was committed to him *pendente lite* between the executors; upon which the defendant then demurred; and it was adjudged for him; and ſo now pleads this matter by way of eſtoppel, and demands judgment if, as executor, he ſhall have an action upon the ſame bond againſt the ſame defendant; this is no good plea; for by the firſt judgment the plaintiff was only barred as to the action of the writ, *viz.* to have one as adminiſtrator; but this miſtake of his action is no bar or eſtoppel to bring his true action.

Cro. Jac. 73. Brown v. Wotton, Yelv. 67. Moor, 762. S. C. (*a*) So, though he had him not in execution; for by the judgment *tranſit in rem judicatam.* Yelv. 68.——And where and how the defendant may enforce the plaintiff to enter up his judgment, to the end he may plead it to another action, *vide* Latch, 216.

If in trover for plate the defendant pleads that the plaintiff had before brought his action for the ſame plate againſt *J. S.*, and had judgment to recover 20 *l.* damages, and (*a*) had *J. S.* in execution for the ſame, and avers it to be the ſame converſion, *&c.*, this is a good plea; for by the judgment the damages which were before uncertain are reduced to a certainty, and therefore he ſhall not demand the uncertainty again; and by the judgment the property of the goods is altered.

Cro. Jac. 73. for this *vide* tit. Obligation.

But a judgment in debt againſt one obligor, upon a joint and ſeveral obligation, and the body taken in execution, is no plea to an action brought againſt the other obligor.

6 Co. 44. Higgin's caſe.

If a man hath judgment in *C. B.* upon an obligation, he ſhall not afterwards bring an action of debt upon the ſame obligation, as long as the ſaid judgment remains in force; for by this judgment the ſpecialty is turned into a matter of record.

6 Co. 45. a. Where a judgment in a foreign attachment ſhall be pleaded in bar to other actions, *vide* Roll. Abr. 555. and title Cuſtom of London.

Otherwiſe, if in the county court by *juſticies*, for that court not being of record, he may, upon the ſame obligation, have debt in a court of record.

Sparry's caſe, 5 Co. 62. Dudfield v. Warden, Fitzg. 313.

[Neither can the pendency of an action in an inferior court be pleaded to an action brought in one of the courts at *Weſtminſter* for the ſame thing.]

*Vide etiam ſupra*, Vol. I. 23.

Cro. Jac. 284. Brownl. 81. Level v. Hall.

If in debt on a bond the defendant pleads, that the plaintiff brought an action in *London* upon the ſame bond, to which the defendant there pleaded *non eſt factum*, and it was found for him; upon which it was entered, that the defendant ſhould recover damages againſt the plaintiff, *et quod eat inde ſine die*, this is no plea, becauſe the judgment was not *quod querens nil capiat per breve*,

*breve*, and so no judgment was given so as to bar the plaintiff in another suit.

If in debt against executors they plead a judgment obtained against one of them as administrator, this is a good bar; for though he might have pleaded in abatement to the first action, yet he was not obliged so to do, and this recovery against him was upon the right of the debt. Lev. 261. Parker v. Amys.

If in action upon the case the declaration is insufficient, and the defendant pleads an ill plea, but judgment is given against the plaintiff upon the insufficiency of declaration, but by mistake entered *quia placit. prædict.*, &c., *bonum & sufficiens in lege existit*, &c., *ideo consideratum*, &c., *quod querens nil capiat per billam* (*a*), whereas it ought to have been entered *quod defendens eat inde sine die*, and the plaintiff brings a new action, and declares aright, and the defendant pleads the former judgment, reciting the record *verbatim*, this is no good plea; for, without question, the plaintiff having only committed a mistake in his declaration, he may set it right in a second action. Mod. 20. Leppin v. Kedgwin. (*a*) Where judgment is given for the tenant or defendant upon a plea in bar, or to the writ, &c. the judgment is all one, viz. *quod eat inde sine die*, and shall have reference to the nature or matter of the plea, and so be taken to go in bar, or to the writ. Co. Lit. 363. 8 Co. 68.

But, if a declaration be faulty, and the defendant take no advantage thereof, but plead a plea in bar, upon which the plaintiff take issue, and the right of the matter be found for the defendant, the plaintiff shall have no other action, for he is estopped by the verdict. So, if a declaration be faulty, and the plaintiff demur to the plea in bar, by which he confesses the fact, if well pleaded, he is estopped thereby, and shall have no other action. But, if the plea is not good, it can be no estoppel, but the plaintiff may have another action. Mod. 207. *per cur.* Skin. 120. pl. 15. S. P. In some cases where the merits are really with the plaintiff, and he hastily demurs to a good plea, conceiving it to be bad, the court will, before judgment, give him leave to withdraw his demurrer, on payment of costs, and take issue on the plea.

If in trover for certain sheep the plaintiff declares that the 25th day of *March* in the year, &c. he was possessed thereof, and lost them, and that the same the last day of *April* in the same year came to the hands of the defendant, who the same day converted, &c., and the defendant pleads, that the plaintiff had before brought trespass against the defendant, and *J. S. quare ceperunt & abduxerunt* the said sheep, and thereupon counted of a taking the 14th of *April* in the same year, to which the defendants then pleaded a judgment against *J. N.* who was possessed of the said sheep, and that by virtue of a *fieri facias* thereupon, the said sheep were sold to the defendant, &c.; whereupon issue being joined it was found for the plaintiff, and 2 *d.* damages given, upon which the plaintiff had judgment for the said 2 *d.* damages and 6*l.* costs, and avers the taking and driving, for which the said recovery in trespass was had, and the conversion in this action to be all one, &c.; and to this plea the plaintiff replies and confesses the said action, and recovery of the 2 *d.* damages, &c., but says the said 2 *d.* damage was not given for the value or conversion of the said sheep, *absque hoc*, that the said taking and driving, whereupon the said Cro. Car. 35. Laicon v. Bernard, Hutton, 81. S. C. adjudged by three Judges against Yelverton.

ſaid judgment was had, is the ſame treſpaſs *quoad* the converſion of the ſaid ſheep of which the plaintiff now declares; this is a good replication, and the plaintiff ſhall recover; for the damage being ſo ſmall, cannot be preſumed to be given for the value of the ſaid ſheep; for if ſo, the plaintiff muſt for 2 *d.* only loſe his property in the ſaid ſheep; therefore it ſhall be preſumed, and may be averred, that this damage was given for the chaſing and driving, and that the plaintiff had the ſheep again, and after loſt them, *&c.*, and the rather, becauſe in time the converſion is ſuppoſed ſo long after the chaſing and driving.

Style, 3, 4. 201. Watſon v. Norbury.

If in an action upon the caſe the plaintiff declares againſt the defendant, that he falſely and maliciouſly did procure a commiſſion of bankrupt to iſſue out againſt the plaintiff, *&c.*, by virtue whereof the defendant broke his ſhop, and took away his goods and ſhop-books, whereby he was diſcredited and loſt his trade, to his damage, *&c.*; and the defendant pleads, that the plaintiff had brought an action of treſpaſs for breaking his ſhop, taking his goods, *&c.*, and upon that action had recovered damages, *&c.*; this is no good plea, for this action is not brought for the ſame thing as the former was, in which no damages could be recovered for the ſcandal, upon which this action is grounded.

Raym. 47. 3 Mod. 1, 2. 2 Mod. 318. Put v. Rawſtern.

If in trover for certain goods the defendant pleads, that the plaintiff had brought treſpaſs *vi & armis* for the ſame goods, and upon not guilty pleaded a verdict and judgment was thereupon given for the defendant, *&c.*; this is no good plea, becauſe this action will in many caſes lie where treſpaſs will not; and ſo it may be very well preſumed, that the plaintiff at firſt only miſtook his action, and brought treſpaſs where his evidence would ſerve in trover only.

2 Vent. 169. Letchmere v. Toplady, 1 Show. 146. S. C.

But it hath been ſince held, that if in trover for certain goods the defendant pleads, that the plaintiff had before brought an action of treſpaſs *quare vi & armis ceperunt & aſportaverunt* againſt the ſame defendants for the ſame goods, to which the defendants then pleaded not guilty; and upon a ſpecial verdict, which the defendants in their plea ſet forth *verbatim*, the court then gave judgment, that the plaintiff *nil capiat per billam*, and that the defendants *ireut inde ſine die*, and avers the goods in both declarations to be the ſame; and the taking and carrying away, *&c.* ſuppoſed in the ſaid action of treſpaſs, and the coming to the hands of the defendant, *&c.* in this declaration, to be the ſame, and the cauſe of action the ſame, *&c.*; this is a good plea; for though trover will lie in many caſes where treſpaſs will not, yet upon the matter here diſcloſed in pleading it appears the plaintiff was before barred, not by miſtake of his action, but upon the rights and merits of the cauſe.

Kitchen v. Campbell, 2 Bl. Rep. 827. 3 Wilſ. 304. S. C. (*a*) 2 Ld. Raym. 1216. That

[So, to an action of *indebitatus aſſumpſit* for the value of goods, a judgment for the defendant in trover for the ſame goods may be pleaded in bar, provided it appear by proper averments in the plea, that the queſtion between the parties was the ſame in both actions. So, *e converſo* (*a*), a recovery in *indebitatus aſſumpſit* for the value of the goods, may be pleaded in bar to an action of trover for

for the ſame goods. In theſe caſes the principal conſideration is, whether it be preciſely the ſame cauſe of action in both, which may appear either by proper averments in a plea, or by proper facts ſtated in a ſpecial verdict, or a ſpecial caſe. One great criterion of this identity is, that the ſame evidence will maintain both the actions.]

a former recovery may be given in evidence on the general iſſue to an action on the caſe.

2 Str. 733. 3 Burr. 1353. 1 Show. 146. *Secùs*, to debt *qui tam*, 1 Str. 701-2. or on bond.

If *A.* ſays *B.* is perjured, and thereupon *B.* brings his action, and *A.* juſtifies, and iſſue is thereupon taken and found for the defendant, and judgment thereupon given, and after *A.* again publiſhes the ſame words of *B.*, and thereupon *B.* brings another action, and *A.* pleads the firſt judgment in bar, this is a good plea.

2 Brownl. 49. Stiles v. Baxter.

If an alderman of *N.* brings an action for theſe words, *he is a raſcally alderman, a factious alderman, a lampooner*, and avers, that a lampooner is there underſtood of a libeller, and the defendant pleads a former action brought for the ſame words, and laid in the ſame manner, (ſaving only that in the firſt action no interpretation is given to the word *lampooner*,) in which action the plaintiff was barred, this is a good plea; for the plaintiff having been once barred ſhall not entitle himſelf to a new action by a new interpretation of the ſame words.

3 Lev. 248. Gardner v. Helvis.

In caſe for erecting a nuiſance 2 *die Feb.* the defendant pleaded a prior action brought for erecting a nuiſance 20 *die Martii*, and a recovery thereupon, and avers theſe to be the ſame nuiſance and erection; plaintiff demurred, and judgment againſt him, for he may have an action for the continuing of the ſame nuiſance, but can never have a new action for the ſame erection.

Salk 10. pl. 3. Ld. Raym. 370. Johnſon v. Long. Carth. 456. S. C. adjudged, because the plaintiff had not laid any continuance of the nuiſance in his declaration.

But, though an action will lie for continuing a nuiſance, yet it hath been held, that in aſſault, battery, and maihem, if the plaintiff in his declaration recites a judgment in a former action for the ſame battery, and ſhews that he has ſince ſuſtained conſequential damages by a piece of his ſkull's coming out; yet this will not entitle him to a new action; for *per Holt*, C. J., every new dropping is a nuiſance; but here is not a new battery, and in treſpaſs the grievouſneſs or conſequence of the battery is not the ground of the action, but the meaſure of the damages which the jury muſt be ſuppoſed to have conſidered at the trial.

Salk. 11. pl. 5. Fetter v. Beale, Ld. Raym. 339. 692. 12 Mod. 542.

## (K) Duplicity in Pleading: And herein,

### 1. The Reaſon why Duplicity is a Fault, and the Manner of taking Advantage thereof.

THE plea, ſays my Lord *Coke*, that contains duplicity or multiplicity of diſtinct matter to one and the ſame thing, whereunto ſeveral anſwers (admitting each of them to be good) are required, is not allowable in law; and this rule, ſays he, extends to pleas

Co. Lit. 304. a. Doct. pl. 135. [Duplicity is, where

distinct matters, not being part of one entire defence, are attempted to be put in issue.

pleas perpetual or peremptory, and not to pleas (*a*) dilatory, for in their time and place a man may use divers of them. Also, where the tenant or defendant may plead the general issue, there, upon the general issue pleaded, he may give in evidence as many distinct matters to bar the action or right of the demandant or plaintiff as he can: also, a special verdict may contain double or treble matter, and therefore in those cases the tenant or defendant may either make choice of one matter, and so plead it to bar the demandant or plaintiff, or plead the general issue, and take advantage of all; or he may plead to part, one of the pleas in bar; and to another part, another plea; and his conclusion of his plea shall avoid a doubleness, and hereby neither the court nor the jury is so much inveigled, as if one plea should contain divers distinct matters; and if the tenant make choice of one plea in bar, and that be found against him, yet he may resort to an action of a higher nature, and take advantage of any other matter.

But this does not preclude a party from introducing several matters into his plea, if they are constituent parts of the same entire defence. For though it be true, that issue must be taken upon a single point; yet it is not necessary that such single point should consist only of a single fact. For instance, the point of the plea may be, that the defendant is entitled to common: but to establish this point several facts may be necessary, as, that the cattle with which he is to use the common must be his own cattle, must be levant and couchant, &c. Robinson v. Rayley, 1 Burr. 316.] —— (*a*) But, where the defendant pleaded ten outlawries on mesne process in disablity, to which the plaintiff demurred for duplicity, it was held, that the plea was naught; and the diversity between a plea in bar and abatement as to duplicity being urged, it was answered by the court, that there was a difference between a plea of an outlawry in disability and other pleas in abatement; and that this plea was ill for duplicity, because the plaintiff is disabled as well by one outlawry as by all the other nine, to which several answers are required. Carth. 8, 9.

5 H. 7. 7. Doct. pl. 135. Plow. 194. Yelv. 13. Roll. Rep. 212. Vent. 47-8.

The reasons why duplicity in pleading is a fault are, that the party being effectually barred by one single point, it is unnecessary and vexatious to put him upon litigating any other; and though he might take issue on any one point, yet must he be at a loss which the material point is, so as to traverse the same, and thereby put an end to the cause; whereas the party pleading such double matter must be presumed conusant of his own strength, and therefore ought to put his defence on that single point, which will put an end to it. Besides, the jury ought not to be charged with multiplicity of things, when finding any one of them contrary to their evidence lays them liable to the severity of an attaint.

*Vide* under the division Demurrer; & *vide* 11 Co. 52.

Also, from the expence and vexatiousness attending it, a person is no more allowed to plead and demur to the same fact, than he is to plead double; for the duplicity herein draws the matter to a different *examen*, since the demurrer is to be tried by the court, and the fact by a jury.

2 Vent. 212. 3 Mod. 318. Co. Ent. 504.

So, where one confesses and avoids, and likewise traverses the same point, this is in nature of a double plea, and therefore naught.

2 Roll. Rep. 306. Lutw. 4. 3 Mod. 251. Ld. Raym. 332. Comb. 65.

But, though duplicity in pleading be a fault, yet must the same be taken advantage of on a special demurrer, that is, the party must shew wherein the doubleness consists; and it is not sufficient to demur *quia duplex & caret formâ*, &c., but he must lay his finger on the very point that is so.

Poph. 113. Lev. 76. Salk. 219. pl. 5. 2 Ld. Raym. 798. 2 Salk. 678. pl. 5. 7 Mod. 71. & *vide* title Demurrer more authorities to this purpose.

If

If a plea is pleaded which is double, and the adverſe party demurs not for the doubleneſs, he is obliged to anſwer both parts. 1 Vent. 272.

## 2. What ſhall be ſaid Duplicity in Pleading.

In treſpaſs for aſſault and battery, defendant juſtifies by a *molliter manus impoſuit* for due correction of the defendant as his ſervant, and pleads over, that ſince that time the plaintiff *exoneravit & relaxavit* (without ſaying *per ſcriptum*) to the defendant the ſaid matter; to this plea it was demurred for doubleneſs ſpecially; and the opinion of the court was, that it was double; for though the releaſe be not ſufficiently pleaded, yet it is pleaded ſo as iſſue may be taken upon it, which will be expenſive and vexatious to the plaintiff: but, had it been really no plea at all, or ſuch a one on which no iſſue could be taken, then, it had been only (*a*) ſurpluſage, and, conſequently, could not amount to a double plea. Sid. 175. Keb. 661. Bleke v. Grove.

(*a*) Matter of ſurpluſage ſhall never make a plea double. 1 H. 7. 16. Dyer, 42. b. Doct. pl. 138. S. P.

In an action of falſe impriſonment the defendant juſtifies by force of a *latitat* out of *B. R.* by force of which he took him; the plaintiff replies that he did it *de injuriâ ſuâ propriâ*, &c. it was moved that this was naught after a verdict, and not helped; but the court held it well after a verdict, but that upon a demurrer it would be naught, as being multifarious, jumbling (*b*) matters of record and matters of fact together, and putting both into the mouths of the *lay gents*. Raym. 50. Keb. 125. 164. Beeſly v. Walker.

(*b*) For this *vide* Hob. 244. Hutt. 20. Sid. 314.

In debt on an obligation the defendant pleaded, it was on condition that he ſtood to the award of certain perſons, ſo that it were delivered in writing, and ſaid that no award was made or delivered in writing; and this plea was held naught for duplicity, for the award might be made in one county, and might be delivered in another, and ſo the ſame jury not proper judges of both theſe facts. 5 H. 7. 7. Dyer, 242. a. Doct. pl. 136.

In debt upon an obligation, if the defendant ſays that the obligation was made by dureſs of impriſonment, and by menace of impriſonment, this is a double plea. Plow. 140. 19 E. 4. 4. But, if an executor *plene adminiſtravit*, and ſo *rient in mains*, this is not double, being only an inference neceſſarily following from his plea. 1 H. 7. 15. 18 H. 8. 4. Dyer, 243.—In debt for rent *nihil debet* and *nihil habuit in tenementis* held to be double and repugnant. *Vide* 4 Mod. 254.

In a *ſcire facias* on a fine, as heir to two parceners, the tenant pleaded in bar a fine levied by the two parceners with warranty, and he relied on the warranty; and that plea was held double, and he forced to rely on the warranty of one. Co. Lit. 304. Hob. 29.

So, if one have divers warranties, and they fall by deſcent on one perſon, heir to both, yet he muſt be vouched as heir to one only; for as to the demandant, the voucher is a kind of plea in bar, and ought to be ſingle; for the demandant may counterplead the poſſeſſion of the vouchee and his anceſtors, which he cannot do if they be divers; and as to the vouchee, the voucher is a kind of demand or ſuit, and ought to be ſingle; for the vouchee may counterplead the lien, which he cannot do if they be divers. Co. Lit. 304. Hob. 29.

2 Vent. 198. 222. Saund. 338.

In debt on a penal bill of 7 *l.* for the payment of 10 ſhillings at one day and 10 ſhillings at another, and ſo till the whole was paid; the plaintiff aſſigns the breach, that the defendant did not pay on the ſaid ſeveral days, *&c.*, the defendant pleads an inſufficient plea, the plaintiff replies, and the defendant demurs generally: in this caſe it was held, that no exception could be taken on the general demurrer to the declaration for the doubleneſs, but judgment ſhould go againſt the defendant for the inſufficiency of his plea.

Lev. 79.

In covenant on a leaſe, wherein the leſſee covenanted to pay his rent yearly by equal portions at *Michaelmas* and *Lady-day*, the breach aſſigned was, that he did not pay the rent due at the aforeſaid ſeveral feaſts during the term; and though it was objected, that the breach was not well aſſigned, but ought to have been ſo particularly; yet it was reſolved to be well enough, for perhaps it was never paid at any of the days; and this differs from the caſe laſt abovementioned, for there, the aſſignment of non-payment at any one of the days was ſufficient to entitle him to the penalty of the bill.

2 Saund. 48, 49. Trethewy v. Ackland. Lev. 281. *& vide* 1 Mod. 33. 2 Mod. 36. 2 Keb. 591. 2 Sand. 336. 4 Mod. 54. 63. Carth. 195.

In debt againſt an executor who pleads ſeveral judgments had againſt him, *&c.* the plaintiff replies to each ſeverally, that it was had by fraud to bar him of his debt: The replication is clearly double, becauſe if he had avoided any one of the judgments he ſhould have had a general judgment againſt the defendant, his plea being entire (*a*); yet in this particular caſe this pleading is allowed, for he may be miſtaken in one; and in this caſe he has it in his election to plead fraud to them all ſeverally, or to any of them, omitting the others; and if payment of ſeveral obligations had been alleged, the plaintiff might traverſe the payment of each ſeverally, or any of them; and though he miſtake ſome of the ſums to which he pleaded *non ſolvit*, yet it ſhall not hurt; for it is no more than if he had ſaid nothing to them; and in the caſe of ſeveral judgments the plaintiff may reply, that one was obtained by fraud, that ſatisfaction is acknowledged on record on another, and ſo avoid each by a different plea.

(*a*) This is called an anomalous caſe againſt the rules of law, which condemn double pleading; but in this caſe it hath ſeveral times been allowed. 2 Sand. 48. Comb. 444. Ld. Raym. 263. Salk. 298. pl. 10. Carth. 429. 12 Mod. 153.

Plow. 194. Doct. pl. 136.

If a man pleads two things where he is compellable to ſhew both, this does not make his plea double.

2 Lev. 82. Vent. 236.

As, where to a plea in abatement in trover that another action depends by *B.* and *C.* for the ſame cauſe, the plaintiff replied that they are both dead; this replication is not double, for he muſt ſhew the death of both to enable him to bring the action alone.

Keilw. 68. Stile, 82.

If there are three in execution jointly at the ſuit of *A.* and all eſcape, the plaintiff may declare for the eſcape of all, and it will not be double, though the eſcape of any one of them will be (*b*) ſufficient to entitle him to the action.

(*b*) For this *vide* Sid. 5. Skin. 583. and title Eſcape.

In

In detinue by Dame *Audley* the defendant pleads, that after bailment of the goods to him by the plaintiff ſhe married Lord *Audley*, and that during ſuch marriage the Lord *Audley* releaſed to him all actions, *&c.* It was objected that this plea was double, *viz.* property in the huſband by the intermarriage, and a releaſe by him; but it was reſolved not double, becauſe he could not plead the releaſe without ſhewing the marriage. Moor, 25. pl. 85. Dame Audley's caſe. Daliſ. 30. pl. 9. S. C.

3. Of pleading double by Leave of the Court.

This depends on the ſtatute 4 & 5 *Ann. c.* 16. for amendment of the law, by which it is enacted, "That any defendant or tenant in any action or ſuit, or any plaintiff in replevin in any court of record may, with leave of the ſame court, plead as many ſeveral matters thereto as he ſhall think neceſſary for his defence; and if any ſuch matter ſhall on demurrer joined be judged inſufficient, coſts ſhall be given at the diſcretion of the court; or if a verdict be found upon any iſſue in the ſaid cauſe for the plaintiff or demandant, coſts ſhall alſo be given in like manner, unleſs the judge who tried the ſaid iſſue ſhall certify that the ſaid defendant, or tenant, or plaintiff in replevin had a probable cauſe to plead ſuch matter, which upon the ſaid iſſue ſhall be found againſt him."

In the conſtruction of this branch of the ſtatute the following opinions have been holden:

That a perſon cannot plead and demur to the ſame part of the declaration: alſo, that pleading double is at the peril of the pleader; and if the court give him leave in caſes where they have no power by the act ſo to do, the other party may demur *. Caſes in Law and Equity, 281. 327.

* *Qu.* If the proper method is not to move the court to diſcharge the rule.

It is held, that theſe double pleas muſt be to the plaintiff's declaration, and that therefore the defendant cannot rejoin two ſeveral matters to the plaintiff's replication. T. 5 G. 2. in B. R. Warren v. Ives. 2 Str. 908. S. C.—Whether to a writ of error to reverſe a common recovery the defendant may plead double. Caſes in Law and Equity, 326. *Dubitatur.*

It was moved, that an executor being likewiſe heir at law might have leave to plead double, *viz. ſolvit ad diem*, and *riens per deſcent*, to an action of debt upon a bond; but the court refuſed the motion, without an affidavit that he had *riens per deſcent*, and ſaid, that there is the ſame law in caſe of an adminiſtrator, who ſhall not be allowed to plead *plene adminiſtravit*, and no aſſets, without affidavit †. T. 2 G. 1. in B. R. Carrington v. Warren.

† The common plea of *plene adminiſtravit*, as now uſed, includes an allegation that the defendant hath not, nor at the commencement of the ſuit had, any aſſets, and the whole makes but one plea, and is not double.

So, in covenant for non-payment of rent, as aſſignee of ſeveral terms, the plaintiff ſet out his title under ſeveral deeds, and the defendant moved to plead eight pleas; but, becauſe he had not an affidavit to prove them material to the merits of the cauſe, the motion was denied. And here the court obſerved, that this ſtatute H. 7 G. 2. in B. R. Sir Charles Peers v. Whale.

was

was not deſigned to put the plaintiffs under unneceſſary difficulties in proving iſſues foreign to the merits of the matter in queſtion: and though they are to allow any perſon that aſks the favour of pleading double, to uſe the benefit of the act, yet are they to ſee the deſign of it is not abuſed in multiplying fruitleſs and impertinent iſſues.

It hath been frequently inſiſted upon, that a defendant could not within this act plead contradictory and inconſiſtent pleas; as *non aſſumpſit* and the ſtatute of limitations, *&c.* But the court obſerving, that if the benefit of the ſtatute was to be confined to ſuch pleas as are conſiſtent, it would hardly be poſſible to plead a ſpecial plea and a general iſſue, the one always denying the charge, the other generally confeſſing and avoiding it; and as the ſtatute itſelf makes no diſtinction herein, hence it hath been held,

H. 8 G. 1. in B. R. Cary v. Jenkins. 1 Str. 496. S. C.

That in debt for rent the defendant may plead a tender and eviction.

Iſaac and Sir William Gordon in Scacc.

So, an action upon articles under hand and ſeal relating to *South-Sea* ſtock, defendant had leave to plead *non eſt factum*, *non obtulit*, *non dedit notitiam ſecundum* the *proviſo* in the deed, and that the deed was not regiſtered.

M. 2 G. 2. in B. R. Smith v. Smallwood.

So, not guilty and *ſon aſſault demeſne* was pleaded by leave of the court *.

* And is now the common practice, without exception.

T. 3 G. 2. in B. R. Atkinſon v. Atkinſon, 2 Str. 871. S. C. and M. 8 G. 2. S. P. between Phillips and Wood. 2 Str. 1000. S. C.

So, in debt upon a bond, the defendant was permitted to plead *non eſt factum* and bankruptcy.

H. 4 G. 2. in B. R. Deconſta v. Carteret, 2 Str. 889. S. C. Fitzgib. 189. S. C. Barnard. K. B. 407. S. C.

In an action on the caſe againſt the poſt-maſter-general, it was allowed him to plead *non culp.* & *non culp. infra ſex annos.*

T. 5 G. 2. in B. R. Bohun v. Morgan.

In treſpaſs the defendant had leave to plead a licence and juſtify the cutting down ſome boughs, becauſe they hung over his gardens; though it was objected, that theſe pleas were inconſiſtent, the licence being a tacit or implied acknowledgment, that he had no right to cut the boughs, whereas the juſtification aſſerts one.

T. 5 G 2. in B. R. Dun v. Vaucher, 2 Str. 908. S. C.

In debt upon a bond given by a woman, conditioned that ſhe ſhould marry the plaintiff, if he requeſted, within ten days after his return from ſea, leave was given to plead *non eſt factum*, and that ſhe was never requeſted.

M. 6 G. 2. in B. R. Semining v. Bygrove.

In debt for rent upon a parol demiſe, defendant had leave to plead *nil habuit in tenementis* & *non dimiſit.*

Maſlellan v. Howard, 4 Term Rep. 194. Jenkins v. Edwards, 5 Term Rep 97.

[A defendant ſhall not be allowed to plead *non aſſumpſit*, or *non eſt factum*, to the whole declaration, and a tender as to part; for one of theſe pleas goes to deny that the plaintiff had any cauſe of action, and the other partially admits it.

Neither

Neither ſhall he be allowed to plead ſeveral matters, which require different trials, as, in dower, *ne unques accoupe en loyal matrimonie*, and a mortgage, or *ne unques ſeiſie que dower*; for the firſt matter is triable by the biſhop, and the others by a jury; and if the former be found againſt the defendant, the judge cannot certify, that he had a probable cauſe of pleading it. Anderſon v. Anderſon, 2 Bl. Rep. 1157. Hillier v. Fletcher, *Id.* 1207. Robins v. Crutchley, 2 Wilſ. 118. Semb. *contr.*

This ſtatute of the 4 & 5 *Ann.* does not extend to any action, or information, upon a penal ſtatute.] Morgan v. Luckup, Ca. temp. Hardw. 262. 2 Str. 1044. S. C. Law v. Crowther, 2 Wilſ. 21. Lookup v. Frederick, Barnes, 365. Heyrick v. Foſter, 4 Term Rep. 701.

## (L) Departure in Pleading.

A Departure in pleading is, when the ſecond plea contains matter not (*a*) purſuant to the former, and which does not fortify the ſame; and when the rejoinder contains matter ſubſequent to the bar, and not fortifying the ſame, this is regularly a departure. 2 E. 4. 12. Plow. 105. Co. Lit. 304. Doct. pl. 119.

(*a*) But, where a man pleads any thing which he could not have ſhewed at firſt, it ſhall never be reckoned a departure: ſo, where he fortifies it in the ſame manner that he pleaded it; but, if he fortifies it in another manner, as, by a ſpecial cuſtom, it will be a departure. For this *vide* Yelv. 14. Dyer, 253. Style, 260. Jon. 262. Leon. 156. 2 Leon. 199. 3 Leon. 3. 203. Cro. Car. 257. Finch, 392.

In an aſſiſe the tenant pleads a deſcent from his father, and gives colour, the demandant entitles himſelf by a feoffment from the tenant himſelf, the tenant cannot ſay that the feoffment was on condition, and ſhew the condition broken; for that were a departure, as containing new matter, and ſubſequent to the matter of his bar; but in aſſiſe, if the tenant plead in bar, that *J. S.* was ſeiſed, and enfeoffed him; the plaintiff ſhews, that he himſelf was ſeiſed in fee till *J. S.* diſſeiſed him, who enfeoffed the tenant; the tenant may plead a releaſe of the plaintiff to *J. S.*, for this fortifies his bar. Doct. pl. 120. Plow. 104.

If a man plead an eſtate generally, as, a feoffment in fee, he, without a departure, cannot maintain it in his ſecond plea by matter tantamount; as, by a diſſeiſin and releaſe, or by a leaſe and releaſe, or a gift in tail and a recovery in value; nor, when a man pleads an eſtate made by the common law, can he make it good by an act of parliament in his ſecond plea. Co. Lit. 304.

So, when a matter is pleaded as at common law, he cannot maintain it in his replication by cuſtom; as, in covenant on an indenture of apprenticeſhip to ſerve ſeven years, and breach aſſigned, that he did not ſerve, *&c.*, the defendant pleads infancy; the plaintiff replies the cuſtom of *London*; and adjudged a departure. Lev. 81. Keb. 376. 469. 512.

Nor can action at common law be made good in the replication by ſtatute; as, in treſpaſs for taking his beaſts, the defendant juſtifies as damage-feaſant; the plaintiff replies he drove them out of the county; and adjudged a departure; for driving out of the 3 Lev. 48.

county was not prohibited by the common law, but by the ſtatute of *Marl.* (52 *H.* 3.) and 1 & 2 *Ph. & M. c.* 12.

Lev. 81. But, if one pleads a ſtatute, the other ſays it is repealed, he may reply that it is revived by another; for this fortifies the firſt matter.

Co. Lit. 304. a. If a man pleads performance of covenants, the plaintiff replies, he did not do ſuch an act according to the covenant; the defendant ſays, he offered to do it, and he refuſed; this is a departure, it being one thing to do a thing, and another, that he offered to do it, but he refuſed.

Vent. 121. 2 Lev. 5. Debt againſt a clerk upon an obligation conditioned to perform covenants, one of which was to account for all money he ſhould receive; the defendant pleads performance; the plaintiff replies, that ſuch a day ſuch a ſum came to his hands, which he had not accounted for; the defendant rejoins, that he accounted *modo ſequente, viz.* that thieves broke into the counting-houſe and ſtole it, and that he acquainted the plaintiff, & *hoc paratus eſt*, &c. And on demurrer it was reſolved, that the rejoinder was no departure, for though it contained new matter, yet it was purſuant to the former; for ſhewing that he was robbed, amounted to giving an account. 2*dly*, That the rejoinder, though an expreſs affirmative, *viz.*, that he did account, in contradiction to what was ſaid in the replication, *viz.* that he did not account, was yet good with an averment, without concluding to the country; for new matter being alleged in the rejoinder, the plaintiff ought to have liberty to come in with a ſur-rejoinder and anſwer it, *viz.* by traverſing the robbery.

2 Lev. 67. Debt on an obligation for performance of covenants, one of which was, to return certain goods from *D.*, the defendant pleads performance; the plaintiff aſſigns a breach in not returning ſuch goods; the defendant rejoins he had no order; and held a departure, for there was no mention of order in the covenant: but, it ſeems, had the covenant been to return them on order, the plea had been good; for then the covenant was not to be performed without order, and *performavit omnia* may be taken, that he performed all that he ought to perform, he not having orders.

Lev. 85. 127. 133. 300. Mod. 289. Roberts v. Marriot. In debt upon an obligation for performance of an award, the defendant pleads no award; the plaintiff replies, and ſhews the award and breach; if the defendant rejoin, and ſhew that it is void, either becauſe that there was an award of mutual releaſes to the time of the award, or that the award was all on one ſide, or that it was not made of all matters ſubmitted, and whereof the arbitrators had notice, or the like, in all ſuch caſes the rejoinder is a departure; for no award pleaded is no award at all, either in fact or in law, which is not to be maintained by ſhewing the award to be void, but he ſhould at firſt plead the award, and alſo the matter whereby it was void.

3 Lev. 239. 241. In debt for not performing an award, the defendant pleads no award, the plaintiff replies, and ſhews one, but does not ſhew where it was made; the defendant demurs; and reſolved that

that could not be objected after no award pleaded, for that were a departure.

In debt on a bond, conditioned to ſave a pariſh harmleſs concerning a baſtard-child which the obligor was forced to father, he pleads *non damnificat.*; they reply, that the child was ready to ſtarve, and that therefore they put it out to nurſe, which coſt them 4*l.*, defendant rejoins, that he was ready to repay the money and ſave the pariſh harmleſs: Upon this they demurred, and had judgment, becauſe the rejoinder is a departure; for the defendant ought to have taken iſſue upon the child's being ready to ſtarve; if the plaintiffs had once being at any expence about the child, and were thereupon actually damnified, the defendant being ready to repay the money will not ſave the condition of the bond. 2 Saund. 80. Sid. 444. Mod. 43. 2 Keb. 612. 619. Richards v. Hodges.

In debt on a bond for performance of an award the defendant pleads no award; the plaintiff replies and ſhews it, and the breach; the defendant pleads, that it was not tendered: this is a departure; for though both be neceſſary by the condition of the bond to charge the defendant, *viz.* that an award be made, and that it be alſo tendered, yet he ought to rely on either one or other, either being ſufficient to bar the plaintiff; then, when he chooſes one in his plea, *viz.* that no award was made, he cannot after waive that in his rejoinder, and have recourſe to the other, *viz.* that the award was not tendered. 2 Sand. 189; Sid. 10.

In treſpaſs for breaking his houſe and carrying away his goods, the defendant juſtified as a diſtreſs damage-feaſant; the plaintiff replied, that after the diſtreſs, *viz.* the ſame day, the defendant converted them to his own uſe; and on demurrer the replication was held no departure; for he who abuſes a diſtreſs is a treſpaſſer *ab initio*, and the converting is a treſpaſs or trover, at election; and the bringing treſpaſs determines his election, and the matter in the replication makes good that election; for it proves it a treſpaſs as well as trover. Salk. 221. pl. 1. Gargrave v. Smith.

In covenant for further aſſurances, *&c.*, the defendant by proteſtation ſays, that the plaintiff's counſel did not adviſe, *&c.*, and for plea ſaith, that he was not required; the plaintiff replies, that *J. S.* his counſel, adviſed a releaſe, and that he required the defendant to ſeal it, which he refuſed; the defendant rejoins, that he did not refuſe; this is a departure. Dyer, 31. b. Doct. pl. 120.

The defendant pleads in bar a leaſe for fifty years made by a corporation, and after in the rejoinder pleads the proviſo in the ſtatute 31 *H.* 8. *c.* 13. which makes ſuch leaſes good for 21 years; it was held, that the pleading the proviſo was a departure, as not enforcing that which went before in the bar. Dyer, 102, Doct. pl. 121.

If it be pleaded, that the parties to a fine *nihil habuerunt*, which is denied, and the defendant rejoin, that the party had only a uſe in the land; this is a departure. Dyer, 291. Doct. pl. 121.

If in bar to an action on a bond, conditioned to ſave the plaintiff harmleſs, the defendant pleads, that he did ſave harmleſs; and the plaintiff in his replication ſhews a damnification; to which Sand. 117. Lev. 194.

the defendant rejoins, that he had not notice thereof; this rejoinder is a departure.

6 Mod. 115 *per* Holt, C. J.

If a man lay a day in his declaration that is not material, and the defendant by his plea make it material, and then the plaintiff in his replication vary from the day in the declaration, it will be a departure (*a*): otherwiſe, (*b*) if the day had not been material by the plea.

[(*a*) This part of the doctrine in the text is nothing more than a looſe *dictum* of my Lord Holt, and is contradicted by authorities. For, if the time laid in the declaration is immaterial, there, though it becomes material by the defendant's plea, yet the plaintiff in his replication may depart from it; as, in treſpaſs, Co. Lit. 282. a. b. 1 Salk. 222. 2 Ld. Raym. 1015., or trover, Cro. Car. 245. 333. 1 Salk. 222., or upon a general *indebitatus aſſumpſit*, 1 Str. 22. 2 Str. 806. 1 Lev. 110. 1 Keb. 566. 578. 10 Mod. 251. Fort. 375., where the time becomes material by the defendant's plea of a releaſe, tender, or the ſtatute of limitations, &c. And in actions for a tranſitory treſpaſs, where the defendant pleads a local juſtification, the plaintiff, in his replication, may vary from the place laid in the declaration. 1 Ld. Raym. 120.] (*b*) For this *vide* Cro. Car 229. 2 Mod. 31. 1 Salk. 222. 3 Lev. 348. title Traverſe. ——— And that a departure in ſuch caſe may be cured by pleading over and verdict. Lev. 110. Raym. 86. Keb. 566.

Cath. 306. The King v. Larwood. Ld. Raym. 29. 4 Mod. 269. Salk. 167. pl. 1. Skin. 574.

To an information exhibited againſt the defendant, for not taking upon him the office of ſheriff of *Norwich*, the defendant pleaded the ſtatute of 13 *Car.* 2. (*ſt.* 2. *c.* 1. § 12.) by which it is enacted, that a perſon elected into any office in a corporation ſhall be ſuch as within one year before hath taken the ſacrament according to the church of *England*, elſe the election ſhall be void, and averred, that he had not taken the ſacrament, *&c.* at any time within one year next before the election of him to be ſheriff, *&c.*, wherefore the election was void: the Attorney-General replied, and ſet forth that part of the act of uniformity, by which every perſon is obliged to take the ſacrament three times a year according to the liturgy, *&c.* The defendant rejoined, and ſet forth the act of parliament for tolerating diſſenters; to which there was a demurrer; and it was held, that the defendant's rejoinder was a departure from his plea.

Mich. 6 G. 2. in C. B. Owen v. Reynolds. See 2 Barnard. K. B. 193.

In debt upon a bond, conditioned to indemnify the plaintiff from all tonnage of certain coals bought of the defendant due to *W. B.*, the defendant pleaded *non damnificat.*; to which the plaintiff replied, that for 5 *l.* for tonnage of coals bought of the defendant the day of the date of the bond, his barge was diſtrained, and that the defendant had not paid the ſaid 5 *l.*: the defendant rejoined, that no tonnage was due for the coals; to which the plaintiff demurred, ſuppoſing the rejoinder to be a departure from the plea; for the defendant having pleaded generally, that the plaintiff was not damnified, and the plaintiff having aſſigned a breach, the matter of the rejoinder is only by way of excuſe, confeſſing and avoiding the breach, which ought to have been done at firſt, and not after a general plea of indemnity; for rejoinders, it was inſiſted, ſhould ſtrengthen the bar, whereas this is a plain retraction of the plea, that denying the plaintiff has ſuffered any damage, this confeſſing and excuſing it. On the other ſide it was inſiſted, that it was not neceſſary for the defendant to ſet out all his caſe at firſt; and it ſuffices, that his bar is ſupported and ſtrengthened by his rejoinder, which it was urged had been done in

in this case; for the plea being only to enforce the plaintiff to assign a breach, the defendant may come afterwards and shew the breach assigned is not within the meaning of the condition; as, here, the condition is to save the plaintiff harmless from all tonnage due to *W. B.*, plaintiff replies, his barge was distrained for tonnage, but does not aver it was due; then the defendant rejoins, there was no tonnage due, which being confessed by the demurrer, it is certain the plaintiff could not be prejudiced within the tenor of the condition, by which the defendant is obliged only to indemnify the plaintiff against such tonnage, so the plea is directly confirmed by the rejoinder; and of this opinion was the court. Another point was made in this case by defendant's counsel, *viz.* admitting there was a departure, yet, if the plaintiff has assigned for a breach of the condition what is really no breach, whereby it appears he has no cause of action, judgment shall be entered for the defendant; as, in this case, plaintiff has instanced a distress of his barge for tonnage of coals bought of the defendant the day of the date of the bond, and has not ascertained what the coals were, so that they do not appear to be the same coals as are mentioned in the condition, which the court cannot intend, though they are said to be bought upon the day of the date of the condition; for he might buy other coals for what appears to the contrary; and of this opinion also was the court.

## (M) Repleader: And herein,

1. Of the Nature of a Repleader, and Manner of awarding it.

WHEN issue is joined on an immaterial point, or such a point as after trial thereof the court cannot give judgment, as being impertinent or uncertain, and not determining the right (*a*), the court regularly awards a repleader, or gives (*b*) judgment *quod partes replacitent;* in which case the parties must begin again at the first fault which occasioned the immaterial issue. And herein it hath been held, that, (*c*) if the declaration be ill, the bar ill, and the replication ill, the parties must begin *de novo;* but, if the bar be good, and the replication ill, at the replication; and, if the bar and replication be both bad, and the repleader is awarded, it must be as to both.

22 H. 6. 18. Doct. pl. 311. 2 And. 6, 7. 24-5. 4 Leon. 19. Skin 570. 2 Lutw. 1622.

[(*a*) Note: The materiality of these words, "*not determining the right*:" for, if the court see, that by the verdict, as found, substantial justice hath been done, or, if they see that the party's case itself cannot be amended, or would be at all *material*, if put in any shape whatever, in neither of these cases shall there be a repleader. For in no case will a repleader be awarded, but where complete justice may be answered. *Vide* Rex v. Philips, 1 Burr. 292. Rex v. Philips, 1 Str. 394. Symmers v. Regem, Cowp. 510. Taylor v. Whitehead, Dougl. 710.] (*b*) The judgment to replead was, *quia videtur curiæ quod placitum prædictum et exitum superinde junctum est minus sufficiens in lege, ideo dictum est partibus quod replacitent:* and it was objected, that it was not any judgment, but that it ought to have been *ideo consideratum est*, &c. But the court held it a sufficient award to replead, and that this was the form agreeable to the course of the court. Cro. Jac. 6. (*c*) For this *vide* Dyer, 117. 5 E. 4. 108. 19 E. 4. 1. Doct. pl. 311. Dal. 17 pl. 8. 76 pl. 2. And. 31. Raym. 458. 3 Keb. 664. Ld. Raym. 707. Salk. 173. pl. 2. 216. 2 Salk. 579. 6 Mod. 2. Cowp. 510.

If a repleader be denied where it should be granted, or granted where it should be denied, it is error. 2 Salk. 579. 6 Mod. 2.

Roll. Rep. 287. Biſhop of Briſtol v. Sir Stephen Proctor. Dalliſ. 15. pl. 6. Like point.—— But I take it to be now

Upon an iſſue joined in Chancery, on a *ſcire facias* upon a recognizance, the whole record was removed into *B. R.*, and, after a trial had there, the judgment was arreſted, by reaſon of miſawarding the *venire;* and the parties being deſirous to replead, the queſtion was, Whether the repleader ſhould be in Chancery or *B. R.?* And it was held by the judges of *B. R.* that it ſhould be in that court.

the ſettled rule, not to ſuffer the court of King's Bench to alter or amend any iſſue directed out of Chancery, but that for any irregularity herein application muſt be made to the court of Chancery. *Vide* under title Courts, Juriſdiction of the Court of Chancery.

2 Vent. 196. 2 Salk. 579. (*a*) 6 Mod. 2.

It is held, that there can be no coſts to either party on a repleader (*a*), becauſe it is a judgment of the court upon the pleading, and therefore differs from an amendment, which cannot regularly be without payment of coſts.

1 Burr. 304.

[But, ſince the practice of ſetting aſide verdicts has prevailed, repleaders have been rarely granted, ſo that under the modern practice, the courts can direct the coſts to be paid by the party to whom the miſtake in the pleadings is imputable.]

## 2. A Repleader in what Caſes to be awarded.

Cro. Eliz. 227. Doct. pl. 312. 2 Mod. 137. 140. Lev. 32.—— Where iſſue is joined upon a matter not triable. Raym. 458. Cro. Eliz. 131.—— Where the

Herein the general rule is, that if there be an immaterial iſſue, and thereupon a verdict, upon which the court cannot know for whom to give judgment, whether for the plaintiff or the defendant, a repleader is regularly to be awarded; for ſuch immaterial iſſue is not aided after verdict by 32 *H.* 8. *c.* 30. or any of the ſtatutes of jeofail; for, if what is material in the pleadings be not put in iſſue, it is not made neceſſary to be proved on the trial: or, if it be alleged and proved, yet, if it appear inſufficient, ſo as not to be deciſive between the parties, the verdict will be no good foundation for the judgment. But an (*b*) informal iſſue is helped by the verdict.

time is immaterial, and yet made part of the iſſue. Latch, 92. 2 Sand. 318. 2 Lev. 12. Hard. 40. —For an iſſue on an immaterial traverſe, Moor, 693. pl. 959. Cro. Eliz. 456. Winch, 76. Cro. Eliz. 228. Goulſ. 39. pl. 15. Savil, 78. 1 Sand. 22. (*b*) If the plea on which the iſſue is joined have no colourable pretence in it to bar the plaintiff, or if it be againſt an expreſs rule in the law; then the iſſue is immaterial, and ſo as if there was no iſſue, and therefore it is not aided by the ſtatute: but if it have the countenance of a legal plea, though it want neceſſary matter to make it ſufficient, there ſhall be no repleader, becauſe it is helped after verdict. Moor, 867. pl. 025. & *vide* Lev. 32. Carth. 371.——Diverſity where an iſſue is misjoined, and where there is no iſſue. 2 Roll. Rep. 187. Cro. Jac. 580. 2 Leon. 195. 3 Leon. 67. Godb. 56.

Cro. Jac. 5. Cox v. Cropwell.

In trover againſt baron and feme upon a finding of the goods by the feme during coverture, and a converſion to her uſe, they pleaded *quod ipſi non ſunt culpabiles;* which was held ill, becauſe there was no tort ſuppoſed in the huſband, and therefore a repleader was awarded, and the plea made *quod ipſa non eſt inde culpabilis.*

Owen, 53. Houſe and Elkin v. Grindon, S. P. ſaid to

If in debt upon an obligation by the ſheriffs of *London* againſt *J. S.* he pleads, that he being arreſted by precept out of *B. R.*, appeared at the day according to the condition of the bond, and thereupon iſſue is joined; in this caſe there ſhall be a repleader for

for the apperance being entered of record, as it ought to be, the same is triable by the record, and not by a jury.

Bret v. Shepherd, the same term. Leon. 90. have been adjudged between

In trover for divers trees, the defendant pleads, that Queen *Mary* was seised in fee of the manor of *D.*, where those trees were growing, and that she granted it to the defendant in tail, whereby he was seised thereof, and that *J. S.* cut the said trees, and granted them to the plaintiff, who lost them, and the defendant found them, and converted them, *&c.*, the plaintiff replies, *de injuriâ suâ propriâ*, &c., and thereupon issue is joined: it was held, that pleading *de injuriâ suâ propriâ* was ill, where the defendant makes justification by claiming an interest in the freehold to himself; but that where one claims not any interest, but justifies by command or authority derived from another, it is otherwise; wherefore a repleader was awarded. Cro. Eliz. 539. Archbishop of Canterbury v. Kemp.

In battery the baron justifies, for that the plaintiff assaulted his feme, in aid of whom, *&c.* the feme by herself pleads and justifies *de son assault demesne*; the plaintiff saith, *de injuriâ suâ propriâ absque tali causâ*; and both issues found for the plaintiff, and damages entirely given; and now alleged in arrest of judgment, that the trial was ill; for the feme by herself cannot plead, and the damages being entirely assessed, all was ill; and of that opinion was the court, and awarded that they should replead. Cro. Jac. 239. Watson v. Thorpe and his wife.

If in debt upon a bond, conditioned for the payment of 60*l.* upon the 25th of *June*, the defendant pleads payment of the said 60*l.* upon the 20th day of *June secundum formam & effectum conditionis*; and thereupon issue is joined and a verdict found, that he did not pay the said 60*l.* upon the 20th of *June*; the plaintiff shall not have judgment, for the issue is taken *debors* the matter of the condition, and so void; and it might not be paid the 20th, and yet might be paid the 25th; but it is held, that if it had been found for the defendant, *viz.* that the money was paid the said 20th day, perhaps the verdict would have made it good. Cro. Jac. 435. Holmes v. Brockett.

[A bond was conditioned for the payment of money *on or before* the 5th of *December*. Plea of payment on the 5th of *December*. Replication, issue, and verdict for the plaintiff. This was holden to be an immaterial issue, and a repleader was therefore awarded: though it would have been exclusive, if found for the defendant; but did not conclude, when found for the plaintiff. And though this was a slip of the defendant, yet, as it did not determine the question, a repleader was awarded.] Tryon v. Carter, 2 Str. 994. 1 Burr. 302. It was said by Buller, J. to be a rule, to which he could find no case of tendering it.

any exception, never to grant a repleader, when the issue is found against the party Dougl. 396.

In an action of debt upon a simple contract, payment was pleaded at *A.*: plaintiff traverses, that the payment was at *A.*: and a verdict, that the defendant did not pay at *A.* It was moved in a writ of error, that there ought to have been a repleader; otherwise, if the verdict had been found for the defendant: but the court affirmed the judgment. Keb. 662. Lucas v. Harlow. Q.

If in debt upon a single bill the defendant pleads payment without an acquittance, and thereupon issue is joined, and found for 5 Co. 43. Nichol's case.

the plaintiff, he ſhall have judgment; for though payment without an acquittance is no plea to a ſingle bill, yet, becauſe iſſue was joined upon an affirmative and a negative, and a verdict for the plaintiff, he ſhall have judgment *.

* See the ſtat. 4 Ann. c. 16. § 12.

Lev. 32. Serjeant v. Fairfax.

Debt for rent againſt leſſee for years, defendant pleads, that before any rent due he aſſigned the term to another, of which plaintiff had notice; iſſue upon the notice, and verdict for the defendant, but no judgment was given, but a repleader awarded, in regard the iſſue was joined on a thing not material.

2 Mod. 139. Read v. Dawſon.

In debt on a bond againſt the defendant as executor, iſſue was joined, whether the defendant had aſſets or not, on the 30th day of *November*, which was the day on which he had the firſt notice of the plaintiff's original writ; and it was found for the defendant, that then he had not aſſets; and this being held an immaterial iſſue, (for though he had not aſſets then, yet, if he had any afterwards, he is liable to the plaintiff's action,) a repleader was awarded.

Cro. Car. 78. Purchaſe v. Jegon. Jon. 140. Latch, 158. Noy, 85. S. C.

If in debt upon an obligation, conditioned for the payment of 100*l.* upon the 31ſt day of *September* following, the defendant pleads payment the ſaid 31ſt day according to the condition; and thereupon iſſue is joined, and found, that the money was not paid upon the ſaid day, the plaintiff ſhall have judgment; for though the iſſue is upon an impoſſibility, there being no ſuch day, yet the jury finding it not paid at the day, or at any time before, in effect find it was never paid, which is a good verdict.

2 Lev. 164. Maſters v. Wood.

Treſpaſs for battery and falſe impriſonment ſuch a day and place; the defendant juſtified at another day and place by virtue of a writ and warrant from the ſheriff, *abſque hoc*, that he is guilty *alitèr vel alio modo*, *vel* at any other place; the plaintiff replied, that he is guilty *alitèr & alio modo*, and at another place; whereupon iſſue was joined, and verdict for the plaintiff; but for the badneſs and uncertainty of the iſſue, upon motion in arreſt, judgment was ſtaid, and a repleader awarded.

2 Vent. 196.

In *aſſumpſit* againſt an adminiſtratrix, the defendant pleaded *quod ipſa non aſſumpſit* inſtead of the inteſtate; and after verdict a repleader was awarded.

Roll. Abr. 200. Yelv. 65. Cro. Jac. 67. S. C. and Cro. Eliz. 752. Style, 167. Palm. 524. L. P.

But, if on an iſſue tendered by the plaintiff the defendant joins the *ſimilitèr* by the plaintiff's name, or the plaintiff joins the *ſimilitèr* by the defendant's to an iſſue tendered by the defendant; this ſhall be amended, there being a negative and affirmative before between the plaintiff and defendant, which is the pattern from whence the joining of that iſſue is to be taken; and this being a plain miſtake, as appears from the nature of the thing, of one man's name for another.

Vent. 122. Reynell v. Heal, 2 Keb. 788. S. C.

In an action upon a penal ſtatute the defendant pleaded *non debet* to the informer, & *de hoc ponit ſe ſuper patriam*; and iſſue was joined, & *prædict.* the informer *ſimilitèr*, without mentioning the king; and after a verdict for the plaintiff a repleader was awarded †.

† *Qu.* As to the law in this caſe, the King not being a party to the ſuit, but the informer the only plaintiff, though he ſues for the King and himſelf?

If

If the jury do not find aſſets to a certain value, the verdict is inſufficient, and a repleader ſhall be granted, and the iſſue tried by another inqueſt. 40 E. 3. 15. Doct. pl. 313. 6 Mod. 3.

### 3. Repleader at what Time to be awarded.

It ſeems, that at common law, a repleader was as well allowed before, as after, trial, becauſe a verdict did not cure an immaterial iſſue; but, (*a*) it ſeems, to be now ſettled, that no repleader ought to be allowed before trial, becauſe the fault of the iſſue may be helped by the trial by the ſtatute of jeofails. Salk. 579. (*a*) 3 Keb. 664. 6 Mod. 2. S. P. and that it is diſcretionary in the court, but not adviſable, ſince the verdict may cure immaterial or informal iſſues.

It is held by a multitude of authorities, that after a demurrer the repleader is not to be admitted, becauſe by the demurrer the parties have put themſelves on the judgment of the court. 5 Co. 52. Ridgeway's caſe. Doct. pl. 311. Poph. 42. Savil, 89. Latch, 148. Leon. 79. Moor, 461. pl. 644. 867. pl. 925. Roll. Rep. 271. And. 168. Lev. 142. 6 Mod. 102.——But in 3 Lev. 20. there is an inſtance of a repleader after a demurrer; and in 3 Lev. 440. it is ſaid, that there was a repleader after demurrer and ſolemn argument; but theſe caſes have of late been denied to be law.

It is ſaid to have been uſual in ancient times to award a repleader upon a writ of error in *B. R.* but it ſeems to be now agreed, that there can be no repleader upon a writ of error. 2 Sand. 319. 2 Lev. 12. 2 Keb. 789. 6 Mod. 102.

It is held, that no repleader can be awarded after a default. 2 Salk. 579. 6 Mod. 3.—No repleader after a diſcontinuance. Comb. 323. Ld. Raym. 20. Salk. 219. pl. 4.

## (N) Demurrer: And herein,

### 1. The Definition and Nature of a Demurrer.

A (*b*) Demurrer in (*c*) pleading is an admiſſion by the adverſe party of the fact charged in the count or declaration, plea, replication, &c. (*d*), and refers the law ariſing on ſuch fact to the judgment of the court. Doct. pl. 115. Finch, c. 40. (*b*) Comes, ſays my Lord Coke, from the Latin word *demorari*, to abide, in law. Co. Lit. 71. b. (*c*) As there may be a demurrer upon counts and pleas, ſo there may be of aid prior, voucher, receit, waging of law, and the like. Co. Lit. 72. a.——For demurring on evidence, *vide infra*. (*d*) May be taken to the rejoinder, &c. and to a ſpecial as well as a general plea; for all parts of pleading to iſſue ought to be according to the rules of law; and if any part fail, the whole is naught, and may therefore be demurred unto. Co. Lit. 72. a. Lil. Reg. 435.

It is termed in ſome books an iſſue in law, and therefore in a declaration, plea, &c. there may be two independent iſſues, *viz.* a demurrer, which is the iſſue in law, determined by the court; and an iſſue in fact, determinable by the jury. But this muſt be underſtood as to diſtinct parts of the ſame declaration, plea, &c., for it is never allowed the defendant to plead and demur to the ſame fact, this being a duplicity that would draw the matter to different judicatures, and would be vexatious and expenſive, were it admitted; for in ſuch caſe the party would demur ſpecially Co. Lit. 71, 72. Doct. pl. 115. Lil. Reg. 438. 5 Co. 104. Dyer, 21. a. 87. b.

to form, and if he was over-ruled there, then he would deny the fact.

Cases in L. and Eq. 280. Halfon v. Jefferies.

So, on the ſtatute 4 & 5 *Ann. c.* 16. which enables defendants by leave of the court to plead ſeveral pleas, &c., it hath been refuſed to allow a defendant to plead and demur to the ſame declaration; for a demurrer is ſo far from being a plea, that it is an excuſe for not pleading; and it would be abſurd for the party to plead, and at the ſame time pray that he might not plead *.

* But the defendant may demur to one count, and plead to another, for ſeparate counts are as ſeveral declarations. [And when there are ſeveral counts in a declaration, ſome of which are good in point of law, and the reſt bad, the defendant can only demur to the latter; for if he were to demur generally, to the whole declaration, the court would give judgment againſt him. 1 Saund. 286. 2 Saund. 380. 1 Wilſ. 248. But, if a plea or replication, which is entire, be bad in part, it is bad for the whole. 2 Saund. 124. 1 Salk. 312. 1 Term Rep. 40. 3 Term Rep. 374.]

Co. Lit. 72. a. 125. b. Doct. pl. 316. Palm. 527. S. P. because the

If there be a demurrer to part, and an iſſue for part, the more orderly courſe is to give judgment upon the demurrer firſt; but yet it is in the diſcretion of the court to try the iſſue firſt if they will.

jury can then aſſeſs the damages on the whole.—[In practice, it is uſual and advifable to determine the iſſue in law firſt, for the following reaſons: firſt, that the determination of an iſſue in law is generally more expeditious, and leſs expenſive, than the trial of an iſſue in fact: ſecondly, that if the iſſue in law go to the whole cauſe of action, and be determined againſt the plaintiff, it is concluſive, and there is no occaſion afterwards to try the iſſue in fact; whereas, if the iſſue in fact be firſt tried, and found for the plaintiff, he muſt ſtill proceed to the determination of the iſſue in law, and if that be found againſt him, he will not be allowed his coſts of the trial of the iſſue in fact: and laſtly, that whether the demurrer goes to the whole, or part of the cauſe of action, if the plaintiff proceed to argue it firſt, and the court ſhould be of opinion againſt him, he may amend as at common law; but, after the cauſe has been carried down to trial, he cannot amend any farther than is allowable by the ſtatutes of amendment. Tidd's Pr. 476, 7.]

Salk. 219. pl. 6. *per cur.*

If there be a demurrer to part, and an iſſue upon other part, and judgment be given for the plaintiff upon the demurrer, he may enter a *non pros* as to the iſſue, and proceed to a writ of inquiry on the demurrer: but without a *non pros* he cannot have a writ of inquiry, becauſe on the trial of the iſſue the ſame jury will aſcertain the damages for that part to which the demurrer was.

## 2. The Manner and Form of demurring; and therein, of joining in Demurrer, and waiving thereof.

Co. Lit. 7. b. Yelv. 5, 6. Where the ſubſtantial part of the demurrer was in, though ill in form, the court held it a demurrer. *Vide* 5 Mod. 132.

The words of a demurrer, when to the declaration, are *quia narratio*, &c. *materiaque in eâdem contenta minus ſufficiens in lege exiſtit*, &c.; and to a plea are *quia placitum*, &c. *materiaque in eodem contenta minus ſufficiens in lege exiſtit*, &c. *unde pro defectu ſufficientis narrationis ſive placiti*, &c. *petit judicium*, &c.; to which the adverſe party replies, *quod narratio*, or *placitum prædictum*, &c. *materiaque in eodem contenta bon. & ſufficien. in lege exiſtunt*, &c. *& petit judicium*, and thereupon the demurrer is ſaid to be joined.

Co. Lit. 72. b.

In ſome caſes a man ſhall allege ſpecial matter, and conclude with a demurrer; as, in an action of treſpaſs brought by *J. S.* for the taking of his horſe, the defendant pleads, that he himſelf was poſſeſſed of the horſe until he was by one *J. S.* diſpoſſeſſed, who

who gave him to the plaintiff, &c., the plaintiff ſaith, that *J. S.* named in the bar, and *J. S.* the plaintiff, are all one perſon and not divers; and to the plea pleaded by the defendant in the manner, he demurred in law; and the court held the plea and demurrer good, and that without the matter thus alleged he could not demur.

In a *quare impedit* the patron pleaded one plea in bar, and the incumbent the ſame plea by himſelf; the Queen demurred thus, *Quoad ſeparalia placita per def. ſeparaliter placitat. dicta domina regina neceſſe non habet nec per legem terræ tenetur reſpondere; & per cur.*: the demurrer ought to have been ſeveral on each plea by itſelf. Leon. 139. The Queen v. Archbiſhop of Canterbury and others.

If a defendant demur in abatement, the court will notwithſtanding give a final judgment, becauſe there cannot be a demurrer in abatement; for, if the matter of abatement be extrinſick, the defendant muſt plead it; if intrinſick, the court will take notice of it themſelves. Salk. 220. pl. 7. Dominique v. Davenant. *Vide* 2 Hawk. P. C. c. 32.

After the plaintiff and defendant have joined in the iſſue, which is to be tried betwixt them, neither of them (*a*) can demur without the conſent of the other; for by joining in the iſſue they have admitted the pleadings to be good, and ſufficient to try the iſſue. Show. 213. Lil. Reg. 437.

(*a*) A demurrer to an appeal hath been received after iſſue joined. Cro. Eliz. 196.——But it hath been adjudged, that a demurrer to an indictment ought not to be received after verdict. Sid. 208.

So, it hath been reſolved, that after a demurrer there cannot be a repleader; for the parties, by their mutual conſent, having put themſelves on the judgment of the court, cannot without leave of the court replead. Cro. Eliz. 62. 318. 3 Co. 52. b.

There cannot be (*b*) a demurrer to a demurrer; and if there be, it makes a diſcontinuance, for there is no difference between pleading over when iſſue is offered, and not joining in demurrer, but pleading over, both are alike, and make a diſcontinuance. Salk. 219. pl. 4. Ld. Raym. 20.

(*b*) It is ſaid that one may demur to a demurrer for the doubleneſs of it, for a demurrer ought to have formality and certainty in it to avoid barbariſm, and inveigling of the court; but, if one that might demur do not demur to it, but join in the demurrer, he cannot demur afterwards, for he hath ſlipped his advantage. Lil. Reg. 438.——And in caſe of a demurrer to a plea in abatement, it is ſaid, one may demur upon that demurrer. But *per* Holt, C. J. that is, where the demurrer is not appoſite; but, if the demurrer be proper and appoſite, you muſt join. Comb. 306.

It is ſaid, that there are the ſame rules for joining in demurrer as there are in pleading; and that in criminal caſes, not capital, the courſe is to allow the party four days to join in demurrer; but it hath been held, that in capital caſes the party muſt join in demurrer *inſtanter*. Skin. 217. pl. 1. *Vide* Layer's trial. State Trials, 6 V. 229.

If a demurrer be entered it cannot be waived, except both the plaintiff and defendant conſent unto it, nor then without leave of the court; becauſe by the demurrer both parties have ſubmitted the matters in law in queſtion betwixt them to the judgment of the court. Cro. Car. 513. Jenk. 128. 5 Mod. 18.

A demurrer is not to be allowed unleſs it be ſigned by counſel. Lil. Reg. 436. But a demurrer upon a challenge to a jury is good without a counſel's or ſerjeant's hand; and as ſoon as it is agreed on at the bar, the ſame is to be entered up without further circumſtances. 3 Leon. 222.

3. What

### 3. What Facts are admitted by a Demurrer.

Co. Lit. 72. a. Dyer, 21. 5 Co. 69. Doct. pl. 119. Hob. 81. Sand. 353. Carth. 31.

It is laid down as a general and unconteſted rule, that a demurrer admits all ſuch matters of fact as are ſufficiently pleaded.

34 H. 6. 5. Doct. pl. 117.

And therefore if in waſte the defendant demurs to the declaration, and it is adjudged againſt him, there ſhall iſſue no writ of waſte, this being admitted by the demurrer; but a writ ſhall iſſue to inquire of the damages.

Hob. 56.

But matters not ſufficiently pleaded are not admitted by a demurrer: ſo, in a demurrer upon a matter in law, ſays my Lord *Hobart*, though the parties will join upon ſome one point, upon which, if it ſtood alone, judgment ſhould be given for the one party, yet, if upon the whole record matter in law appears why judgment ſhould be given againſt the ſaid party, the court muſt determine ſo; for it is the office of the court to determine the law upon the whole record, and the conſent of parties cannot prejudice their opinions, nor diſcharge them of their office in that point.

2 Sand. 379, 380. (*a*) In trover for ſeveral things, and among the reſt *de duobus fulcris*, the defendant demurred, and Holt, Ch. J. refuſed to give judgment *quod nil capiat*, ſaying, the plaintiff may take ſeveral damages, and releaſe as to this, and then take judgment as to the reſt, and all would be well. Salk. 218. pl. 1.

If in covenant divers breaches are aſſigned, ſome of which are good and others ill, and the defendant demurs to the whole declaration, the plaintiff ſhall have judgment for (*a*) thoſe which are well aſſigned, and for the others ſhall be barred.

### 4. How far a Judgment on a Demurrer is peremptory.

(*b*) So, where a ſtatute enacts, that a perſon convicted of ſuch an offence ſhall forfeit ſo and ſo, a conviction on a demurrer hath been held ſufficient. 11 Co. 58. Roll. Rep. 89.

It ſeems to be agreed as a general rule, that a (*b*) judgment on a demurrer is as concluſive and binding, as if the ſame had been after a verdict, *&c.*

Jenk. 306. [Gilb. C. P. 53. 1 Ld. Raym. 351. Say. Rep. 46. 2 Wilſ. 368.] (*c*) Dyer, 69. pl. 35. 341. pl. 5.——If after a demurrer a perſon ſhall have the advantage of his age, *quære* 3 H. 6. 46. Doct. pl. 116.

But upon a plea to the juriſdiction, perſon, writ, aid prior, view, eſſoin (*c*), voucher, and demurrer joined upon ſuch plea or prayer, and ruled againſt him who demurs, there is only judgment to anſwer over.

Tidd's Pr. 478, 9.

(*d*) 1 Str. 425.

[But in other caſes, the judgment is interlocutory or final, according to the nature of the action: if the action be for damages, in *aſſumpſit*, &c. it is interlocutory, and ſhould be ſigned, on treble-penny ſtamped paper, with the judgments, after which the damages ſhould be aſſeſſed, on a writ of inquiry, or reference to the Maſter: but in *debt*, &c. for a ſum certain, the judgment is final, and there being no neceſſity for a rule for judgment (*d*), the plaintiff may immediately tax his coſts, and take out execution.]

It

It ſeems to be the better opinion, that a general demurrer, concluding in bar of an appeal or indictment, or a demurrer to a plea in bar which admits the fact, or to a replication to ſuch a plea, is peremptory and concluſive; ſo that if the indictment be good, judgment and execution ſhall go againſt the priſoner. *Vide* 2 Hawk. P. C. c. 32.

But it hath been adjudged, that if an appellee demur in law to an appeal by reaſon of the inſufficiency of the declaration, or generally demur to the declaration, with a concluſion *et petit judicium de narratione illâ, & quod narratio illa caſſetur*, &c., ſuch demurrer ſhall not conclude him from pleading over to the felony, either at the ſame time with the demurrer, or after it ſhall be adjudged againſt him. Dyer, 38. Cro. Eliz. 196.

But in criminal caſes, not capital, if the defendant demur to an indictment, *&c.*, whether in abatement or otherwiſe, the court will not give judgment againſt him to anſwer over, but final judgment; for it ſeems, that in ſuch caſes there can be no demurrer properly in abatement, except it be to a plea in abatement, or to a replication to ſuch a plea. Cro. Eliz. 196. Raſt. Ent. 160.

## 5. Of the Difference between a general and ſpecial Demurrer.

A demurrer is ſaid to be general or ſpecial (*a*); general, where no particular cauſe is alleged; ſpecial, where the particular thing objected to is pointed out, and inſiſted upon as the cauſe of demurrer. And herein it is ſaid (*b*), that as a general demurrer confeſſeth all ſuch matters of fact as are ſufficiently pleaded, ſo, he that demurs ſpecially can take no advantage of any other matter of form than what he hath expreſſed in his demurrer; but he may of any other matter of ſubſtance. Co. Lit. 72. a.

(*a*) The words of a general demurrer are, *quod breve vel narratio vel placitum, &c. materiaque in eodem continent. minus ſufficien. in lege exiſt.*, &c. ——— A demurrer, becauſe *incerta & caret forma*, is a general demurrer. Show. 212. Comb. 297. (*b*) 10 Co. 88.

And herein it is ſaid, that the ancient practice was, to demur ſpecially, and that the way was, when the pleadings were drawn at the bar, to make the exception immediately, and the other party might mend if he pleaſed, or might demur if he durſt venture it; and *Hale* ſays, that though now they are put in paper, yet ſuch a courſe ſhould be obſerved, that perſons may not be caught by demurrers contrary to the original intention of them. Vent. 240. ——Good rule to be obſerved in demurrers, always to ſhew the cauſe of demurrer. 2 Bulſt. 267. *per* Coke.

But, as the law requires regularity in the proceeding, and that all parts of pleading ſhould be according to approved precedents, it ſeems an eſtabliſhed rule, not to admit the party to amend after a demurrer entered of record; though it hath been held, that if the plaintiff declares and the defendant pleads, and the plaintiff replies and the defendant demurs, and the plaintiff joins in demurrer, yet the plaintiff may move to amend on payment of coſts, if the cauſe be ſtill in paper: [Indeed, the very intent of requiring miſtakes, in point of law, to be ſhewn for cauſe of demurrer, was, to give the party an opportunity of amending. And even where the proceedings are entered on record, and the demurrer has been argued, Yelv. 38. Cro. Jac. 13. Bulſt. 204. 2 Vent. 142. 3 Lev. 39. 6 Mod. 263. 3 Mod. 235. 2 Salk. 520. Gilb. C. P. 114, 15. 2 Str. 846. 1 Barnard. K. B. 213. 220. 2 Saund. 402.

2 Str. 735. 954. 976. Ca. temp. Hardw. 42. 1 Burr. 321. Dougl. 330. Barnes, 9. 21. 25. 2 Burr. 756.

argued, the court will give leave to amend, where the juſtice of the caſe requires it, and there is any thing to amend by. The court, however, will always take care, that if one party obtain leave to amend, the other party ſhall not be prejudiced or delayed thereby.] So, a party may withdraw a demurrer not entered of record, and move to amend.

Tidd's Pr. 450. Dougl. 385. 452.

[And leave hath been ſometimes given to a party to *withdraw* his demurrer, after it has been argued, and to plead or reply *de novo*, in order to let in a trial of the merits. Thus, after a demurrer to the defendant's plea had been argued, and the matter ſtood over for the judgment of the court, a rule was made to ſhew cauſe, why the plaintiff ſhould not have leave to withdraw his demurrer, and reply to the plea; which rule, no cauſe being ſhewn, was afterwards made abſolute. But this is altogether diſcretionary in the court. Therefore, where to an action of debt on a bail-bond the defendant pleaded there was no bill of *Middleſex*, and the plaintiff demurred, the court, after delivering their opinion in favour of the defendant, refuſed to give the plaintiff leave to withdraw his demurrer, and amend: And by *Wright*, J. —It is not uſual to amend, after a demurrer has been argued, and the opinion of the court is known: and it is certainly improper to give leave in the preſent caſe, it being an action againſt bail, whom the court is always inclined to favour.—So, where the defendant rejoined to ſeveral replications in treſpaſs, and demurred to others, and a verdict was found for him upon the iſſues in fact, and contingent damages were aſſeſſed upon the demurrers, which were afterwards over-ruled, the court refuſed to let the defendant withdraw his demurrers and plead to iſſue: And by *Denniſon*, J. —Where the demurrer is firſt argued, before any trial of the iſſues, the court will give leave to amend; as in the caſe of *Giddins* v. *Giddins* (*Say. Rep.* 316.): But this is an attempt to amend iſſues in law, after a verdict has been found on the iſſues in fact, and contingent damages aſſeſſed, of which there never was an inſtance. And we do not know where it would end, nor how the cauſe could be again carried down to trial. The court cannot help ſeeing that this is upon record: here are verdicts, and contingent damages found. The caſes of amendment cited are, where the whole is ſuppoſed to be in paper; elſe the court could not have done it. We have no authority to do this, after it is plainly upon record.]

Robinſon v. Rayley, 1 Burr. 321.

Sand. 285. Duppa v. Mayo.

Alſo, where a perſon hath good cauſe of demurrer at the time of his demurring, no act of the other party afterwards will make it naught; as, if in debt for rent, the plaintiff declares for more than appears by his own ſhewing to be due to him, and for which the defendant demurs, the plaintiff cannot afterwards enter a *remittitur* for the overplus; for by this means the defendant, by relying on his demurrer, might be tricked in his defence.

But, for the better underſtanding the difference between a general and ſpecial demurrer, we ſhall briefly conſider,

6. What

6. What Things are good on a general Demurrer, that would be otherwiſe on a ſpecial one.

Herein the eſtabliſhed diſtinction is, that matters of ſubſtance, that is, the omiſſion of ſuch material things as are neceſſary to ſhew a right in the plaintiff, or material for the defendant in his plea, may be taken advantage of on a general demurrer; but matters of form merely muſt be ſpecially alleged, and aſſigned as cauſes of demurrer. For the law, ſays my Lord (a) *Hobart*, requires in pleading two things; *1ſt*, That it be in matter ſufficient: *2dly*, That it be deduced and expreſſed according to the forms of law; and if either the one or the other of theſe be wanting it is cauſe of demurrer, with this diſtinction, which ſeems to be founded on the common law, and is fully explained and confirmed by the ſtatutes 27 *Eliz. c.* 5. & 4 *Ann. c.* 16.

For this diſtinction *vide* 10 Co. 83. Dr. Leyfield's caſe. Doct. pl. 118. Style, 41. Latch, 185. Roll. Rep. 112. Co. Lit. 72. a. Hob. 127. 164. Hutt. 15. Savil, 78. 87.

Palm. 368. Leon. 44. 2 Roll. Rep. 306. Sid. 308. Sand. 9. 31. 98. 337. 2 Sand. 190. 5 Mod. 18. Carth. 66. 88. Salk. 291. pl. 5. (a) Hob. 232. 2 Ld. Raym. 798. 7 Mod. 71. 2 Salk. 678. pl. 5.

By the 27 *Eliz. c.* 5. § 1. reciting, "That exceſſive charges and "expences, and great delay and hindrance of juſtice hath grown "in actions and ſuits between the ſubjects of this realm, by "reaſon that, upon ſome ſmall miſtaking, or want of form in "pleading, judgments are often reverſed by writs of error, and "oftentimes upon demurrers in law, given otherwiſe than the "matter in law and very right of the cauſe doth require, whereby "the parties are conſtrained either utterly to loſe their right, or "elſe after long time, and great trouble and expences, to renew "again their ſuits; for remedy whereof it is enacted, that after "demurrer joined, and entered in an action or ſuit in any court "of record within this realm, the Judges ſhall proceed and give "judgment according as the very right of the cauſe and matter in "law ſhall appear unto them, without regarding any imperfection, "defect, or want of form in any writ, return, plaint, declaration, "or other pleading, proceſs, or courſe of proceeding whatſoever, "except thoſe only which the party demurring ſhall ſpecially and "particularly ſet down and expreſs, together with his demurrer, "and that no judgment to be given ſhall be reverſed by any writ "of error for any ſuch imperfection, defect, or want of form as "is aforeſaid, except ſuch only as is before excepted."

And § 2. it is further enacted, "That after demurrer joined and "entered, the court, where the ſame ſhall be, ſhall and may, by "virtue of this act, from time to time amend all and every ſuch "imperfections, defects, and wants of form, as is before men-"tioned, other than thoſe only which the party demurring ſhall "ſpecially and particularly expreſs and ſet down, together with "his demurrer, as is aforeſaid."

There is a proviſo in this act, that it ſhall not extend to criminal proceedings.

It hath been frequently adjudged, that if a plea be double no advantage can be taken thereof on a general demurrer; but the

Co. Lit. 72. Roll. Rep. 112.

Lutw. 4. party must shew (a) specially in what the doubleness consists, being only matter of form, and clearly within the above-mentioned statute 27 *Eliz. c.* 5.

(a) In demurrer for duplicity, it is not sufficient to demur *quia duplex est*, or *duplicem habet materiam*, but the party must shew wherein; for the statute, by requiring to shew cause, intended to oblige the party to lay his finger upon the very point. Salk. 219. pl. 5. 2 Ld. Raym. 798. 7 Mod. 71. 2 Salk. 678. pl. 5. *per* Holt, Ch. J.

Roll. Rep. 112. Saunders v. Crawley. As, in debt upon an obligation for performance of articles, which was to pay so much at two days in certain, the defendant said he paid accordingly, the plaintiff replied that he had not, this was held a double plea, because it went to both days, yet aided on a general demurrer.

10 Co. 94. a. Doct. pl. 116. Hob. 127. Jenk. 306. So, if the defendant pleads a plea which amounts to the general issue, this is but matter of form, and must be taken advantage of on a special demurrer: also, at common law, if a defendant had pleaded a plea which amounted to the general issue, and the plaintiff had demurred thereupon; if the defendant had refused to plead the general issue, but instead thereof joined in demurrer, the court determined it against him.

5 Mod. 18. Also, it is held, that if a special matter is pleaded, which looks like the colour of a plea, but amounts to the general issue, it is no cause of demurrer; as, if in debt you plead a release, though you might have given it in evidence on *nil debet*, yet it is no cause of demurrer: so, in debt for rent, if you plead entry and expulsion, it is no cause of demurrer, though it may be given in evidence on *nil debet*.

Lil. Reg. 436. But, where an act of parliament gives the party privilege to plead the general issue, and he pleads specially, if such special plea be faulty the plaintiff may demur to it; for though he needed not to have pleaded specially, yet having done so, his plea must be agreeable to the rules of law.

Lil. Reg. 437. There must be a special demurrer to a negative pregnant, that is, a negative plea, which doth also contain in it an affirmative: so, to an argumentative plea, that is, a plea which concludes nothing directly, but only by way of argument or reasoning; for the court will intend every plea to be good till the contrary doth appear.

Cro. Eliz. Oglethorp v. Hyde; *& vide* Hob. 13. Moor, 856. Co. Lit. 303. In debt upon an obligation to perform covenants, the defendant pleaded generally performance of covenants, where some were in the negative, and some in the affirmative; and this was held to be but matter of form, and aided by the statute 27 *Eliz. c.* 5. except the party sheweth for cause of his demurrer, that some of the covenants are in the negative, and some in the affirmative, for the court shall adjudge according to the truth of the matter: but, if any of the covenants are in the disjunctive it is otherwise, for the court cannot know which of them in the disjunctive he hath performed.

Comb. 297. Gibbs v. Cope. In debt upon a bond for performance of covenants in an indenture of apprenticeship, several breaches were assigned, and the defendant demurred generally; and *per Holt*, C. J. you could not take advantage of the assignment of several breaches even at common law, without shewing it for cause; and though in this case there

there were the words *incerta & caret forma*, yet it was held but a general demurrer, and therefore ill.

But, though matters of form are aided upon a general demurrer, yet there muſt be ſufficient appear to the court to ground their judgments upon; and it is not enough that the party hath right, but ſuch right muſt be diſcloſed to the judges in the record ſo as to enable them to pronounce upon it. Hob. 233.

And therefore it hath been held, that if an executor or adminiſtrator brought an action of debt, and did not produce their probate or adminiſtration, that this was not aided. Hob. 233. But this is now aided by the expreſs words of 4 & 5 Ann. c. 16. which *vide* title Amendment, letter (B).

So, if a man plead a conveyance of a rent, or the like, that cannot paſs without deed, without (*a*) producing the deed in his plea it is not aided; for it is not enough for the party to ſay that he is executor, or that the rent was granted to him, but the court muſt ſee and judge of it, elſe the right appears not; and the adverſe party may cauſe the deed to be enrolled, which makes it a part of the plea, whereupon the court ſhall judge whether it maintain the plea or not. Hob. 233. 10 Co. 88. Cro. Jac. 178. 613. (*a*) That the omiſſion of *profert in cur.* the deed pleaded, is only matter of form, which the party demurring cannot take advantage of upon a general demurrer, and that when oyer of the deed is demanded, it is preſumed that the deed is in court, and that *ei legitur*; the reading is the act of the court. Sid. 308.

So, if the means be wanting whereby the right ſhould be made to appear, it is incurable: as, if a man bring an action of debt upon an obligation and produce it, but ſay it was made beyond ſea, or do not allege a place * where it was made, a general demurrer ſerves; and for the ſame reaſon two affirmatives without a traverſe is not aided, becauſe it admits no trial, without which the court cannot ſee the right. Hob. 233. * Suppoſing a bond made in and dated at Fort St. George, in the Eaſt Indies, it is uſual to allege it made there, under a *ſcilicet*, at Weſtminſter, or wherever the *venue* is laid.

So, if in debt upon an obligation, conditioned for the performance of an award, the defendant pleads *nullum fecerunt arbitrium*, and the plaintiff replies and ſhews the award, he muſt alſo ſhew the breach, without which he hath no cauſe of action, or it is ill on a general demurrer; for though the defendant can make no anſwer to the breach, yet it ought to appear to the court that the plaintiff hath cauſe of action. Hob. 233. Yelv. 152. Cro. Jac. 220. Sand. 102.

But, if in debt on an obligation conditioned for the performance of an award, ſo as, *&c.*, the defendant pleads no award made, and the plaintiff replies, that *ante exhibitionem billæ, ſcilicet* the 24th of *June*, (which was a day within the ſubmiſſion,) the arbitrators made an award, *&c.*, and the defendant demurs generally, the plaintiff ſhall have judgment; for though the plaintiff ought to have replied, that the arbitrators made their award before the day limited to them, yet this is form only, and helped on a general demurrer. Sid. 370.

If in debt on a bond for performance of an award, the defendant pleads no award, and the plaintiff ſets forth an award with a *profert in cur.* and the defendant craves *oyer*, and then demurs Salk. 72. pl. 9. Foreland v. Marygold.

demurs for variance between the award ſet out in the replication and the oyer, and the variances appear material, the defendant muſt have judgment; otherwiſe, if the variance had been as to thoſe parts in which the award was void.

Carth. 66. cont. Sid. 253.

It hath been held, that a declaration in treſpaſs, not concluding *contra pacem domini regis* was ill on a general demurrer; but this is now helped by the forementioned ſtatute 4 & 5 *Ann.* c. 16. which enacts, "That no advantage or exception ſhall be taken "of or for an immaterial traverſe, or of or for the default of "alleging the bringing into court any bond, bill, indenture, or "other deed whatſoever mentioned in the declaration, or other "pleading, or of or for the default of alleging of the bringing "into court letters teſtamentary or letters of adminiſtration, or "of or for the omiſſion of *vi & armis & contra pacem*, or either "of them, or of or for the want of averment of *hoc paratus eſt* "*verificare per recordum*, or of or for not alleging *prout patet per* "*recordum*; but the court ſhall give judgment according to the "very right of the cauſe as aforeſaid, without regarding any ſuch "imperfections, omiſſions, and defects, or any other matter of "like nature, except the ſame ſhall be ſpecially and particularly "ſet down and ſhewn for cauſe of demurrer."

## 7. Demurrer to Evidence.

Co. Lit. 72. Allen, 18. Godb. 10. Raym. 404. 2 Jon. 146. Doct. pl. 118. [The reaſon for demurring to evidence is, that the jury, if they pleaſe, may refuſe to find a ſpecial verdict, and then the facts never appear on the record. *Per* Buller, J. Doug. 134.]

Demurrer to evidence is an admiſſion of the truth of the fact alleged by the adverſe party, or an acknowledgment, that the evidence produced by him at the trial of the cauſe is true, but a denial of its operation and effect in law, whereupon the party demurs, and prays the judgment of the court; for, the fact being agreed on, the judges are the proper expoſitors of the law, and are to determine the ſame, and not the jury. But, if a matter of evidence, which is thought material, be offered, and the court diſallow or over-rule it, this is a proper matter for a (*a*) bill of exceptions, which the judges are compellable to ſign. Alſo (*b*), if the court over-rules one who offers to demur upon evidence, this is a proper caſe for a bill of exceptions, and the remedy which the ſtatute in that caſe provides.

(*a*) For this *vide* title Bill of Exceptions. (*b*) 9 Co. 13. 2 Inſt. 426. and Cro. Car. 341. Cort and The Biſhop of St. David's adjudged.—Jon. 331. S. C. by which it appears, that a bill of exceptions was tendered and ſigned.

5 Co. 104. a. Baker's caſe. Cro. Eliz. 751-2. S. C. adjudged, becauſe there cannot be any variance of a matter in writing.

If in ejectment, or any other action, the plaintiff give in evidence any matter in writing or record, or a ſentence in the ſpiritual court, and the defendant offer to demur thereupon, the plaintiff cannot refuſe joining in demurrer, but muſt do the ſame, or waive his evidence.

5 Co. 104. Cro. Eliz. 752. S. C. —Where it

Alſo, if the plaintiff produce witneſſes to prove any matter of fact, upon which any queſtion of law ariſes, and the defendant admit their teſtimony to be true, in ſuch caſe likewiſe the defend-

ant

ant may demur: ſo, the plaintiff may demur upon the evidence offered by the defendant *mutatis mutandis*.

is ſaid, that if either party offer to demur upon any evidence given by witneſſes, the other, unleſs he pleaſeth, ſhall not be compelled to join; becauſe the credit of their teſtimony is to be examined by a jury; and the evidence is uncertain, and may be enforced more or leſs, but both parties may agree to join in demurrer upon ſuch evidence. —Alſo it is ſaid, that in a demurrer upon evidence the party demurred unto may demand judgment of the court, whether he ought to join in the demurrer; for if there be not a colourable matter to ground the demurrer upon, the court will not force the party to join in it, but will over-rule it, that juſtice may not be frivolouſly delayed. Lil. Reg. 437.

But in the caſe of the king, he by his prerogative is not obliged to join in any demurrer; but in caſe any doubt ariſes, the court may direct the jury to find the matter ſpecial, and thereupon determine what the law is.

Co. Lit. 72. a. Dyer, 53. pl. 8. Cro. Eliz. 752. 5 Co. 104. S. P.

The king by his prerogative may waive his iſſue and demur in law, & *e cont.* Plow. 85. a. 236.

He that demurs upon evidence ought to confeſs the whole matter of fact to be true, and not refer that to the judgment of the court; and if the matter of fact be uncertainly alleged, or it be doubtful whether it be true or no, becauſe offered to be proved only by preſumptions and probabilities, and the other party will demur thereupon, he that alleges this matter cannot join in demurrer with him, but ought to pray the judgment of the court, that he may not be admitted to his demurrer, unleſs he will confeſs the matter of fact to be true.

Allen, 18. Wright v. Paul Pinder, ſaid to be reſolved. Stile, 22. 34. S. C.

As, if it be alleged by one party, that there is ſuch a writ, which is denied by the other, and thereupon there is a demurrer to the evidence; upon this there can be no judgment given, for the being or not being ſuch a writ is a fact that the jury ſhould determine; but in this caſe a writ ſhould have been admitted *tiel quel*, and then the effect thereof might have been determined by the court; and in this caſe both parties having miſbehaved themſelves, the one in offering and the other in joining in demurrer, the court held, that judgment could not be given for either, but that an (*a*) *alias venire facias* ſhould be awarded.

Stile, 22. 34. Allen, 18. (*a*) In Stile, 34. it is ſaid by Rolle, that a new *venire facias* ſhould go in the ſame manner, as if a ſpecial verdict be found inſufficient; but in Allen, 18. the opinion of the court was, that an *alias venire facias* ſhould be awarded, and not a *venire de novo*, becauſe no verdict was given.

[If a matter of *record*, or other matter in *writing*, be offered in evidence to maintain an iſſue joined between the parties, all the books agree, that the adverſe party may inſiſt upon the jury being diſcharged from giving a verdict by demurring to the evidence, and obliging the party offering the ſame to join in demurrer, or waive the evidence: and the reaſon given for it is, that there cannot be any variance of matter in writing. The books alſo agree, that if *parol* evidence be offered, and the adverſe party demur; he who offers the evidence may join in demurrer if he will. But the language of the old books is very indiſtinct upon the queſtion, whether the party offering *parol* evidence ſhall be *obliged* to join in demurrer. In a late caſe which came before the Houſe of Lords, (*Gibſon* and *Johnſon* v. *Hunter*, 2 *H. Bl.* 187.) it was obſerved, in delivering the opinion of the judges, that *parol* evidence is ſometimes certain, and no more admitting of any variance, than a

Tidd's Pr. 582, 3, 4.

matter in writing; but it is alſo often looſe and indeterminate, often circumſtantial. The reaſon for *obliging* the party offering evidence in *writing*, to join in demurrer, applies to the firſt ſort of parol evidence; but it does not apply to parol evidence that is looſe and indeterminate, which may be urged with more or leſs effect to a jury; and leaſt of all, will it apply to evidence of circumſtances, which evidence is meant to operate beyond the proof of the exiſtence of thoſe circumſtances, and to conduce to the proof of the exiſtence of other facts. In ſuch caſes, however, if the party, who demurs, will admit the evidence of the fact, which evidence is looſe and indeterminate, or, in the caſe of circumſtantial evidence, if he will admit the exiſtence of the fact, which the circumſtances offered in evidence conduce to prove, there will then be no more variance in this parol evidence, than in a matter in writing; and in ſuch caſe, the party ſhall be allowed to demur, and his adverſary muſt join in demurrer. But on a demurrer to *circumſtantial* evidence, unleſs the party demurring will diſtinctly admit, upon the record, every fact, and every concluſion, which the evidence offered conduces to prove, it is not competent to him to inſiſt upon the jury being diſcharged from giving a verdict, by demurring to the evidence, and obliging the party offering it to join in demurrer: though, if the party offering the evidence conſent to waive the objection, and to join in demurrer, every fact is to be conſidered by the court as admitted, which the jury could infer in his favour, from the evidence demurred to: and the court will, if they can, give judgment upon ſuch evidence: but otherwiſe, a *venire de novo* muſt be awarded.

Dougl. 119. 2 H. Bl. 209.

2 H. Bl. 208. Cro. Car. 341. Bull. N. P. 313.

The whole operation of entering the matter upon record, and conducting a demurrer to evidence, is and ought to be under the direction and controul of the court, upon a trial at bar, or of the judge at *niſi prius*: ſubject, however, to an appeal, by bill of exceptions, if the demurrer be refuſed. And where a demurrer to evidence is admitted, it is uſual for the court, or judge, to give orders to the aſſociate, to take a note of the teſtimony, which is ſigned by the counſel on both ſides, and the demurrer is affixed to the *poſtea*.

Dougl. 218.

The queſtion upon a demurrer to evidence being, whether the evidence offered be ſufficient to maintain the iſſue, the party, on ſuch demurrer, cannot take advantage of any objection to the pleading.]

Plow. 408. Scholaſtica's caſe, Style, 22.

Upon a demurrer to evidence, though the matter of fact be confeſſed, yet the jury may inquire of the damages, and aſſeſs them conditionally, *viz.* if upon the argument of the demurrer the law ſhould be for the plaintiff, then ſo much, *&c.* Alſo, it hath been reſolved (*a*), that the damages may be inquired of by a writ of inquiry of damages, when the demurrer is determined; and it is ſaid to be the moſt uſual courſe, when there is a demurrer upon evidence, to diſcharge the jury without more inquiry.

(*a*) Cro. Car. 143. Darroſe v. Newbott.

Lev. 87. Fitz-Harris v. Boiun.

Error of a judgment in the palace court in *aſſumpſit*, where to prove the conſideration an arreſt was to be proved by the plaintiff; and for that he did not produce the writ the defendant demurred

murred on the evidence, and thereupon judgment was given for the plaintiff: and now to reverſe the judgment it was ſaid for the plaintiff in error, that the king's writs are matters of record, and are not to be proved but by themſelves; and it was agreed by the court, that the writ ought to have been produced in evidence, but by the demurrer it is confeſſed, the arreſt being matter of fact, though it be to be proved by a matter of record; and the jury might of their own knowledge know that there was a writ, and by the demurrer on the evidence all matters of fact are confeſſed that the jury could know of their own conuſance.

## (O) Plea at what Time to be put in, and the Ceremony requiſite therein.

IF the defendant neglects to put in his plea, when the rules for pleading are out, the plaintiff may ſign judgment for want thereof; but if the matter which is to be pleaded is difficult, the court will upon motion grant the defendant longer time to put in his plea than otherwiſe by the rules of court he ought to have; but without leave of the court he cannot have longer time, becauſe the court is to judge whether it be neceſſary to plead ſuch a plea as requires longer time to conſider of than ordinary; and ſhould it be otherwiſe, the defendant might upon ſuch pretences delay the plaintiff without cauſe *. Lil. Reg. 36, 37.

* It is uſual now to grant time, by Judge's order, obtained on ſummons for that purpoſe. —— [When a ſummons is taken out, and made returnable, before the expiration of the time for pleading, it is a ſtay of proceedings, pending the application: but it is otherwiſe, when taken out, or made returnable, after the expiration of the time for pleading. Say. Rep. 165. Barnes, 240. 252. Caſ. Pr. C. B. 137. Pr. Reg. 292. S. C. Barnes, 255. Caſ. Pr. C. B. 144. S. C. Barnes, 254. Pr. Reg. 293. S. C. Nor will it operate as a ſtay of proceedings, where the object of it is collateral to the time for pleading, as, to diſcharge the defendant out of cuſtody upon common bail, &c. *Per Cur.* M. 28 G. 3.]

Alſo, where the plaintiff doth keep any deed, or writing, or other thing from the defendant, which doth belong unto him, and whereby he is to make his defence, and is diſabled by the retaining thereof to plead for his beſt advantage, the court will upon a motion grant an imparlance to the defendant till the plaintiff do deliver it to him, or bring it into court, and alſo a convenient time after till he can draw up his plea; for the law gives every defendant convenient time to make his beſt defence; and in this caſe, if the plaintiff be delayed, it ſhall be adjudged his own default. Lil. Reg. 37.

So, where an executrix was ſued by ſpecial original, it was moved, that being executrix ſhe might imparl till next term, that ſhe might know how to plead with ſafety; the motion was granted for four days to plead, and afterwards for three more; but the court refuſed to enlarge it to the following term, becauſe of the inconveniency that might accrue to other creditors; and in doing it thus far obliged the defendant to enter into terms not to acknowledge judgment in the mean time to other creditors that were in equal Hil. 5 G. 2. in B. R. Snellgrave v. Morris, Executor of H. Morris, and S. P. ſo ruled between the Bank of England v.

Morris. 2 Stra. 1002. 1028. Ca. temp. Hard. 165. 2 Barnard. K. B. 183.

equal degree with the plaintiff, nor to do any thing to his prejudice *.

* Now, if defendant obtains, by a judge's order, time to plead, it is cuſtomary to inſert the like conditions.

Trin. 5 G. 2. in B. R. Knight v. Robinſon.

So, a defendant had time to plead given till the ſecond day of the next term, upon affidavit that four days before the declaration delivered he was and ſtill continued to be ſo indiſpoſed in mind that he could not make his defence.

5 Mod. 215.

When a perſon appears upon a recognizance, or *in propria perſona*, or is a priſoner in cuſtody upon any information for a miſdemeanor, where no proceſs iſſued out to call him in, by the courſe of the court, in theſe caſes, he muſt plead *inſtanter*.

Comb. 3. *per* Aſton.

Thoſe that come in upon a *habeas corpus* or attachment muſt plead the ſame term without imparlance, giving the ordinary rules, which are eight days *.

* This muſt depend on the ſituation of the cauſe when removed, the time when the *habeas* is returnable, and the perſon who ſues it forth, &c.

Comb. 251. *Vide ſupr.* tit. Abatement (O), 27.

A plea in abatement muſt be pleaded within four days, without ſpecial leave from the court, becauſe the perſon coming in by the proceſs of the court ought not to have time to delay the plaintiff: alſo ſuch plea by the 4 & 5 *Ann. c.* 16. being for delay, is not to be received, unleſs on oath, and probable cauſe ſhewn to the court.

Comb. 19.

Upon a *reſpondeas ouſter* they have uſually four days' time to plead; but this is ſaid to be in the diſcretion of the court.

Mich. 4 G. 2. in B. R. Andrews v. Dingley. 2 Str. 877. and Barnard. K. B. 368. S. C. but S. P. does not appear.

By the rule of the court, as many days are allowed for the defendant to plead after oyer given, as he had by the rule of the court at the time of oyer demanded.

R. T. 5 & 6 G. 2. and ſee R. M. 10 G. 2. Reg. 2.

[In *B. R.*, if the plaintiff *amend* his declaration, the defendant ſhall have *two* days, excluſive of the day of amendment, to alter his firſt plea, or plead *de novo*.]

Mich. 7 G. 2. in B. R. Stackie v. Wilkes.

Defendant had an order by conſent from a judge for eight days' time to plead, and at the expiration of the eight days plaintiff ſigned judgment, without giving a rule to plead; & *per cur.* the judgment is regular; rules are only to give the parties notice when they are expected to plead, here, the defendant's praying time to plead excludes any preſumption that the plaintiff has not given him ſuch notice.

2 Lil. Reg. 298-9.

If the defendant do not plead according to the rules of the court, ſo that the plaintiff may enter judgment upon a *nil dicit*, yet if after the rules are out the defendant put in his plea into the office before the plaintiff hath entered his judgment, this plea is to be accepted, and the plaintiff ought not then to enter his judgment; and if he do, the judgment may be ſet aſide for irregularity.

R. T. 5 & 6 G. 2.

[In *B. R.*, where the defendant has appeared, or filed bail, upon any kind of proceſs, returnable the *firſt* or *ſecond* return of any term;

term; if the plaintiff declare in *London* or *Middlesex*, and the defendant live within twenty miles of *London*, the declaration should be delivered or filed *absolutely*, with notice to plead within *four* days; or, in case the plaintiff declare in any other county, or the defendant live above twenty miles from *London*, within *eight* days *exclusive* after the delivery or filing thereof; and the defendant must plead accordingly without any imparlance.

Where the defendant has not appeared, or filed bail, the rule in *B. R.* is, that "upon all process returnable before the *last* return of "any term, where no affidavit is made and filed of the cause of "action, the plaintiff may file or deliver the declaration *de bene esse*, "at the return of such process, with notice to plead in *eight* days "exclusive, after the filing or delivery thereof; and if the defend-"ant do not file common bail, and plead within the said *eight* "days, the plaintiff, having filed common bail for him, may sign "judgment for want of a plea." But, if the declaration be not filed, until *after* the return of the process, the defendant has *eight* days to plead from the time of filing it, whenever it may be. And "upon all process, where an affidavit is made and filed of "the cause of action, the declaration may be filed or delivered *de* "*bene esse*, at the return of such process, with notice to plead in "*four* days after the filing or delivery, if the action be laid in "*London* or *Middlesex*, and the defendant live within *twenty* miles "of *London*, and in eight days, if the action be laid in any other "county, or the defendant live above twenty miles from *London*; "and if the defendant put in bail, and do not plead within such "times as are respectively before mentioned, judgment may be "signed." But in all the foregoing cases, the declaration should be delivered, or filed, and notice thereof given, *four* days *exclusive* before the end of the term, a rule to plead duly entered, and a plea demanded, when necessary.

R. T. 22 G. 3. 1 Burr. 56. Delatre v. Mango, M. 20 G. 3. Tidd's Pr. 244.

When the process is returnable the *last* return of the term, or, where it is returnable before, but the declaration is not delivered, or filed, and notice thereof given, *four* days *exclusive* before the end of the term, the defendant is entitled to an imparlance, and must plead within the first *four* days of the next term, provided the declaration be delivered or filed, and notice thereof given, before the essoin-day of that term, otherwise the defendant will be allowed to imparl to a subsequent term.

Tidd's Pr. 245.

If four terms have elapsed, since the delivery or filing of the declaration, the defendant shall have a whole term's notice to plead, before judgment can be entered against him, unless the cause have been staid by injunction or privilege; and the notice in such case must be given before the essoin-day of the term: but it does not extend beyond the term; and therefore a rule to plead may be entered, and judgment signed, in the vacation.

R. T. 5 & 6 G. 2. 2 Burr. 660. Dougl. 71. 2 Bl. Rep. 2 Str. 1164. 1 Str. 211, *contr.* 2 Term Rep. 40.

After a defendant in a *quo warranto* information has appeared, the prosecutor must give two four-day rules to plead, and after the expiration of the last, must also move in term-time for a peremp-

6 Term Rep. 594. In all criminal pro-

ſecutions for miſdemeanors two tory rule to plead, otherwiſe the defendant has until the next term to plead.

four-day rules are given to plead, and a peremptory rule moved for; and then, if there be a demurrer, one four-day rule to join in demurrer, and a peremptory rule moved for. *Ibid.* Rex v. Sayer.

R. T. 35 G. 3. The time allowed perſons in confinement, charged with offences againſt the exciſe laws, is, in caſe ſuch perſons are confined in any gaol within the diſtance of *forty* miles from *London*, *ſix* days; if above *forty* miles, *eight* days, after the delivery of the copy of the indictment or information to ſuch perſons, or to the gaoler, keeper, or turnkey of the gaol, with a notice thereon indorſed.

Ruſſolm v. Chapman, 5 Term Rep. 473. A priſoner needs not give notice of a plea, unleſs he files it before the time when by the rules of the court he is compellable to plead.

Thomas v. Prichard, 4 Term Rep. 664.

Dyche v. Burgoyne, 5 Term Rep. 454. A plaintiff muſt make a demand of a plea before he ſigns judgment, and he cannot ſign judgment until the expiration of twenty-four hours after the demand has been made. But the demand may be made at the time of delivering the declaration.

Bowles v. Edwards, 4 Term Rep. 118. Churchwardens of Edmonton v. Oſborne, 6 Term Rep. 689.

Kaye v. Whitehead, 2 H Bl. 35. Time to plead under a judge's order, is reckoned *incluſive* of the day of the date of the order, but *excluſive* of the day on which it expires.

Meſure v. Britten, 2 H. Bl. 616. If a rule to plead expire on a *dies non juridicus*, ſuppoſing ſuch day not to be *Sunday*, the defendant is bound to plead on or before that day; and if he do not, judgment may be ſigned on the next day; for the offices are open on all the other *dies non juridici*, but *Sunday*.]

2 Lil. Reg. 399. Every ſpecial plea muſt have counſel's hand, otherwiſe it will be rejected, and the plaintiff may ſign judgment; but, if there be two defendants, and one plead a general iſſue, and the other ſpecially, and both are on the ſame paper; though the ſpecial plea is not ſigned, the plaintiff cannot reject the general iſſue, and take judgment againſt both; for, if he do, the judgment is totally erroneous, and if execution be ſued, reſtitution ſhall be awarded: but the plaintiff may regularly take judgment againſt him who pleaded ſpecially.

Lil. Reg. 299. Stile, 373. 345. & *vide* Het. 126. A foreign plea muſt be engroſſed in parchment, and ſigned by counſel, and put in upon the (*a*) oath of the defendant, that is, he muſt ſwear that his plea is true, or ſuch a plea is not to be received; becauſe thereby he endeavours to ouſt the court of its juriſdiction.

(*a*) If one will not ſwear a foreign plea, where he ought to do it, the plaintiff may enter judgment upon a *nihil dicit*. Stile, 225.

Sid. 172. Keb. 477. 479. 658. 823. Error was aſſigned, that the defendant in the writ of error was dead before the firſt judgment given, and it appearing by affidavits that he was alive, and that it was a trick merely for delay, the court determined to over-rule the plea, unleſs the plaintiff would ſwear that it was true.

## (P) Continuance and Diſcontinuance in Pleading.

AT common law no plea could be determined but in the preſence of the parties, unleſs default was made by one of the parties, and not excuſed; and therefore by the ſtatute *Weſtm.* 2. 28 to ſave delays at the *niſi prius*, they ordered, that the inqueſt ſhould be taken, though the defendant made default, and did not appear. Hence it became neceſſary, after iſſue joined, that there ſhould be continuances from time to time till the verdict was taken, as before iſſue joined, a continuance was given the defendant from term to term until his plea was put in; and if theſe continuances were not entered from term to term, the defendant was without day in court; and wherever he was ſo, there was an end of the proceedings in that writ; for he had fulfilled the command of that writ in appearing, and the court might give judgment againſt him if he did not plead; and if the court neither gave him leave to plead, nor gave judgment againſt him for want of a plea, he having fulfilled the writ, the matter was at an end: ſo, if he had pleaded, and the court had not given a day to the parties to prove their allegations, there likewiſe, the defendant having appeared, the writ was complied with, and the matter at an end, unleſs the court gave farther time to verify the allegations; and therefore in ſuch caſes there muſt be continuances till the verdict.

Bro. Diſcontinuance (1), (2). 6 Mod. 283. Roll. Abr. 487-8. Cro. Jac. 528. Cro. Car. 236.

So, upon a demurrer, or after a verdict given, if the court give time to conſider of their judgment, they muſt give day to the parties, becauſe they can determine nothing in the abſence of the parties, and the command of the writ being complied with by the defendant's appearance, and the effect of the writ anſwered, it is at an end; and the court can give time only from one term to another; for, if they could give day to a ſecond term, they might give it to a 5th, 20th, or 100, and they would have power to delay *ad infinitum*.

Roll. Abr. 484. 3 Bulſt. 233. Stile, 339. *Vide* 1 Bulſt. 144. S. P. *cont.* but is not law.

If a man declares in an action upon the ſtatute of monopolies, as the king's patentee of ſoap, and after the defendant in *Eaſter* term pleads, that the king did not make any ſuch letters patent, and iſſue is joined thereupon, and day given to the plaintiff till *Mich.* term, but there is no continuance between *Eaſter* and *Trinity* term, it is a diſcontinuance; for though the court might give day to bring in the letters patent in *Mich.* term, omitting *Trinity* term, yet there ought to be a continuance between *Eaſter* and *Trinity* term by a *curia adviſare vult* till *Trinity* term, or otherwiſe it is a diſcontinuance.

Roll. Abr. 483. Stile, 339. Friend v. Baker, adjudged.

In ejectment, if the defendant at the day of *niſi prius* at the aſſizes pleads, that the plaintiff entered into parcel of the land pending the writ, and the juſtices of *niſi prius* accept the plea, and diſmiſs the jury, though they do not give any day to the parties,

Roll. Abr. 486. Lane, 81. 86. 89. Sir Hugh Brown's

case. (a) If the issue is found against the defendant, it is not

*in banco*, yet this is not any discontinuance, although the plea is collateral; for the day of *nisi prius* and the day in bank are but one day, for the court *in banco* gave day to the jurors *in banco nisi prius justiciarii ad assisas venerint*, and to the (a) parties day is given there absolutely.

material whether he had a day given *in banco* or not; because he hath nothing further to do but to discharge himself. Palm. 333. Cro. Car. 236. & *vide* Cro. Jac. 528.

Roll. Abr. 485. Pipe v. Agar, Roll. Rep. 408. S. C. But 3 Bulst. 208. S. C. it is held by

If a man recovers upon demurrer, or by default, &c. and a writ of inquiry of damages is awarded, there ought to be continuances from term to term between the first and second judgment, otherwise it will be a discontinuance; for the first is but an award, and not complete till the second judgment upon the return of the writ of inquiry of damages.

the clerks, that there is no necessity to have a continuance entered after the writ of inquiry awarded; and *per* Coke, it is good either way. —— If a judgment be given in trespass, or other such action, by default or upon demurrer, and a writ of inquiry of damages awarded, returnable the next term, no continuance *per idem dies* shall be given to the defendant, because he is out of court by his own default; said to be the constant course of the court of King's Bench. Roll. Abr. 486. But for this *vide* 11 Co. 6. b. Cro. Eliz. 75. 144. 774. Roll. Rep. 31. Godb. 195. Sid. 16.

Roll. Abr. 486. Thornton v. Wade, adjudged. (b) That the process

In an action of debt in an (b) inferior court, if the defendant acknowledges the action at one court, and no judgment is entered at this court, but at the next court judgment is given for the plaintiff; if there be no continuance between the said courts, this is a discontinuance.

in an inferior court must be returned at a day certain, and ought to be to the court as well as to the day. *Vide* Cro. Eliz. 105. Cro. Jac. 314. Stile, 58. 66. 70. 122. Cro. Car. 254. 2 Bulst. 36. Mod. 81. 2 Mod. 59. —— But, if a continuance be made in an inferior court *ad proximam curiam ibidem tenendam*, without alleging any day to which it is adjourned, yet, if the court be to be held by custom, not at any certain day, as every week, or *de tribus in tres*, &c. but *die lunæ*, when the judges thereof please, this is a good continuance. Cro. Car. 254. —— In a pie-powder court the adjournment was entered *idem diet datus est*, where it should have been *eadem hora*, yet adjudged good. Moor, 459. pl. 637.

Cro. Jac. 357. Peplow v. Rowley. (c) For this *vide* Cro. Car. 341. Jon. 331. Yelv. 155. Stile, 328, 329.

If in an action upon the case in an inferior court the defendant is essoigned, and hath a day *per essoigne*, and the plaintiff *habet eundem diem*, at which day the defendant being demanded appears not, but makes default, *& habet diem per defaltam secundum consuetudinem villæ* given by the court, &c., this is a discontinuance; for when the defendant made default he was out of court, and (c) so no day could be given to him; and the custom alleged cannot help that which is against the common law.

Hard. 504. Attorney-General v. Town of Farnham. That when the King is party no day

If in a *quo warranto* against a corporation, for using a fair and market and taking toll, &c., issue is taken, whether they have toll by prescription, or not, and it is found for the defendants; the Attorney-General may yet proceed to take issue upon the rest, for in the case of the king there is no discontinuance before judgment.

is given to him, because he is always present in court. Roll. Abr. 486-7.

Roll. Abr. 487. —— But for this

In an action after issue joined, and a verdict for the plaintiff, the plaintiff cannot discontinue the action without the consent of the

the defendant; and if he will not enter the judgment, the defendant himſelf may enter it. *vide* Stile, 346. Sid. 60.

Lev. 48. Mod. 13. ——Where there has been a diſcontinuance after a ſpecial verdict. Latch, 216. Hetl. 3. Cro. Car. 575. Salk. 178. ——Where by the courſe of the court the plaintiff may diſcontinue without motion, paying coſts. Stile, 366. Leon. 105. ——Where after a demurrer by leave of the court. Cro. Jac. 317. Cro. Car. 195. March, 24. Stile, 120. 134. 306. 309. 310. 382. Allen, 20. Sand. 23. 2 Sand. 74. Sid. 84. 306. Lev. 227. 298. 2 Lev. 118. 124. Mod. 41. Bulſ. 217.

If a man vouches for parcel, and as to the reſt makes no anſwer, and the demandant does not take advantage thereof by prayer of ſeiſin, but ſuffers the proceſs to be continued againſt the vouchee in right of the parcel, all is diſcontinued. 18 E. 3. 40. Roll. Abr. 487.

If the tenant vouches for all the demand, and the proceſs upon the voucher is made for leſs than it is, all is diſcontinued. 18 E. 3. 40. Roll. Abr. 487.

In an action for treſpaſs a diſcontinuance in parcel is a diſcontinuance in the whole. 7 H. 6. 27. Roll. Abr. 487.

In treſpaſs for ſeveral things the defendant pleads a plea in bar for part, and does not anſwer to the reſt, and the plaintiff demurs generally, the plaintiff ſhall not have judgment againſt the defendant; for the demurrer was by intendment upon the bar, and not for want of pleading to the reſidue; for he ought to have prayed judgment upon *nil dicit* for it, ſo all is diſcontinued. 4 Co. 62. Roll. Rep. 135. 176. 2 Bulſ. 325. ——But where for want of anſwering to part all is diſcontinued, *vide* Brownl. 228. Carter, 51. 2 Mod. 259. Yelv. 65. Sid. 223.

If a plea begins with an anſwer to the whole, but in truth the matter pleaded is only an anſwer to part, the whole plea is naught, and the plaintiff may demur; but, if a plea begin only as an anſwer to part, and is in truth but an anſwer to part, it is a diſcontinuance, and the plaintiff muſt not demur, but take his judgment for that as by *nil dicit*; for if he demurs or pleads over, the whole action is diſcontinued. Salk. 179. pl. 6. Ld. Raym. 679. & *vide* Salk. 180. pl. 9. S. P. 1 Str. 302. S. P.

In *indebitatus aſſumpſit* the defendant pleaded an attainder of high treaſon in diſability; the plaintiff replied a pardon, *prout per exemplification. inde*, &c., (which was held good,) & *petit judicium & damna ſua*; to which it was demurred; and held, that there was a diſcontinuance by the miſconcluſion of the replication, for an ill prayer of judgment is as none. Salk. 177. pl. 1. Biſſe v. Harcourt, Ld. Raym. 338.

It is ſaid, that the courſe of the court of *King's Bench* is to enter no continuance on the roll till after iſſue or demurrer, and then to enter the continuance of all upon the back (*a*) before judgment. Roll. Abr. 485. (*a*) A diſcontinuance can never be objected *pendente placito*, for before judgment it may be continued at the pleaſure of the court, though not after judgment in another term. Cro. Jac. 211. ——But at what time continuances may be entered, *vide* Savil. 54. Lit. Rep. 4. Cro. Car. 236.

In debt, the declaration was of *Michaelmas* term, and the plea roll of *Eaſter*, and no continuance entered, and this upon demurrer was ſhewed to the court as a diſcontinuance; but they ſaid the practice is never to enter continuances till the plea roll be entered up, though the declaration be of four or five terms ſtanding. Salk. 179. pl. 7. Curtius v. Padley, Ld. Raym. 872.

If

Roll. Abr. 487. Like point in Godb. 219. Cro. Jac. 35. 316, 317.

If the plaintiff be nonſuit, by which the defendant is to recover coſts, if the plaintiff will not enter his continuances, on purpoſe to ſave the coſts, the defendant ſhall be ſuffered to enter them, and ſo recover his coſts.

Yelv. 5, 6. Brownl. 192. S. C. Johnſon v. Turner, adjudged.

If in treſpaſs for breaking his houſe, and taking and carrying away his goods, the defendant juſtifies the whole, and the plaintiff *quoad fractionem domûs*, and the taking the goods, *nec non materiam in ea contentam*, demurs upon the defendant's bar, and the defendant joins in demurrer in this manner, *quia placit. prædict. quoad fractionem domûs*, and the taking the goods *ſufficiens*, &c., and thereupon judgment is given, here is a diſcontinuance; for in the offer of the demurrer *ex parte querentis* nothing is alleged ſpecially, but only *quoad* breaking of the houſe, and taking the goods; and though the ſubſequent words *nec non materiam in ea contentam* go to all the matter in bar, *viz.* the aſportation; yet, when the defendant joins in demurrer, he joins but ſpecially *quoad* the breaking the houſe, and taking the goods, but ſays nothing as to carrying them away.

Yelv. 117. St. John v. Comyn, adjudged, and the judgment upon a writ of error in B. R. in Ireland reverſed upon a writ of error here accordingly, & *vide* Yelv. 138.

If upon a writ of error upon a judgment in ejectment the plaintiff aſſigns for error the want of an original, and the defendant pleads, that ſuch a day an original was delivered to, &c., and concludes to the country, and thereupon the judgment is reverſed; here is a diſcontinuance; for when the defendant concludes to the country where the matter of his plea, *viz.* the delivery of the original, was triable by record, and the plaintiff does not reply or demur upon defendant's plea, here is not any perfect record.

11 Co. 5, 6. Roll. Rep. 30. S. C. (*a*) By the 32 H. 8. c. 30. diſcontinuances are aided, ſo that there be a verdict for the plaintiff or defendant; in the conſtruction of which it hath been held, that if as to part the defendant joins iſſue, but ſays nothing as to the reſt, and this iſſue is found for the plaintiff, he ſhall have judgment. 11 Co. 6. b. 2 Leon. 194. Godb. 55. Roll. Rep. 161. Cro. Jac. 353. Hob. 187. Golſb. 109. Bulſ. 25. Carter, 51. 3 Lev. 39. Salk. 179. pl. 8. 180. pl. 9. 2 Ld. Raym. 856. 1121. 7 Mod. 24. But, if the matter is pleaded to the whole, though in fact but an anſwer to part, this is a bad plea, and not helped by the ſtatute. Hard. 331.——That diſcontinuances, as well on the part of the plaintiff as defendant, are aided. Cro. Eliz. 489. Cro. Jac. 528.——That diſcontinuances, in inferior courts as well as ſuperior, are aided, being within this act. Salk. 177. pl. 2. *

In an action of treſpaſs againſt *A.*, *B.*, and *C.*, *A.* confeſſed judgment, and *B.* and *C.* pleaded ſeverally not guilty, and ſeveral *venires* were awarded to try theſe iſſues, &c., but no day given to *A.*, and it was reſolved upon a writ of error upon a judgment *in banco*, that it was according to the courſe of the court, and that if it was a diſcontinuance it was helped by the verdict againſt *B.* and *C.* (*a*)

* Continuance of Suit or Process.

*When neceſſary.*——Defendant in cuſtody on *capias ad ſatisfaciendum* was diſcharged on a written agreement; above a year after new *capias ad ſatisfaciendum* iſſues without continuance on the roll; it ſhall be ſet aſide. Barnes, 205.——On *nul tiel record*, plaintiff may continue the day for bringing in the record. Barnes, 84.——*When not*—Continuance need not be entered on the record of *niſi prius*; therefore, if after iſſue joined, and before day of *niſi prius*, one of defendants dies, ſuggeſtion of it, and *venire facias* between plaintiff and ſurviving defendant, & *jurata* at the foot, agreeable thereto, is good. Barnes, 469.——*How it ſhall be entered.*—When the trial is deferred, if the *venire facias* is returned and

## (Q) Pleas *Puis darrein continuance.*

THE defendant can regularly have but one plea, on which, if there be an iſſue or demurrer, the cauſe is to be determined, becauſe there can be but one verdict in a cauſe: but, if any new matter happens pending the writ, he may plead it after a former plea pleaded, provided he plead it before the next continuance after ſuch new matter has happened, which is called a plea *puis darrein continuance*, becauſe ſuch matter being new it was not in his power to plead it when his former plea was pleaded; and it would be hard, becauſe he had pleaded to preclude him from an advantage which he had not at the time of pleading, ſince there was no laches in him; but this he cannot plead after a continuance, becauſe having ſuffered the former plea to continue, he reſts upon it, and waives the benefit of any new matter. Doct. pl. 297. Salk. 178. pl. 5. Ld. Raym. 693.

In debt againſt an adminiſtrator, after demurrer joined, the adminiſtration was repealed, and granted to another, for which the defendant would have pleaded this matter, *puis darrein continuance;* but it was reſolved not to be pleadable after demurrer, though it might after an iſſue joined. Moor, 878. pl. 1210. Stonner v. Gibbons, 1 Str. 493. S. P. but ſee Hob. 81. *contra.*

So, if a releaſe be given after the day of *niſi prius*, and before the day in bank, he cannot plead it, becauſe there is a verdict 21 H. 6. 10. Bro. Cont. 27.

---

and filed, the proper entry is, that the jury *ponitur in reſpect.*; if it be not filed, enter a *non miſit breve*; either way will prevent a diſcontinuance. Rex v. Hare and Man. Stra. 266.——If proper continuances are entered on the plea-roll, the want of them on the *niſi prius* roll is not material. French v. Wiltſhire, And. 67.——If to declaration of Trinity, there is imparlance to Michaelmas term, and defendant procures judge's order for time to plead till the 15th of December, the imparlance ſhall be continued to *quinden. Mart.* Barnes, 161.——*At what Time.*—If bill is of Eaſter, and in Trinity defendant pleads, and iſſue joined, and paper-book delivered without continuance from Eaſter to Trinity, it ſhall not be ſet aſide; for it may be entered at any time on the roll. Wilkes v. Wood, 2 Wilſ. 203.

### Discontinuance.

*What ſhall be.*—It is not a diſcontinuance, though no day is given to the tenants in dower to appear on the return of the writ of inquiry; or it is aided by ſtatute 4 & 5 Ann. c. 16. Dobſon v. Dobſon, Ca. B. R. temp. Hardw. 19.——*When it ſhall be by Leave of the Court.*—After demurrer argued and allowed on payment of coſts. Butler v. Maliſſy, 1 Str. 76. Henderſon v. Williamſon, Mich. 5 G. Stra. 116.——The court may grant it after ſpecial verdict argued, but will not do it in a hard action. Boucher v. Lawſon, Ca. B. R. temp. Hardw. 194.——The court will not permit an executor to diſcontinue in any caſe where he has *knowingly* brought his action wrong, but on payment of coſts. Harris v. Jones, 3 Burr. 1451.——After judgment on demurrer for plaintiff, and error brought, plaintiff may diſcontinue on coſts in action and error. Barnes, 169.——Plaintiff may diſcontinue, though defendant has been arreſted a ſecond time before diſcontinuance. Barnes, 169.——After judgment on demurrer in replevin for avowant, plaintiff cannot diſcontinue. Barnes, 169.——Rules ſhould be drawn up, "*have leave* or *be at liberty*" to diſcontinue, not "*ſhall* diſcontinue." Barnes, 170.——Whether diſcontinuance may be entered without leave? Q. Barnes, 170.—Alſo, Whether plaintiff in replevin can diſcontinue? Q. Barnes, 171. [The avowant cannot, though an actor. 1 Str. 112.]——Plaintiff cannot move to diſcontinue after defendant has moved for judgment, as in caſe of a nonſuit. Barnes, 316. Plaintiff may enter *nil capiat per breve* on a plea in abatement without leave, but not in other caſes. Barnes, 257.——*When it ſhall be aided.*—If after judgment by default on a bill againſt an attorney in C. B. where the proceedings are on a day certain, the writ of inquiry is returnable at a general return, it is a miſcontinuance, and aided by the ſtatutes. Launder v. Cripps, Stra. 947.—The ſtatute 32 H. 8. c. 30. extends to diſcontinuances *made* after verdict; as, if the original proceſs is returnable at a common return, and the *ſcire facias* in error is returnable at a day certain, this diſcontinuance is aided by the ſtatute. Bern v. Bern, Mich. 8 G. 2. Ca. Br. R. temp. Hardw. 72.

already

2 Lutw. 1143. 1174.

already in the cauſe, and upon another plea; and therefore the cauſe is determined, ſo that he is put to his *audita querela* to hinder the execution of the judgment.

21 H. 6. 10. Doct. pl. 297. Lev. 80. Sid. 93. 133. 143. 185. 2 Lutw. 1143. 1174. 5 Mod. 12.

But there are two caſes where a man may plead, though it be not after the laſt continuance, *viz.* outlawry, and the death of the plaintiff: as to outlawry, it is upon the prerogative that the debt itſelf is forfeited to the king, and by virtue of the prerogative *nullum tempus occurit regi*, and therefore he may plead it though a continuance has happened after the outlawry: ſo, he may plead the death of the plaintiff, becauſe, though a continuance has been entered, yet the continuance is a nullity, becauſe there was no plaintiff in being to whom day could be given: ſo, it may be pleaded if the plaintiff died after the day at *niſi prius* *, and before the day in bank; and the reaſon is, that there is no cauſe in court, for no judgment can be given for a perſon who is not *in rerum natura*, and if it be given it is erroneous; and if the plaintiff's attorney will traverſe the plea, he cannot ſay the plaintiff comes *per attorn.*, becauſe that would be to forejudge the matter in iſſue; but the attorney by his name, *viz.* J. S. *venit pro magiſtro ſuo & dicit*, may appear, and ſo traverſe it.

* Death of a party between verdict and judgment, not to be error, provided judgment be entered within two terms. 17 Car. 2. c. 8.

13 E. 4. 4.

But a releaſe may, it ſeems, be pleaded, though there have been imparlances between, becauſe there is no continuance of a former plea pleaded; and by the *libertas loquendi* the defendant has time given to plead what makes moſt for his advantage.

2 H. 6. 13. Sid. 143.

But, if the writ be only abateable, as, if the plaintiff be made a knight †, or the plaintiff being feme ſole takes a huſband, this muſt be pleaded after the laſt continuance, otherwiſe he depends on his firſt plea, and waives the benefit of his new matter: but it cannot be pleaded between the day at *niſi prius* and the day in bank, becauſe there has been a trial in the ſame cauſe before.

† Certain ſuits not to be abated for acceptance of knighthood. 4 H. 6. c 4.

Hob. 5.

But, if the leſſor of the plaintiff dies, this cannot be pleaded *puis darrein continuance*, becauſe the right is ſuppoſed in the leſſee.

15 E. 4. 149. Allen, 66. 2 Lutw. 1143.

The pleas of this kind are twofold, *viz.* in abatement and in bar; if any thing happens pending the writ to abate it, this may be pleaded *puis darrein continuance* though there is a plea in bar, for this can only waive all pleas in abatement that were in being at the time of the bar pleaded, but not any ſubſequent matter: but, though it be pleaded in abatement, yet after a bar is pleaded, it is peremptory, as well on demurrer as on trial, becauſe, after a bar pleaded he has anſwered in chief, and therefore can never have judgment to anſwer over: ſo, it may be pleaded in bar: but, as to the manner of its being pleaded in bar or abatement, herein it is to be obſerved, that in the firſt caſe it muſt be pleaded *quod breve caſſetur*, and in the other *quod actionem ulterius manutenere non debet*, and not that the former inqueſt ſhould not be taken, becauſe it is a ſubſtantive bar in itſelf, and comes in the place of the former, and therefore muſt be pleaded to the action.

Bro. Continuance, 40.

There can be but one plea *puis darrein continuance*, that the plaintiff may not be delayed *ad infinitum*, for, if he made a ſecond change

change he might make a third, and ſo *in infinitum*: but ſome have held, that he might plead an outlawry after the laſt continuance, becauſe *nullum tempus occurrit regi*; but *quære* whether the ſubject ſhall after plea *puis darrein continuance* partake of the prerogative, or whether it ſhall be preſumed, after ſuch trifling, that it is frivolous and untrue, and therefore to be rejected. Fitz. Continuance, 5.

If a matter happens after plea pleaded, and before iſſue joined, it ſhall be pleaded to be done pending the writ; but, if it happen after iſſue joined, it ſhall be pleaded *poſt ultimam continuationem*. Bro. Continuance, 1. 26 H. 8. 2.

If the plaintiff releaſe to the defendant after the award of the *niſi prius*, and at the day of *niſi prius* the jury remain *propter defectum*, the defendant may plead it the day in bank; becauſe the cauſe was not determined by the jury, and therefore he is at liberty to plead it at any other day of continuance; and it may be tried by the jury, when they appear. Bro. Continuance, 30. 22 H. 6. 1.

If the plaintiff, after a writ of inquiry awarded, releaſe to the defendant, he cannot plead this releaſe at the day in bank; becauſe there is no day given him, and judgment is already: but, if the plaintiff dies, ſuch death may be pleaded; becauſe there is no perſon in court for whom judgment can be given: but now by the 8 *W.* 3. *c.* 11. the executors, *&c.* may have a *ſcire fac.* on ſuch an interlocutory judgment *. * By this ſtatute the death of one plaintiff or defendant, where there is another ſurviving, ſhall not abate the ſuit.

Time and place muſt be laid in this as in other pleas, and it muſt have the ſame certainty with other pleas. Doct. pl. 297. Allen, 66. 2 Lutw. 1143.

It is no good plea to ſay *puis darrein continuance* ſuch a thing happened, but it ought to be preciſe in the day. 5 Mod. 12. Yelv. 141.

One may plead *puis darrein continuance*, that the plaintiff brought a ſecond action for the ſame cauſe, and recovered, though he might have pleaded the former in abatement to the ſecond. Comb. 357.

Plea *puis darrein continuance* put in at the aſſizes muſt be certified as part of the record, and cannot be then tried. 2 Mod. 307.

If after a plea in bar the defendant pleads a plea *puis darrein continuance*, this is a waiver of his bar, and no advantage ſhall be taken of any thing in the bar †. Salk. 178. pl. 5. Ld. Raym. 693. Barber v. Palmer, *&* *vide* Hob. 81.——† A plea *puis darrein continuance* muſt be verified, or it will be ſet aſide. Martin v. Wyvill, Stra. 492.——If on an imparlance to next term, plaintiff gives a releaſe to defendant in the mean time, he may plead the releaſe in bar as an original plea, as it is before iſſue; but, if after iſſue joined, it muſt be pleaded *puis darrein continuance*. Price v. Kenrick, Fort. 338.—*It cannot be rejected by the court if it be verified by affidavit*; and they cannot determine whether it is a good plea or not, but on demurrer. Paris v. Salkeld, 2 Wilſ. 137.

[It ſeems dangerous to plead any matter *puis darrein continuance*, unleſs you be well adviſed, becauſe if that matter be determined againſt you, it is a confeſſion of the matter in iſſue, and no *niſi prius* ſhall be granted. And the plea put in cannot be amended after the aſſizes are over: but it may during the aſſizes be amended before the judge of *niſi prius*. Cro. Eliz. 49. Yelv. 181. Freem. 252.

It is in the breaſt of the judge at *niſi prius* whether he will accept of ſuch plea or not, *i. e.* whether he will or will not proceed in the trial, therefore the party ought to make it appear to the judge that it is a true plea; yet the plaintiff is not to reply to this plea *Ibid.* 2 Mod. 307. It appears that the judge is

bound to receive this plea, if verified by affidavit.

plea at the aſſizes, for the judge has no power to accept of ſuch replication, nor to try it, but only to return the plea as parcel of the record of *niſi prius*; and if the plaintiff demur, it cannot be argued there.

3 Term Rep. 554. 2 Wilſ. 137.

Pearſon v. Perkins, Hil. 3 G. 1. Bull. N. P. 310.

A plea *puis darrein continuance* may be pleaded after the jury are gone from the bar, but not after they have given their verdict.

Thel. Dig. 204.

There are ſome pleas which may be pleaded at *niſi prius* that cannot properly be termed pleas *puis darrein continuance*, becauſe the matter pleaded need not to be expreſsly mentioned to have happened after the laſt continuance.

Br. Continuance, 57.

As in treſpaſs, after iſſue joined, the defendant may plead that the plaintiff was outlawed of felony, without ſaying after the laſt continuance. So, he may in like manner plead that the plaintiff was covert the day of the writ purchaſed, though he cannot plead that the plaintiff took baron pending the writ, without pleading it after the laſt continuance.—The diverſity ſeems to be between ſuch things as diſprove the writ in fact, and ſuch as diſprove it in law.

The laſt continuance where ſuch plea is pleaded at the aſſizes, is the day of the return of the *venire facias*, from whence the plea is continued by the award of the *diſtringas* or *habeas corpus* till the next term *niſi prius*, &c.

Salk. 519.

If the matter of the plea ariſe by deed, it ought to be pleaded with a *profert*.

The form of the plea, if at the aſſizes, is as follows: "And "now at this day, that is to ſay, *&c.* comes the ſaid *C. D.* by "*R. H.* his counſel, and ſays, that the ſaid *A. B.* ought not fur- "ther to maintain his action againſt him the ſaid *C. D.* becauſe "he ſays that after the day of laſt paſt, from which "day until the day of in *Mich.* term next, (unleſs "the juſtices of our lord the king, aſſigned to hold the aſſizes of "our lord the king in and for the county of *C.*, ſhould firſt come "on the day of at *B.* in the ſaid county of *C.*) the "action aforeſaid is continued, to wit, on, *&c.* at, *&c.* the ſaid "*A. B.* by his deed dated, *&c.* did releaſe."——And to ſhew the particular matter, and conclude, "And this he is ready to verify, "wherefore he prays judgment if the ſaid *A. B.* ought further "to maintain this action againſt him," *&c.*

Prem. 252.

Where a plea is certified on the back of the *poſtea*, and the plaintiff demurs, if the defendant on the expiration of a rule given for him to join in demurrer, refuſes to do ſo, the plaintiff may ſign judgment.]

# Præmunire.

(A) What Offences come under the Notion of a Præmunire.

(B) Of the Puniſhment therein.

## (A) What Offences come under the Notion of a Præmunire.

THE offences coming under the notion of a (*a*) *præmunire*, or for which the party incurs a *præmunire*, are reduced by Serjeant *Hawkins* to the following particulars: Hawk. P.C. c. 19.

(*a*) So called from the word in the writ, which is uſed for *præmonere*. Co. Lit. 129. 3 Inſt. 120.

1. The offence of making uſe of papal bulls is made a *præmunire*, by many ancient as well as later ſtatutes, to which purpoſe it is enacted by 25 *E.* 3. *ſt.* 6. § 4. called the ſtatute of proviſors, "That whoever ſhall, by a papal proviſion, diſturb any patron to "preſent to a benefice, &c. ſhall be fined and impriſoned till he "make full renunciation. And it is further enacted by 25 *E.* 3. "*ſt.* 5. *c.* 22. that if any one purchaſe a proviſion of an abbey or "priory, he ſhall be out of the king's protection; and by 38 *E.* 3. "*ſt.* 2. *c.* 1. and 12 *Rich.* 2. *c.* 15. and 13 *Rich.* 2. *ſt.* 2. *c.* 2. "that whoever ſhall accept a benefice, contrary to 25 *E.* 3. *ſt.* 5. "ſhall be baniſhed; and by 13 *Rich.* 2. *ſt.* 2. *c.* 3. that whoever "ſhall bring a ſentence of excommunication againſt any perſon "for executing the ſaid ſtatute of 25 *E.* 3. *ſt.* 5. ſhall ſuffer pain "of life and member; and by 16 *Rich.* 2. *c.* 5. that whoever "ſhall purchaſe or purſue, or cauſe to be purchaſed or purſued, "in the court of *Rome* or elſewhere, any tranſlations, proceſſes, "ſentences of excommunication, bulls, inſtruments, or other "things contrary to the tenor of that ſtatute, which touch the "king, againſt him, his crown, his regality, or his realm, or bring "them within this realm, or receive them, &c. ſhall be out of "the king's protection; and their lands and tenements, goods "and chattels, forfeited to the king, and they ſhall be attached "by their bodies; and by 2 *H.* 4. *c.* 3. that whoever ſhall pur-"chaſe from *Rome* a proviſion of exemption from ordinary obe-"dience; and by 2 *H.* 4. *c.* 4. that whoever ſhall put in execu-"tion bulls purchaſed by thoſe of the order of *Ciſteaux*, to be diſ-"charged of tithes, ſhall incur the like penalty. They are further "reſtrained Vid. Reg. 54. 3 Inſt. 127.

(a) Yet it hath been holden that the alleging an ancient bull in order to induce another principal matter whereon to ground a title, without claiming any thing from the bull itself, is not within this statute. 2 Lev. 251.

" restrained by 6 *H.* 4. *c.* 1. 7 *H.* 4. *c.* 8. 9 *H.* 4. *c.* 8. and " 3 *H.* 5. *st.* 2. *c.* 4. by which the statutes above mentioned are " enforced and explained; and it is further enacted by 23 *H.* 8. " *c.* 2. § 22. that whoever shall sue for or execute any licence, " dispensation, or faculty from the see of *Rome*; and by 28 *H.* 8. " *c.* 16." (by which all bulls, briefs, &c. heretofore obtained from *Rome* are made void) " that whoever shall (*a*) use, allege, or " plead the same in any court, unless they are confirmed by " that statute, or afterwards by the king, shall incur the like " penalty."

Davis, 84.

By the 13 *Eliz.* *c.* 2. those who purchase any bull, &c. from *Rome*, are guilty of high treason. But, as those ancient statutes continue still in force, it is in the election of the crown to proceed either upon them or 13 *Eliz.* *c.* 2. Also, by the said statute of 13 *Eliz.* *c.* 2. the aiders, comforters, and maintainers of such offenders, after the offence, to the intent to uphold the said usurped power, incur a *præmunire*.

Secondly, The derogating from the king's common law courts, is said to have been an high offence at common law, and is made a *præmunire* by many ancient statutes; for by 27 *E.* 3. *c.* 1. of provisors, " If any subject draw any out of the realm in plea, " whereof the cognizance pertains to the king's court, or of things " whereof judgments be given in the king's courts, or sue in any " other court to defeat or impeach the judgments given in the " king's courts, he shall be warned to appear, &c. in proper per- " son, at a day containing the space of two months, at which if " he appear not, he and his proctors, &c. shall be put out of the " king's protection, his lands and chattels forfeited, his body im- " prisoned, and ransomed at the king's will," &c.

And by 16 *Rich.* 2. *c.* 5. " Both those who shall pursue, or " cause to be pursued in the court of *Rome*, or elsewhere, any " processes, or instruments, or other things whatsoever which " touch the king, against his crown and regality or his realm, " and also those who shall bring, receive, notify, or execute " them, and their abettors, &c. shall be put out of the king's " protection."

2 Bulst. 299. 3 Inst. 125. Cro. Jac. 336.

In the construction of these statutes it hath been holden, that certain commissioners of sewers, for summoning one before them who had got a judgment at law, and imprisoning him till he would release it, were guilty of a *præmunire*.

Hawk. P.C. c. 19. § 18. and the authorities there cited.

Also, suits in the admiralty or ecclesiastical courts within the realm, for matters which upon the face of the libel itself appear to belong only to the cognizance of the temporal courts, are said to be within 16 *Rich.* 2. *c.* 5. by force, of the words, *or elsewhere*.

But for this *vide* title Court of Chancery.

And it hath been formerly holden, that even suits in a court of equity, to relieve against a judgment at law, are within the danger of these statutes, especially if they tend to controvert the very point determined at law, or to relieve in a matter relievable at law.

Thirdly,

Thirdly, Appeals to *Rome* are made *præmunire* by 24 *H.* 8. *c.* 12. and 25 *H.* 8. *c.* 19. by which it is enacted, "that ſuch "appeals as formerly were made to *Rome*, ſhall be made from "henceforth to Chancery."

Fourthly, The exerciſing the juriſdiction of a ſuffragan without the appointment of the biſhop of the dioceſe, is made a *præmunire* by 26 *H.* 8. *c.* 14. which ſets forth at large how ſuffragans are to be nominated, *&c.*

Fifthly, By 25 *H.* 8. *c.* 20. "If a dean and chapter refuſe to "elect one named in the king's letter for a biſhoprick, and to cer-"tify ſuch election to the king within twenty days after the li-"cence ſhall come to his hands, or if any archbiſhop or biſhop "after ſuch election (or nomination by the king in default "thereof, *&c.*) refuſe to confirm and conſecrate within twenty "days the perſon ſignified to them by the king's letters patents, "they incur a *præmunire*."

Sixthly, Maintaining the Pope's power is made a *præmunire* by 5 *Eliz. c.* 1.

Seventhly, By 13 *Eliz. c.* 7. "If any one ſhall bring into the "realm, *&c.* any *agnus Dei*, croſſes, pictures, beads, or ſuch like "ſuperſtitious things, pretended to be hallowed by the Biſhop of "*Rome*, &c. and ſhall deliver or offer the ſame to any ſubject to "be uſed in anywiſe; or if any one ſhall receive the ſame to "ſuch intent, and not diſcover the offender, *&c.*, or if a juſtice "of peace, having any offence in that act declared to him, do not "within ſixteen days declare it to a privy counſellour, he incurs a "*præmunire*."

Eighthly, By the 27 *Eliz. c.* 2. "Sending relief to any Jeſuit, "ſeminary prieſt, or college of prieſts or Jeſuits beyond the ſeas, "or to one not returning out of ſuch college into *England*, ſhall "incur a *præmunire*."

Ninthly, Perſons refuſing to take the oaths, incur a *præmunire* by ſeveral ſtatutes, as 1 *Eliz. c.* 1. and 5 *Eliz. c.* 1. and 3 *Jac.* 1. *c.* 4. and 7 *Jac.* 1. *c.* 6. and 1 *W. & M.* &c. *c.* 1. Vent. 171. Raym. 212. 374. 2 Keb. 825. [But ſee ſt. 31 G. 3. c. 31.]

Tenthly, By the 6 *Ann. c.* 7. it is enacted, "That if any "perſon ſhall maliciouſly and directly, by preaching, teaching, "or adviſed ſpeaking, declare, maintain, and affirm, that the pre-"tended Prince of *Wales* hath any right or title to the crown of "theſe realms; or that any other perſon or perſons hath or have "any right or title to the ſame, otherwiſe than according to "1 *W. & M. c.* 2. and 2 *W.* 3. *c.* 2. and the acts then lately "made in *England* and *Scotland* mutually for the union of the "two kingdoms; or that the kings or queens of this realm with "the authority of parliament are not able to make laws to limit "the crown and the deſcent, *&c.* thereof, ſhall incur a *præmunire*."

[By the ſtatute 1 & 2 *P. & M. c.* 8. to moleſt the poſſeſſors of abbey lands granted by parliament to *Henry* and *Edward* the ſixth, is a *præmunire*.

So likewiſe is the offence of acting as a broker or agent in any uſurious contract, where above ten *per cent.* intereſt is taken, by ſtat. 13 *Eliz. c.* 10.

To obtain any ſtay of proceedings, other than by arreſt of judgment or writ of error, in any ſuit for a monopoly, is likewiſe a *præmunire*, by ſtat. 21 *Ja.* 1. *c.* 3.

To obtain an excluſive patent for the ſole making or importation of gunpowder or arms, or to hinder others from importing them, is alſo a *præmunire* by two ſtatutes; the one 16 *Car.* 1. *c.* 21. the other 1 *Ja.* 2. *c.* 8.

On the abolition, by ſtat. 12 *Car.* 2. *c.* 24. of purveyance, and the prerogative of pre-emption, or taking any victual, beaſts, or goods, for the king's uſe, at a ſtated price, without conſent of the proprietor, the exertion of any ſuch power for the future was declared to incur the penalties of *præmunire*.

To aſſert, maliciouſly or unadviſedly, by ſpeaking or writing, that both or either houſe of parliament have a legiſlative authority without the king, is declared a *præmunire* by ſtat. 13 *Car.* 2. *c.* 1.

By the *habeas corpus* act, 31 *Car.* 2. *c.* 2. it is a *præmunire*, and incapable of the king's pardon, beſides other heavy penalties, to ſend any ſubject of this realm a priſoner into parts beyond the ſeas.

By 6 *Ann.* *c.* 23. if the aſſembly of the peers in *Scotland*, aſſembled to elect their ſixteen repreſentatives in the *Britiſh* parliament, ſhall preſume to treat of any other matter ſave only the election, they incur the penalties of a *præmunire*.

The ſtatute 6 *G.* 1. *c.* 18. (enacted the year after the *South-Sea* project,) makes all unwarrantable undertakings by unlawful ſubſcriptions, then commonly known by the name of bubbles, ſubject to the penalties of a *præmunire*.

The ſtat. 12 *G.* 3. *c.* 11. ſubjects to the penalties of the ſtatute of *præmunire*, all ſuch as knowingly and wilfully ſolemnize, aſſiſt, or are preſent at, any forbidden marriage of ſuch of the deſcendants of the body of King *George* II. as are by that act prohibited to contract matrimony without the conſent of the crown.

Degge, p. 1. *c.* 13. 3 Inſt. 122. Br. Præmunire, pl. 21.

It is ſaid, that if the biſhop take upon him to viſit a donative, and deprive the incumbent, he runs himſelf into the danger of a *præmunire*. And in ſuch caſe was *Barlow*, Biſhop of *Bath* and *Wells*, in the reign of *Edward* the 6th, who was forced to obtain a pardon for having deprived the Dean of *Wells*, the deanery being a donative by letters patent from the king.]

## (B) Of the Puniſhment therein.

MOST of the ſtatutes of *præmunire* refer the puniſhment to 16 *Rich.* 2. *c.* 5. which enacts, "That thoſe who offend "againſt the purport thereof ſhall be put out of the king's pro"tection, and their lands and tenements, goods and chattels, "forfeited to our lord the king; and that they be attached by "their bodies if they may be found, and brought before the king "and his council, there to anſwer to the caſes aforeſaid; or that "proceſs be made againſt them by *præmunire facias*, in manner as "is ordained in other ſtatutes of proviſors."

Co. Lit. 129. b. 3 Inſt. 125. 218.

The judgment in *præmunire* at the ſuit of the king, againſt the defendant, being in priſon, is, that he ſhall be out of the king's protection;

tection; and that his lands and tenements, goods and chattels, ſhall be forfeited to the king; and that his body ſhall remain in priſon at the king's pleaſure: but, if the defendant be condemned upon his default of not appearing, whether at the ſuit of the king or party, the ſame judgment ſhall be given as to the being out of the king's protection and the forfeiture; but inſtead of the clauſe, that the body ſhall remain in priſon, there ſhall be an award of a *capiatur*. 2 Hawk. P. C. c. 48. § 9.

As the above-mentioned ſtatute 16 *Rich.* 2. *c.* 5. expreſsly ſaith, that ſuch offenders ſhall be put out of the king's protection; and alſo the ſtatute of 25 *E.* 3. *ſtat.* 5. *c.* 22. had farther added, that any one might do with a purchaſer of the proviſions therein prohibited, as with the king's enemy; and that he who ſhould offend againſt ſuch an one in body, lands, or goods, ſhould be excuſed; it was formerly holden, that a perſon attainted in a *præmunire* might lawfully be ſlain by any one, as being the king's enemy and out of the protection of the laws; but the later opinions ſeem to have diſapproved of this ſeverity; and it is now expreſsly enacted by 5 *Eliz.* *c.* 1. § 21, 22. "That it ſhall not be lawful to kill any "perſon attainted in a *præmunire*, ſaving ſuch pains of death or "other hurt or puniſhment, as heretofore might without danger "of law be done upon any perſon that ſhall ſend or bring into "the realm, or within the ſame ſhall execute any proceſs, *&c.* "from the ſee of *Rome*." Co. Lit. 130. 12 Co. 68. 3 Inſt. 128. Bro. Cor. 197. Jenk. 199.

It is clearly agreed, that a perſon attainted in a *præmunire* can bring no (*a*) action whatſoever; neither is it ſafe for any one, knowing him to be guilty, to (*b*) give him any aid, comfort, or relief. Co. Lit. 130. (*a*) Whether he is entitled to ſurety of the peace. Hawk. P. C. c. 19. § 47. (*b*) That it ſeems doubtful whether there can be any acceſſaries in *præmunire*, *vide* Stamf. P. C. 44. Plow. 97.

It hath been reſolved, that a ſtatute, by appointing that an offender ſhall incur the penalty and danger mentioned in the 16 *Rich.* 2. *c.* 5. does not confine the proſecution for the offence to the particular proceſs thereby given. Vent. 173.

It is holden, that the ſtatutes of *præmunire* which give a general (*c*) forfeiture of all the lands and tenements of the offender, extend not to lands in tail. Co. Lit. 130. (*c*) Whether the forfeiture of any lands, &c. ſhall relate to the time of the offence, or only to that of the judgment, *Q. et vide* Cro. Car. 172. Jon 217.

It hath been adjudged, that a pardon of all miſpriſions, treſpaſſes, offences, and contempts, will pardon a *præmunire*. Cro. Jac. 336. 2 Bulſt. 299.

The defendant in a *præmunire* muſt regularly appear in perſon, whether he be a peer or commoner, unleſs he is diſpenſed with by ſome writ or grant for that purpoſe; though in the caſe of (*d*) Sir *Anthony Mildmay* he was allowed to plead a pardon to a *præmunire* by attorney: but (*e*) it has been thought, that there was ſome clauſe to this effect in the pardon. 3 Inſt. 125. (*d*) 1 Roll. Rep. 190. 2 Bulſt. 290. (*e*) 2 Hawk. P. C. 373.

Upon an indictment of a *præmunire*, a peer of the realm ſhall not be tried by his peers. 12 Co. 92. Ld. Vaux's caſe.

2 Ld. Raym. 1361. The King v. Cawood, Stra. 472.

Upon an information on the ſtatute 6 *G.* 1. *c.* 18. for ſetting up a bubble called the *North Sea*, it was determined, that the court was not obliged by that act to give the whole judgment, as in caſe of a *præmunire*, againſt the defendant, but only ſuch parts of it as in their diſcretions they ſhould think fit; and accordingly a fine of 5 *l.* was ſet on the party convicted, and judgment that he ſhould remain in priſon during the king's pleaſure.

# Prerogative.

*Vide* Stamf. Prero. c. 1. Co. Lit. 90. [By the word prerogative we uſually underſtand that ſpecial pre-eminence which the King hath, over and above all other perſons, and out of the ordinary courſe of the common law, in right of his royal dignity. It ſignifies, (in its etymology from *præ* and *rogo*), ſomething that is required or demanded before, or in preference to, all others. And hence it follows, that it muſt be in its nature ſingular and eccentrical; that it can only be applied to thoſe rights and capacities which the King enjoys alone, in contradiſtinction to others, and not to thoſe which he enjoys in common with any of his ſubjects; for if once any one prerogative of the crown could be held in common with any ſubject, it would ceaſe to be prerogative any longer. And therefore Finch lays it down as a maxim (Finch's L. 85.), that the prerogative is that law in caſe of the King, which is law in no caſe of the ſubject. 1 Bl. Com. 239.] (*a*) That the King's prerogative is part of the law of England, and comprehended within the ſame. 2 Inſt. 496.

PREROGATIVE is a word of large extent, including all the rights and privileges which by (*a*) law the king hath, as head and chief of the commonwealth, and as intruſted with the execution of the *laws*.

And. 153. Co. Lit. 89. 73. 4 Co. 124. —That he is to defend his ſubjects. 7 Co. 4.— That he cannot change the law. 5 Co. 55. 2 Inſt. 36. 12 Co. 70.

The nature of our conſtitution is that of a limited monarchy, in which the legiſlative power is lodged in the king, lords, and commons; but the king is intruſted with the executive part, and from him all juſtice is ſaid to flow: hence he is ſtyled the head of the commonwealth, ſupreme governor, *parens patriæ*, &c., but ſtill he is to make the law of the land the rule of his government; that being the meaſure as well of his power, as of the ſubjects obedience: for as the law aſſerts, maintains, and provides for the ſafety of the king's royal perſon, crown, and dignity, and all his juſt rights, revenues, powers, and prerogatives; ſo it likewiſe declares and aſſerts the rights and liberties of the ſubject.

—Finch's L. 81, 82, 83. ſpeaks highly of it, as a matter divine: the king, ſays he, carries God's ſtamp, and has the ſhadow of God's excellencies given him: the power of God is joined with excellency; for to do wrong is not omnipotency, but weakneſs; ſo it is with the king, he can do no wrong, &c. As to which my Ld. Ch. J. Hale ſaith, it is regularly true, that the law preſumes the king will do no wrong, neither indeed can he do any wrong; and therefore, if the king command an unlawful act to be done, the offence of the inſtrument is not thereby indemnified: For though the king is not under the coercive power of the law, yet, in many caſes, his commands are under the directive power of the law, which conſequently makes the act itſelf invalid, if unlawful; and ſo renders the inſtrument of the execution thereof obnoxious to the puniſhment of the law; yet in time of peace, if two men combat together at barriers, or for trial of ſkill, if one kill the other, it is homicide; but if it be by the command of the king, it is only felony. Hal. Hiſt. P. C. 43, 44.

Hence

Hence it hath been eſtabliſhed as a rule, that all prerogatives must be for the advantage and good of the people, otherwiſe they ought not to be allowed by the law *. Moor, 672. Show. P. C. 75.

* And moſt undoubtedly this is the great end of the King's prerogative, who is not the ſovereign of the ſtate, but the people's executive magiſtrate: For as to ſovereignty, that reſides where the conſtitution has placed the legiſlative power, *i. e.* in king, lords, and commons, in parliament aſſembled; ſo that the king, in his political capacity, as one of the ſtates of the realm, poſſeſſes a part, and only a part of the ſovereignty, but is not ſovereign, any more than a part is equal to the whole. But, as executive magiſtrate, he is inveſted with great power, pre-eminence, and many prerogatives; all intended by the conſtitution to be employed for the good of the people; none to their detriment; nor can any prerogative be legally ſo employed.

[This paſſage, which has been induſtriouſly foiſted into the work by the laſt editor, abounds throughout with the moſt dangerous political errors. It gives a falſe view of the nature of our government: it repreſents it as almoſt a pure republick. From the qualifications which the kingly power is ſubjected to, the editor would infer the non-exiſtence of the power itſelf: Becauſe the king acts with *advice* in *all* caſes, and with advice and *conſent* in *ſome* caſes, therefore he never acts *proprio jure*. Becauſe the law hath aſſigned him various counſellours to aid and adviſe him in the deliberative and executive parts of his government, therefore theſe counſellours are co-equal and co-ordinate with him.—But let us mark the ſeveral parts of this notable paſſage, and let us ſee how well they correſpond with the authorities we ſhall hereafter cite, authorities drawn from our records and ſtatute books, and from the writings and ſpeeches of men eminent for their knowledge of the law and conſtitution of their country, and not ſuſpected of any blind attachment to monarchy. "The king is not the ſovereign of the ſtate, but the people's exe-"cutive magiſtrate."—"Sovereignty reſides where the conſtitution has placed the legiſlative power, "viz. in king, lords, and commons, in parliament aſſembled.—So that the king, in his political capa-"city, as one of the ſtates of the realm, poſſeſſes a part, and only a part of the ſovereignty; but it "not ſovereign, any more than a part is equal to the whole."—In the firſt place this writer ſeems to ſuppoſe, that the ſovereign power of a ſtate conſiſts merely in legiſlation; whereas the power of a ſtate conſiſts equally in enforcing the execution of laws when made, as in the making of them.—"But," ſaith this writer, "the king is not the ſovereign of the ſtate, but the people's executive magiſtrate;"—if then the king is not the ſovereign of the ſtate, but the people's executive magiſtrate, the people are the ſovereign of the ſtate, for the king is *their* magiſtrate: but according to this writer, the ſovereignty is lodged not in the people only, but in king, lords, and commons; then, upon this writer's own hypotheſis, the people cannot be ſovereign, for, to uſe his own words, *a part cannot be equal to the whole*; but if they are not ſovereign, how can the king be the *people*'s executive magiſtrate? whence is their authority to commiſſion this officer?—But ſo far from the king not being the ſovereign of the ſtate, it will appear from the following authorities, that the whole power of the ſtate, both legiſlative and executive, ſubject to certain limitations and qualifications, is veſted in the king alone; that he, with the advice and conſent of his great council, makes laws; and, with the advice of other councils, executes thoſe laws when made: that he is not one of the eſtates of the realm, as this writer ſuppoſeth him to be, but paramount thoſe eſtates. Lord Coke ſaith, in his 4 Inſt. pa. 3. that the king is *caput, principium et finis* of his court of parliament. In 22 E. 3. Hil. term, plea 25. it is laid down thus: *Et ſuit dit, que le roy fait les leis par aſſent des peres et de la commune, et non pas les peres et la commune.*

According to Lord Hale, "Although that the Engliſh monarchy is not in all reſpects abſolute and unlimited, but hath certain qualifications of monarchical power, eſpecially in point of making laws, and impoſing taxes upon the people; yet, certainly, ſince the denomination of government is *ad plurimum*, the government is monarchical, and not ariſtocratical or democratical. And hence it is, that all juriſdiction in this realm, whether eccleſiaſtical or civil, is derived from the crown; and that the exerciſe thereof in the miniſters or judges, to whom it is ſo delegated by the crown, is in right of the crown, and by virtue of a delegation from it." *Id.* 190. And in a preceding part of this tract, Lord Hale, ſpeaking of the deliberative and executive parts of civil government, ſays, "In both which, though the king under God be ſupreme governor and fountain; yet it is neceſſary for him to call in others *in partem ſollicitudinis*, and, as to uſe their aſſiſtance in the executive part, ſo to have their advice and council in the deliberative part of his government. Hale's Juriſd. of the Lords' Houſe, pa. 4. Again, Whitelock in his comment on the parliamentary writ, ſays, "The making of ſtatutes is by the king with the aſſent of the lords and commons in parliament." Vol. 1. 406. And farther, the ſtyle of our acts of parliament is, "*Be it enacted by the King's moſt excellent Majeſty, by and with the advice and conſent of the Lords ſpiritual and temporal, and Commons in parliament aſſembled.*" Even in money bills, when the commons have granted the king their money, they pray that he will be graciouſly pleaſed to make it a law. "We your Majeſty's moſt dutiful and loyal ſubjects, the Commons of Great Bri-"tain in parliament aſſembled, having, &c. &c. Do beſeech your Majeſty that it may be enacted, "and be it enacted by the King's moſt excellent Majeſty, by and with the advice and conſent," &c. &c.

With reſpect to the king's not being one of the eſtates of the realm, read the words of Lord Hale in another part of the tract above referred to. The nobility, clergy, and commonalty are the three eſtates of the kingdom. The king comes in upon a higher denomination and title, namely, the head of theſe three eſtates. And therefore they that have gone about to make the king one of the three eſtates, are miſtaken, as will eaſily appear to any that will but read the records fully, being, viz. *Ret. Parl.* 9 *H.* 5. *n.* 15. the concluſion of the peace between the kings of England and France by the

king's command in parliament, 2 May, 9 H. 5. read *coram tribus ſtatibus regni*, viz. *prælatis et clero, nobilibus et magnatibus, et communitate regni Angliæ*, and by them aſſented to. *Rot. Parl.* 3 & 4 E. 4. n. 23. *le roy et les trois eſtates.* Rot. Parl. 13 E. 4. n. 16 & 17. *domino rege et tribus ſtatibus regni ſtatibus in eodem parliamento.* And in the firſt parliament of the uſurper R. 3. who would be ſure to want no formality to countenance his uſurpation, *Rot. Parl.* 1. *titulus Regius*, there is recited an inſtrument allowing him to be king before his coronation was declared in the name of the three eſtates of this realm of England, viz. the lords ſpiritual and temporal, and commons. "Bee it ordained," that "the te-"nour of the ſaid rolle, with all the contynue of the ſame, preſented as is aboveſaid, and delivered to "our beforeſaid ſouveraln lord the king, in the name and on the behalf of the ſayd three eſtates out "of parliament, now by the ſame three eſtates aſſembled in this preſent parlement, and by auctorite "of the ſame, bee ratifyed, enrolled, recorded," &c. This, though done in a time of uſurpation, yet ſufficiently evidenceth what the three eſtates were *. And the objections againſt it, 1. that two of thoſe eſtates are conſtituents of the lords' houſe, and ſo muſt outbalance the commons, which are but one of the three eſtates; and, 2. that the lords ſpiritual by this means ſhould have a negative voice upon the lords temporal and commons, and ſo no law could be made without the conſent of the major part of the ſpiritual lords and the major part of the temporal lords, as well as the moſt part of the commonalty; I ſay theſe objections are vain. For though it be true, that two of the three eſtates are conſtituents of the lords' houſe, yet they conſtitute but one houſe. And the laws and cuſtoms of the kingdom, which are the true meaſure of all bounds of power, have given a negative voice of either houſe upon the other, and of the king upon both; but have not given a negative voice of only one of the two eſtates conſtituting the lords' houſe unto the other, or to the commons being the third eſtate; *the legiſlative power being lodged in the king with the aſſent of the two houſes of parliament as ſuch*, and not with the aſſent of the three eſtates ſimply conſidered as ſuch; *for it is the ſettled conſtitution and cuſtom of the kingdom, that fixeth and defineth where the legiſlative power is lodged, not notions and ſpecies.*" Hales's Juriſdict. of the Lords' Houſe, &c. pa. 10, 11. And Lord Coke, before him, had begun his chapter on the High Court of Parliament in theſe words: "This court conſiſteth of the King's "Majeſty, ſitting there, as in his royal political capacity, and of *the three eſtates of the realm*, viz." &c. 4 Inſt. cap. 1. And after him, at the memorable æra of the Revolution, in the preamble to the Bill of Rights, the Convention Parliament uſe theſe words: "Whereas the lords ſpiritual and temporal, "and commons, aſſembled at Weſtminſter, lawfully, fully, and freely repreſenting *all the eſtates of the* "*people of this realm*, did, upon, &c. preſent unto their Majeſties," &c. Stat. 1 W. & M Seſſ. 2. c. 2.

But the theory of our government is ſketched with admirable ſpirit and correctneſs by the Attorney-General, in his addreſs to the jury upon Hardy's trial. "The power of the ſtate, by which I mean the power of making laws, and enforcing the execution of them when made, is veſted in the king; enacting laws in the one caſe, that is, in his legiſlative character, by and with the advice and conſent of the lords ſpiritual and temporal and of the commons in parliament aſſembled, according to the law and conſtitutional cuſtom of England; in the other caſe, executing the laws, when made, in ſubſervience to the laws ſo made, and with the advice, which the law and the conſtitution hath aſſigned to him in almoſt every inſtance, in which it has called upon him to act for the benefit of the ſubject." —Hardy's Trial, by Gurney, pa. 32. Again, in a ſubſequent paſſage, after having ſtated the royal duties, he goes on thus: "To that king, upon whom theſe duties attach, the law and conſtitution, for the better execution of them, have aſſigned various counſellours, and reſponſible adviſers: it has clothed him, under various conſtitutional checks and reſtrictions, with various attributes and prerogatives, as neceſſary for the ſupport and maintenance of the civil liberties of the people: it aſcribes to him ſovereignty, imperial dignity, and perfection: and becauſe the rule and government, as eſtabliſhed in this kingdom, cannot exiſt *for a moment* without a perſon filling that office, and able to execute all the duties from time to time, which I have now ſtated, it aſcribes to him alſo that he never ceaſes to exiſt. In foreign affairs, the delegate and repreſentative of his people, he makes war and peace, leagues and treaties: in domeſtick concerns, he has prerogatives, as a conſtituent part of the ſupreme legiſlature: the prerogative of raiſing fleets and armies: he is the fountain of juſtice, bound to adminiſter it to his people, becauſe it is due to them: the great conſervator of publick peace, bound to maintain and vindicate it; every where preſent, that theſe duties may no where fail of being diſcharged: the fountain of honour, office, and privilege; the arbiter of domeſtick commerce, the head of the national church." *Id.* 35. And in the concluſion of this brilliant ſketch, he cloſes the whole with theſe emphatical words: "Gentlemen, I hope I ſhall not be thought to miſpend your time in ſtating thus much, becauſe it appears to me, that the fact that ſuch is the character, that ſuch are the duties, that ſuch are the attributes and prerogatives of the king in this country, (all exiſting for the protection, ſecurity, and happineſs of the people in an eſtabliſhed form of government,) accounts for the juſt anxiety, bordering upon jealouſy, with which the law watches over his perſon—accounts for the fact, that in every indictment, the compaſſing or imagining his deſtruction or depoſition, ſeems to be conſidered as neceſſarily co-exiſting with an intention to ſubvert the rule and government eſtabliſhed in the country: it is a purpoſe to deſtroy and to depoſe *him*, in whom the ſupreme power, rule, and government, under conſtitutional checks and limitations, is veſted, and by whom, with conſent and advice in ſome caſes, and with advice in all caſes, the exerciſe of this conſtitutional power is to be carried on." *Id.* 36.

With reſpect to the rule which is ſaid in the text to be eſtabliſhed, viz. "that all prerogatives muſt be for the advantage and good of the people, otherwiſe they ought not to be allowed by the law," it is neither

* In addition to the above authorities collected by Lord Hale, ſee Rot. Parl. 15 R. 2. m. 9. 31 H. 6. m. 17.

expreſſed

expreſſed in terms ſufficiently clear and preciſe, nor will it hold in the extent to which, as there ſtated, it may be carried. It is not clear from the terms, whether it meant, that the prerogative or right itſelf ſhall be diſallowed, if found to be injurious to the publick, or only the act done by virtue and in exerciſe of that right or prerogative. If the former be the meaning, we may not heſitate to pronounce that there is no ſuch rule of law: for all the prerogatives of the crown are veſted in it for the protection and happineſs of the people, and cannot in law be wreſted from it without danger to both. If the latter be the meaning, then the rule will not hold univerſally and in all caſes. The higher prerogatives of the crown are not to be meaſured by the rules of law, or to be ſcanned by the reaſon of our judges; nor are acts done by virtue of any of thoſe prerogatives to be ſet aſide on the ground, that they are not for the publick good. For inſtance, the king has the prerogative of making war and peace: inveſted with that prerogative, he makes a treaty of peace: that treaty is found to be injurious to the country: is the treaty therefore a nullity? is there any authority in any man, or body of men in this country, to vacate it, becauſe it is a bad treaty? The king has the prerogative of giving his *aſſent*, as it is called, to ſuch bills as his ſubjects, legally convened, may preſent to him, that is, of giving them the force and ſanction of a law: he withholds his aſſent to a bill evidently calculated to promote the intereſts of his people: does the bill, becauſe it is a good bill, therefore paſs into a law, though it want the royal *fiat*? or does the utility of the meaſure deprive the crown of its conſtitutional power of *rejecting*? The rule then ſeems to go no farther than this, that in the exerciſe of ſome of the prerogatives, the royal authority is ſubmitted to the control and direction of the courts of law, the judgment of the King is in ſome caſes committed to his judges. In thoſe caſes it is the duty of the judges ſo to admeaſure the royal prerogatives as that they ſhall in no caſe be exerted ſo as to affect the inheritance of any one, to change the courſe of the law, or to work individual injury. Plowd. 236. 487. Noy, 175. They will always remember the maxim of law, that the king can do no wrong: if they find that wrong has been done, the act cannot be the act of the king, and therefore ought not to be allowed.]

The rights and prerogatives of the crown are in moſt things as ancient as the law itſelf; for though the ſtatute 17 *E.* 2. *ſt.* 1. commonly called the ſtatute *de prerogativa regis*, ſeems to be introductive of ſomething new, yet for the moſt part it is but a ſum or collection of certain prerogatives that were known law long before: as, that the king's wardſhip of lands *in capite*, did attract the wardſhip of lands held of others; that the grant of a manor did not paſs an advowſon appendant, unleſs named; that the king had a right to eſcheats, wrecks, royal fiſhes, and many others which were ancient prerogatives of the crown. Bendl. 117. 2 Inſt. 263. 496. 10 Co. 64.

But for the better underſtanding hereof, I ſhall conſider,

(A) When the King commences his Reign, and the Ceremony requiſite therein.

(B) Of the King's Prerogative as univerſal Occupant: And herein,

1. That he is univerſal Occupant, and entitled to all derelict Lands.
2. Of his Prerogative in Eſcheats.
3. Of his Prerogative in Seas and Navigable Rivers.
4. Of his Prerogative in Swans and Royal Fiſhes.
[5. Of his Prerogative in Ports and Havens.]
6. Of his Prerogative in *Beacons* and Light-Houſes.
7. Of his Prerogative in Wreck.
8. Of his Prerogative in relation to Coins and Mines.
9. Of his Prerogative in derelict Goods; and therein, of Waifs, Strays, and Treaſure Trove.
10. Of his Prerogative in Fines and Forfeitures.

(C) Of

(C) Of his Prerogative over the Perſons of his Subjects: And herein,

1. Who ſhall be ſaid his Subjects.
2. That he is entitled to the Service and Allegiance of his Subjects; and therein, of the Oaths injoined them.
3. That he may reſtrain his Subjects from going abroad; and herein, of the Writ *de Ne exeat regno.*
4. That he may command his Subjects to return Home; and therein, of awarding a Privy Seal.

(D) Of the King as the Fountain of Juſtice, and intruſted with the Execution of the Laws: And herein,

1. That all Civil Juriſdiction flows from the King.
2. Of the King's Prerogative in Eccleſiaſtical Matters.
3. Of his Prerogative in creating Officers.
4. Of his Prerogative in making War and Peace.
5. Of his Prerogative in taking Care of Infants, Idiots, Lunaticks, and Charitable Uſes.
6. Of his Prerogative in Pardoning.
7. Of Diſpenſations and *Non obſtantes.*
8. Of his Proclamations.

(E) How the Rules of Law differ with reſpect to the King and a private Perſon: And herein,

1. Of what Things incapable, from the Dignity of his Perſon and Office.
2. What Things enure to him in his natural, what in his political Capacity.
3. Of the Difference in the Rules of Law as directing the King's Property, otherwiſe than that of a Subject.
4. That his Rights ſhall be preferred to a Subject's where they happen to meet.
5. Of Acts of Parliament which extend to or bind not the King.
6. That no Laches can be imputed to him; and therein, of the Maxim, *Nullum Tempus occurit Regi.*
7. Of his Prerogative in his Suits and Proceedings in Courts of Juſtice.

(F) Of

(F) Of the King's Grants and Letters Patent: And herein, *See 577.*

1. What Things the King may grant: And therein,
   1. Of Grants arising from his Prerogative of Power, and what are inseparably annexed to the Crown.
   2. Of Grants arising from his Interest.
   3. How far the King must have an Interest, in order to enable him to grant.
   4. Grants tending to a Monopoly; and therein, of Things of a new Invention.
   5. Grants of the sole Liberty of Printing.
2. Of the Construction of the King's Grants and Letters Patent, as to their being good or void; and herein, of the King's being deceived in his Grant.
3. Where the King's Grantee shall partake of his Prerogative.

---

## (A) When the King commences his Reign, and the Ceremony requisite therein.

UPON the death or demise of the king, his heir is that moment invested with the kingly office and regal power, and commences his reign the same day his ancestor dies; whence it is held as a maxim (*a*), that the king never dies. 7 Co. 12. in Calvin's case. 6 Co. 27. 7 Co. 30.

(*a*) And therefore if lands are given to the King by deed enrolled, without the words *heirs or successors*; yet a fee-simple passeth, for that in judgment of law he never dies. Co. Lit. 9.

And herein we must take notice, that the rules of descent are the same with those that govern private inheritances, except only as to the rule of *possessio fratris*; which does not hold in the descent of the crown or its possessions: neither is half blood any impediment in such case; for the brother of the half blood shall be preferred to the sister, in the enjoyment of the crown, as the most capable of the two, by the advantages and prerogative of his sex. Co. Lit. 15. b. [But these are not the only exceptions in the case of the crown to the general rules of descent; for, among the females, the crown descends by right of primogeniture to the eldest daughter only, and her issue, and not, as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect: and therefore Queen Mary on the death of her brother succeeded alone, and not in partnership with her sister Elizabeth. 1 Bl. Com. 194.]

Therefore, if the king hath issue a son and a daughter by one *venter*, and a son by another *venter*, and purchases lands and dies, and the eldest son enters, and dies without issue, the daughter shall not inherit those lands, nor any other fee-simple lands of the crown, Co. Lit. 15. b.

crown, but the younger brother ſhall have them together with the crown.

3 Inſt. 7. Hal. Hiſt. P. C 101.

As the king commences his reign from the day of the death of his anceſtor, it hath been held, that compaſſing his death before coronation, yea before proclamation of him, is a compaſſing of the king's death within the ſtatute of 25 *E.* 3. *ſtat.* 5. *c.* 2. he being king preſently, and the proclamation and coronation only (*a*) honourable ceremonies for the further notification thereof.

(*a*) The late Mr. Juſtice Foſter is, however, very far from thinking that the ſolemnity of a coronation is to be conſidered *among us* merely as a royal ceremony, or as a bare notification of the deſcent of the crown, as authors of high diſtinction have been pleaſed to expreſs themſelves: He admits that it is, on the part of the nation, a publick ſolemn recognition that the regal authority, and all the prerogatives of the crown, are veſted in the perſon of the king, antecedent to that ſolemnity; but the ſolemnity of a coronation *with us* goeth a great deal farther; the coronation oath importeth, on the part of the king, *a publick ſolemn recognition* of the *fundamental right of the people*; and concludeth with an engagement under the *higheſt* of all *ſanctions*, that *he* will *maintain* and *defend* thoſe rights; and to the *utmoſt of his power make* the *laws* of the *realm* the *rule* and *meaſure* of his *conduct*. Foſt. Rep. 189. See Sid. on Gov. 91, 92. S. 7.

Hawk. P.C. c. 17. § 11.

Alſo it is held, that every king for the time being, in the (*b*) actual poſſeſſion of the crown, is a king within the intention of the abovementioned ſtatute; for there is a neceſſity that the realm ſhould have a king, by whom, and in whoſe name, the laws are to be adminiſtered; and the king in poſſeſſion, being the only perſon who either doth or can adminiſter thoſe laws, muſt be the only perſon who hath a right to that obedience which is due to him who adminiſters thoſe laws; and ſince, by virtue thereof, he ſecures to us our lives, liberties, and properties, and all other advantages of government, he may juſtly claim returns of duty, allegiance, and ſubjection.

(*b*) As to the diſtinction between a king *de facto* and *de jure*, my Ld. Hale ſays, a king *de facto*, but not *de jure*, ſuch as were H. 4. H. 5. H. 6. R. 3. H. 7. being in the actual poſſeſſion of the crown, is a king within this act; ſo that compaſſing his death is treaſon within this law; and therefore in the 4 E. 4. 20. a perſon that compaſſed the death of H. 6. was attainted for that treaſon in the time of the rightful king; but had it been an act of hoſtility in aſſiſtance of the rightful heir of the crown, which afterwards obtained, this had not been treaſon; but *è converſo*, thoſe that aſſiſted the uſurper, though in the actual poſſeſſion of the crown, have ſuffered as traitors; as appears by the ſtatute of 1 E. 4. and as was done upon the aſſiſtants of H. 6. after his temporary readeption of the crown, in 10 E. 4. and 39 H. 6. Hal. Hiſt. P. C. 101, 103. [Sir M. Foſter, ſpeaking of a king *de jure & de facto*, and contending that allegiance is due by the ſubject to the latter as well as the former, hath theſe remarkable words: "He (the ſubject) hopeth for protection from the crown, and he payeth his allegiance to it, in the perſon of him whom he ſeeth in full and peaceable poſſeſſion of it: he entereth not into the queſtion of title, he having neither leiſure, nor abilities, nor is he at liberty to enter into that queſtion: but he ſeeth the fountain, from whence the bleſſings of government, liberty, peace, and plenty flow to him, and there he payeth his allegiance." Foſt. Cr. L. 399.]

Hawk. P.C. c. 17. § 13. and the authorities there cited.

It hath been ſettled, that all judicial acts done by *Henry* the Sixth, while he was king, and alſo all pardons of felony and charters of denization granted by him, were valid; but that a pardon made by *E.* 4. before he was actually king, was void even after he came to the crown.

Hal. Hiſt. P. C. 104.

The right heir of the crown, during ſuch time as the uſurper is in plenary poſſeſſion of it, and no poſſeſſion thereof in the heir is not a king within this act; as was the caſe of the houſe of *York*, during the plenary poſſeſſion of the crown in *H.* 4., *H.* 5., *H.* 6. But, if the right heir had once the poſſeſſion of the crown, as king, though an uſurper had afterwards gotten the poſſeſſion thereof, yet the other continues his ſtyle, title, and claim thereto, and

and afterwards re-obtains the full poſſeſſion thereof; a compaſſing the death of the rightful heir, during that interval, is a compaſſing of the king's death within this act; for he continued a king ſtill, *quaſi* in poſſeſſion of his kingdom; which was the caſe of *E.* 4. in that ſmall interval wherein *H.* 6. re-obtained the crown; and the caſe of *E.* 5. notwithſtanding the uſurpation of his uncle *Rich.* 3.

It was reſolved by the judges, in the caſe of Sir *H.* (*a*) *Vane*, that king *Car.* 2. was king *de facto*, as well as *de jure*, from his father's death; and that therefore all thoſe who acted againſt and kept him out of poſſeſſion, in obedience to the powers then in being, were traitors. Keiling, 14, 15. Keb. 315.

(*a*) Mr. Juſtice Foſter ſays, that the rule laid down by the court in this caſe, involved, in the guilt of treaſon, every man in the kingdom who had acted in a publick ſtation under a government poſſeſſed *in fact* for 12 years together of a ſovereign power; and that Ld. Ch. J. Hale, when of high rank at the bar, took the engagement "To be true and faithful to the Commonwealth of England, *without a King or Houſe of Lords.*" *This, in the ſenſe of thoſe* that impoſed it, was plainly an engagement for aboliſhing kingly government, at leaſt for ſupporting the abolition of it; and with regard to thoſe who took it, it might, upon the principles of Sir H. Vane's caſe, have been eaſily improved into an overt act of treaſon againſt King Charles the Second. Foſt. Rep. 402.

[But it ought to be conſidered, that it was firſt reſolved by the ſame judges, that King *Charles* the Second was king *de facto* as well as *de jure* from his father's death; and it is apparent, that no other perſon was in poſſeſſion of any ſovereign power known to our laws.] 1 Hawk. P. C. c. 17. § 10. Hence the ſtatutes paſſed in the firſt year after the reſtoration of King Charles II. are always called the acts in the twelfth year of his reign; and all the other legal proceedings of that reign are reckoned from the year 1648, and not from 1660.

By the 1 *Mar. ſtat.* 3. *c.* 1. § 3. "The kingly office of this realm, "and all prerogative, royal power, authorities, and juriſdiction "thereunto annexed, being inveſted in (*b*) either male or female, "are as abſolutely inveſted in the one as the other."

(*b*) The Queen Regent, as were Q. Mary and Q. Elizabeth, is a king within the 25 E. 3. ſtat. 5. c. 2. Hal Hiſt. P. C. 101. but a titular king, as the huſband of a queen regent, is not. 3 Inſt. 8. Hawk. P. C. c. 17. § 20.

By the 1 *W. & M. ſtat.* 2. *c.* 2. § 9. "Every perſon that ſhall "be reconciled to, or hold communion with, the ſee or church "of *Rome*; or ſhall profeſs the popiſh religion; or ſhall marry a "papiſt; ſhall be incapable to inherit or enjoy the crown of this "realm and *Ireland*; and in ſuch caſe the people ſhall be abſolved "of their allegiance, and the crown ſhall deſcend to ſuch perſons, "being proteſtants, as ſhould have inherited the ſame, in caſe the "perſon ſo reconciled, *&c.* were dead."

And by § 10. "Every king and queen, who ſhall come to and "ſucceed in the imperial crown of this kingdom, ſhall, on the "firſt day of the meeting of the firſt parliament, next after his or "her coming to the crown, ſitting in the throne of the Houſe of "Peers, in the preſence of the lords and commons, or at his or "her coronation, before ſuch perſon as ſhall adminiſter the coro-"nation oath, at the time of taking the ſaid oath, (which ſhall firſt "happen,) make, ſubſcribe, and repeat the declaration mentioned "in the ſtatute 30 *Car.* 2. *for preſerving the king's perſon and* "*government, by diſabling papiſts from ſitting in either houſe of* "*parliament.*"

The

Dyer, 209. pl. 22. Plow. 209. Caſe of the Duchy of Lancaſter. Co. Lit. 43. 5 Co. 27. Raym. 90.

The king, as king, cannot be a minor; ſo that grants, leaſes, &c. made by him, though under age, bind preſently, and cannot be avoided by him, either during his minority, or when he comes of age; for the politick rules of government have thought it neceſſary, that he who is to govern and manage the whole kingdom, ſhould never be conſidered as a minor incapable of governing himſelf and his own affairs.

[But it hath been uſually thought prudent, when the heir apparent hath been very young, to appoint a protector, guardian, or regent, for a limited time: but the very neceſſity of ſuch extraordinary proviſion is ſufficient to demonſtrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian. 1 Bl. Comm. 248.]

## (B) Of the King's Prerogative as univerſal Occupant: And herein,

### 1. That he is univerſal Occupant, and entitled to all derelict Lands.

Co. Lit. 1. Dyer, 154. Bendl. 237. Seld. Mare Clauſ. 223.

THE king by our law is univerſal occupant, and all property is preſumed to have been originally in the crown *; and that he partitioned it out in large diſtricts to the great men who had deſerved well of him in the wars, and were able to adviſe him in time of peace. Hence it is ſaid, that the king hath the direct dominion; and that all lands are holden mediately or immediately from the crown.

* A fiction of law, adopted by the conſtitution to anſwer the ends of government, but for the good of the people, the great object of the law and conſtitution of this country.—The right of the people of England to their property does not depend upon nor was in fact derived from any royal grant. The reception of the feudal policy, in this nation, exactly anſwers the definition of a fiction; which is ſome ſuppoſition in law, for a good reaſon, againſt the real truth of a fact, in a matter poſſible to have been actually performed, according to that ſuppoſition. Conſ. on Law of Forfeiture, 55.

Dyer, 326. 2 Roll. Abr. 170.

Hence it is, that if the ſea leaves any ſhore by a ſudden falling off of the water, ſuch derelict lands belong to the king: but, if a man's lands, lying to the ſea, are increaſed by inſenſible degrees, they belong to the ſoil adjoining.

2 Roll. Abr. 170.

So, if a river, ſo far as there is a flux of the ſea, leaves its channel, it belongs to the king; for the *Engliſh* ſea and channels belong to the king; and he hath a property in the ſoil, having never diſtributed them out to his ſubjects.

2 Roll. Abr. 170.

But, if a river, in which there is no tide, ſhould leave its bed, it belongs to the owners on both ſides; for they have in that caſe the property of the ſoil; this being no original part or appendix to the ſea, but diſtributed out as other lands.

8 Co. Sir Francis Barrington's caſe.

If land be drowned, and ſo continue for divers years; if it be after regained, every owner ſhall have his intereſt again, if it can be known by the boundaries.

2 Mod. 107.

It is ſaid that there is a cuſtom in *Lincolnſhire*, that the lords of manors ſhall have derelict lands; and that ſuch is a reaſonable cuſtom; for if the ſea waſh away the lands of the ſubject, he can have no recompence, unleſs he ſhould be entitled to what he regains from the ſea.

2 Lev. 171. 2 Mod. 106. Raym. 241.

Information by *Engliſh* bill in the Exchequer-chamber for one hundred acres of derelict lands in *Lincolnſhire*; the caſe was this: King

King *Ja.* I. granted to *J. S.* the manor of *Holbeck*, with the appurtenances, by expreſs words; and in the letters patent there was the following clauſe, *necnon totum illud fundum et ſolum et terras ſuas contigue adjacen.* to the premiſes, *quæ ſunt aquâ cooperta, vel quæ in poſterum de aqua poſſunt recuperari*, &c., *non obſtante non nominando valorem, qualitatem ſive quantitatem*, &c.; and theſe hundred acres being afterwards improved and recovered from the ſea, the queſtion was, Whether they paſſed to the patentee? and though it was urged in his behalf, that theſe words were as general as they well could be; that the king was entitled to the ſoil of the ſea, not as matter of prerogative only, but as an intereſt which he might grant; that in ſome caſes the king may grant a poſſibility; that the *non obſtante* was ſo particular in this caſe, as if intended to cure all defects; and that the king's grants ought to be conſtrued liberally, as moſt for his honour: yet, it being urged on the other ſide, that theſe words were too general; that though they might be intended to paſs ſome ſmall parcels or lines of land which may become derelict, yet not ſo as to paſs any great tracts of land; and that, by the conſtruction contended for, all the lands between that and *Denmark* might paſs; and admitting the king might grant part of his ſeas, yet that muſt be by expreſs name: It was held by *Montague*, Ch. B. with the advice of *Rainsford* and *North*, Ch. Juſtices, that the patent, as to theſe hundred acres which became derelict, was void. S. C. Attorney-General v. Sir Edward Farmer.

## 2. Of his Prerogative in Eſcheats.

An eſcheat may be either *per defectum ſanguinis*, or *per* (*a*) *delictum tenentis*. But it is ſaid, that in caſe of an attainder of felony, the eſcheat to the lord is *pro defectu tenentis*; and the not deſcending, the conſequence of the corruption of the blood; but in caſe of treaſon, the lands come to the crown as an immediate forfeiture, and not as an eſcheat. Co. Lit. 13. 92. Godb. 211. (*a*) That if the party be pardoned there can be no eſcheat. Owen, 87.

If the king's tenant dies without heir, the lands ſhall eſcheat and revert again to the crown; but the lands holden of any (*b*) other lord ſhall, for want of the heirs of the tenant, eſcheat to the lord. 2 Inſt. 64. Keilw. 104. 2 Roll. Rep. 251. 4 Inſt. 224. (*b*) That the lord by eſcheat is in the *poſt*, and cannot vouch. 1 Co. 1.

If lands held of the king as of an honour come to him by a common eſcheat, as the tenants dying without heir, or committing felony, theſe lands are part of the honour; otherwiſe, if forfeited for treaſon, for then they come to the king by reaſon of his perſon and crown; and if he grants them over, &c. the patentee ſhall hold of the king in chief. 2 Inſt. 64.

It was found by ſpecial verdict, that the prior of *Merton* was ſeiſed of a houſe in *Southwark*, held of the Archbiſhop of *Canterbury*, as of his borough of *Southwark*; and 30 *Hen.* 8. ſurrendered it to the king, who granted the ſaid meſſuage and divers other lands in *London*, *Middleſex*, and *Eſſex*, to *J. S.* and his heirs, to hold of him *in libero burgagio*, by fealty, for all ſervices and demands, and not *in capite*; that afterwards Queen *Mary* granted the manor and borough of *Southwark* to the mayor and commonalty of Cro. Eliz. 120. May v. Street.

*London;* and the tenant of the ſaid meſſuage died without iſſue; and the queſtion was, Whether queen *Eliz.* or the patentees of the borough ſhould have the eſcheat? and adjudged for the queen; for the firſt patentee of the meſſuage held it of the queen in ſocage *in capite*, as of a ſeignory in groſs; and the words *in libero burgagio* are merely void; for the land out of the borough cannot be held *in libero burgagio*, and there ſhall not be ſeveral tenures; for one tenure was reſerved by the king for all; and therefore of neceſſity it ſhall be a tenure in ſocage of the king.

Co. Lit. 8. 3 Inſt. 19.

Upon an attainder of high treaſon, the king by his prerogative ſhall have all the lands of inheritance whereof the offender was ſeiſed in his own right; and alſo all rights of (*a*) entry to lands in the hands of a diſſeiſor or other wrong-doer; though ſuch lands are holden of another: but, in caſe of petit treaſon and felony, they go to the lord of whom they are holden; for the blood being corrupted, ſo that no perſon can repreſent him, it is the ſame as if he had died without heir; and, conſequently, the lord is in by eſcheat.

(*a*) But a right of action, which conſiſts only in privity, cannot eſcheat.

3 Co. 2. b.

Stamf. P.C. 191.

But the lord cannot enter into the lands holden of him upon an eſcheat for petit treaſon or felony, without a ſpecial grant; till it appears by due proceſs, that the king hath had his prerogative of the year, day, and waſte.

3 Inſt. 213.

If one attainted of felony commits treaſon afterwards, and is thereof attainted, as he may be, becauſe the offence is of a higher nature than felony; yet this ſhall not diveſt the right of eſcheat, which by the felony was lawfully veſted in the lord, contrary to the opinion of *Stamford;* for the act of the party ſhall not diveſt the lawful eſcheat of the lord.

3 Inſt. 21.

If one ſeiſed in fee of a fair, market, common, rent-charge, or ſeck, warren, corody, or other inheritance not holden, is attainted of felony, the king ſhall have the profits of them during his life; but after his death they cannot deſcend, becauſe his blood is corrupted; nor eſcheat, becauſe not holden; but periſh and are extinct by act in law.

Roll. Abr. 816. Comp. Incumb. 75.

If a man grant an advowſon in groſs to another in fee, and the grantee die without heir, it ſeems that this ſhall revert to the grantor, not being held of any man; for it is a thing that cannot vaniſh, but ought to be in ſome perſon: but in that caſe, if the grantor cannot have it, the king ſhall have it as ſupreme patron; and for that reaſon ought to preſent where none hath right.

Co. Lit. 268. b.

If a diſſeiſor makes a feoffment, or dies ſeiſed; and after the diſſeiſee dies without heir, there ſhall be no eſcheat, becauſe the lord hath a tenant by title.

4 Co. 11.

Though the lord hath not been ſeiſed of his ſervices within the time of limitation, yet, if the tenant dies without heir, the land ſhall eſcheat; for at the time of the eſcheat the ſeignory remained, though ſeiſin of the ſervices was wanting.

4 Co. 125. (*b*) Dyer, 10. pl. 38. S. P. because the lord hath a tenant by title.

If an infant or *non compos* in perſon make a feoffment, and after die without heir (*b*), the land ſhall not eſcheat: otherwiſe, if made by letter of attorney, for then the feoffment is void.

——If *J. S.* conveys lands to truſtees and their heirs, to the uſe of himſelf for

for life, remainder to his first and every other son, &c. remainder to his own right heirs, and *cestui que trust* dies without heirs, *quære*, Whether the lands shall escheat or remain with the trustees? [In the case of Burgess v. Wheate, the Master of the Rolls (Sir Thomas Clarke), and the Lord Keeper Henley, held, against my Lord Mansfield, that the crown could not in equity, upon a failure of the heirs of *cestui que trust*, claim against a trustee by escheat, if he had the legal estate in him, for that (among other reasons) the title by escheat could only arise, where there was a defect of a tenant; that where there was a feoffee, there was a tenant, whether he were beneficially entitled or not; so that the principle of escheat failed. 1 Bl. Rep. 123. The authority of this case, however, hath been somewhat shaken by the intimation of Lord Thurlowe's opinion in Middleton v. Spicer, 1 Br. Ch. Ca. 204.——Where the character of land is not imperatively and definitively fixed upon money by the terms of a will or other instrument, a court of equity will not order it to be laid out in land, in order to let in the crown claiming by escheat. Walker v. Denne, 2 Vez. jun. 170.]

If he who hath title to a writ of escheat accept homage or fealty of the tenant, this will bar him; otherwise if he accept rent of the tenant; for that may be done by a bailiff. Co. Lit. 268.

If there be lord and tenant, and the tenant be disseised, and the disseisee die without heir; and after the lord accept the rent from the disseisor, this is no bar to him: otherwise, if he avow upon the disseisor for the rent. Co. Lit. 268.

But if, after title of escheat accrued, the disseisor make a feoffment or die seised, the acceptance of the rent from the feoffee or heir, will be a bar. Co. Lit. 268

If one lease a manor for life or years, and a tenancy escheat (*a*), this belongs to the manor held in farm, for which the lessor shall have a general writ, and suppose a lease by him made of the lands escheated, and maintain it by the special matter. 2 Inst. 146.

(*a*) After the death of the tenant for life, the lessor may have a writ of escheat, and the words of the writ are true, viz. that the tenant that died, &c. held the lands of him. Keilw. 114. a.——The tenancy comes in lieu of seignory. Co. 122.

For the better taking care of the king's escheats there is an ancient officer named (*b*) by the lord treasurer, and called escheator, because his office is properly to (*c*) look to escheats, wardships, and other casualties belonging to the crown. Co. Lit. 13. b.

(*b*) By the 14 E. 3. c. 8. to be chosen by the chancellor, &c. as sheriffs; by 12 E. 4. c. 9. must have a freehold in the same county worth 20 *l. per ann.*——by the 1 H. 8. c. 8. must have 40 marks yearly——by the statute 14 E. 3. st. 1. c. 8. there shall be as many escheators as when King Edward came to the crown, viz. one in every county.——But anciently there were but two, one on this side Trent, and the other beyond Trent, but they had sub-escheators. Co. Lit. 13. b. (*c*) To inquire of casual profits, and seize them into the King's hands, that they may be answered to him. Co. Lit. 92. b.

If the inheritance of lands escheat to the king, although he is in the *post*, yet he shall have a term that was limited to attend the inheritance. Vern. 357. Attorney-General v. Thruxton.

### 3. Of his Prerogative in Seas and Navigable Rivers.

It is universally agreed, that the king hath the sovereign dominion in all seas and great rivers; which is plain from *Selden's* account of the ancient *Saxons*, who dealt very successfully in all naval affairs, and therefore the territories of the *English* seas and rivers always resided in the king. Seld. Mar. Cl. 251. &c. Roll. Abr. 168, 169. 5 Co. 106. 10 Co. 141.

[In the narrow seas, that is, the seas which adjoin to the coasts of England, the king hath a double right, viz. a right of jurisdiction, which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. This right of propriety or ownership is evidenced, 1st, in the right of fishing in these seas and the

the arms and creeks thereof, which is originally lodged in the crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is owner of a private or inland river; and, 2d, from the king's right of propriety to the shore, and the *maritima incrementa*.—The shore, as to this purpose, is the land lying between high-water and low-water mark in *ordinary* tides; and this land belongeth to the king *de jure communi* both in the shore of the sea, and the shore of the arms of the sea. And that is called an arm of the sea where the tide flows and reflows, and so far only as the tide flows and reflows. 29 Ass. 93.—The *maritima incrementa* are of three kinds—1. *Per projectionem vel alluvionem*—2. *per relictionem vel desertionem*—3. *per insulæ productionem*. The increase *per alluvionem* is, when the sea by casting up sand and earth doth by degrees increase the land, and shut itself out farther than the ancient bounds went; and this is usual. The reason why this belongs to the crown is, because in truth the soil, where there is now dry land, was formerly part of the very *fundus maris*, and, consequently, belonged to the king. But indeed if such alluvion be so insensible, that it cannot be by any means found that the sea was there, *idem est non esse est non apparere*; the land thus increased belongs as a perquisite to the owner of the land adjacent.—As to the increase *per relictionem*, or recess of the sea, this doth *de jure communi* belong to the king; for as the sea is part of the waste or demesne, so of necessity the land that lies under it, and therefore it belongs to the king when left by the sea: and so also it regularly holds in lands deserted by a river, that is an arm of the sea or creek of the sea *primâ facie*, especially, if the creek or river be part of a port.—And as to islands arising *de novo* in the king's seas, or the king's arms thereof, these upon the same account and reason *primâ facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king: for when islands *de novo* arise, it is either by the recess or sinking of the water, or by the exaggeration of sand and slab, which in process of time grow firm land invironed with water; and thus some places have arisen, and their original recorded, as about Ravesend in Yorkshire. Hale De Jure Maris, c. 4.]

Dyer, 326. 2 Roll. Abr. 170.

And, as the king hath a prerogative in the seas, so hath he likewise a right to the fishery and to the soil; so that if a river as far as there is a flux of the sea leaves its channel, it belongs to the king.

4 Inst. 142. Molloy, 66. For this court and its jurisdiction, and how far it extends, *vide* title Court of Admiralty.

Hence the Admiralty Court, which is a court for all maritime causes or matters arising upon the high sea, is deemed the king's court; and its jurisdiction derived from him who protects his subjects from pirates, and provides for the security of trade and navigation.

10 Co. 141. Case of Isle of Ely. [(*a*) The commission enacted by st. 28 H. 8. c. 5. recites this part of the king's jurisdiction, viz. "We therefore, for that by reason of our royal "dignity and prerogative royal we are bound to provide for the safety and preservation of our realm," &c. This prerogative of the crown Lord Hale calls an *interest of jurisdiction*, viz. in reference to common nuisances. "And" he says, "another part of the king's jurisdiction in reformation of nuisances, is to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats; to reform the obstructions or annoyances that are therein to such common passage: for as the common highways on the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and as the highways by land are called *altæ viæ regiæ*, so these publick rivers for publick passage are called *fluvii regales*, and *haut streames le roy*; not in reference to the propriety of the river, but to the publick use; all things of publick safety and convenience being in a special manner under the king's care, supervision, and protection. And therefore, the report in Sir John Davyes, of the Piscary of Ban, mistakes the reason of those books, that called these *streames le roy*, as if they were so called in respect of propriety, as 19 Ass. 6. Dy. 11. for they are called so, because they are of publick use, and under the king's special care and protection, whether the soil be his or not. Hale De Jure Maris, by Hargrave, pa. 8.]

8 E. 4. 18, 19. Pro Custom, 46. Fitz. Bar.

But notwithstanding the king's prerogative in seas and navigable rivers, yet it hath been always held, that a subject may fish in the sea; for this being a matter of common right, and the means

means of livelihood, and for the good of the commonwealth, cannot be reſtrained by grant or preſcription. 93. Mod. 105. 2 Salk. 637. pl. 4.

[Although *primâ facie* an arm of the ſea be in point of propriety the king's, and *primâ facie* it be common for every ſubject to fiſh there, yet a ſubject may have by uſage a ſeveral fiſhery there, excluſive of that common liberty which otherwiſe of common right belongs to all the king's ſubjects. See Hale De Jure Maris, cap. 5. and the ſeveral authorities there collected.]

Alſo it is held, that every ſubject of common right may fiſh with lawful nets, *&c.* in a navigable river as well as in the ſea; and the king's grant cannot bar them thereof; but the crown only has a right to royal fiſh; and that the king only may grant. 6 Mod. 73. Warren v. Matthews. Salk. 357. pl. 4. S. C. and S. P.

*Per* Holt, C. J. on a claim of *ſolam piſcariam* in the river Ex by grant from the crown.

[And as a ſubject may have a right of fiſhing in the ſea and the arms thereof, ſo the ſhore, that is, the land, which lies between high-water and low-water mark at ordinary neap-tides, may belong to a ſubject. The ſtatute of 7 *Ja.* 1. *c.* 18. ſuppoſeth it; for it provides, that thoſe of *Cornwall* and *Devon* may fetch ſea-ſand for the bettering of their lands, and ſhall not be hindered by thoſe that have their lands adjoining to the ſea-coaſts, which it appears by the ſtatute, they were formerly. Vide *Cartæ Antiquæ*, *D. D. n.* 24. the charter of *Alan de Percy* to the monks of *Whitby*, and the bounds thereof, *viz. totam marinam a portâ de* Whitby *uſque* Blowick, *&c.*, *et uſque* Terdiſo, *et uſque in mare*, *et per marinam in* Whitby, confirmed by king *Henry* I. And the bounds of that abbey's poſſeſſions take in many creeks of the ſea, yet are given by a ſubject, *viz. Derwent*, *Muſe*, *Eſe*, &c. Hale De Jure Maris, c. 6.

The ſhore may not only belong to a ſubject in groſs, which poſſibly may ſuppoſe a grant before time of memory, but it may be parcel of a manor. And the evidences to prove this fact are commonly theſe, conſtant and uſual fetching gravel and ſea-weed and ſea-ſand between the high-water and low-water mark, and licenſing others to do ſo; incloſing and imbanking againſt the ſea, and enjoyment of what is ſo inned; enjoyment of wrecks happening upon the ſand; preſentment and puniſhment of purpreſtures there in the court of a manor, and ſuch like. *Ibid.* So agreed in Sir Henry Conſtable's caſe, 5 Co. 107. 5 E. 3. 3. Dy. 326. b. So in the Exchequer-chamber, P. 16 Car.

inter l'Attorney Generall et Sir Samuel Rolls, Sir Richard Buller, and Sir Thomas Arundel, *per omnes barones.*

And as it may be parcel of a manor, ſo it may be parcel of a vill or pariſh. And the evidence for that will be uſual perambulations, common reputation, known metes and diviſions, and the like. And upon this account the parſon of *Sutton*, about 14 *Car.* 1. had a verdict for the tithes of *Sutton-Marſh* in *Lincolnſhire*, upon a long and a great evidence; though it appeared, that within time of memory it was the mere ſhore of the ſea covered at ordinary tides, and without the old ſea-bank. Hale, *ubi ſupra.*

And it may not only be parcel of a manor, but *de facto* it many times is ſo, and perchance it is parcel of almoſt all ſuch manors as by preſcription have royal fiſh or wrecks of the ſea within their manor. For, for the moſt part, wrecks and royal fiſh are not, nor indeed cannot be well left above the high-water mark, unleſs it be at ſuch extraordinary tides as overflow the land: but Hale, *ubi ſupra.*

theſe are perquiſites which happen between the high-water and low-water mark; for the ſea withdrawing at the ebb leaves the wrecks upon the ſhore, and alſo thoſe greater fiſh, which come under the denomination of royal fiſh.

Hale De Jure Maris, c. 6. And as the ſhore may thus belong to a ſubject, ſo in ſome inſtances may the *maritima incrementa*. Hence, cuſtom and preſcription may give the *jus alluvionis* to the land whereunto it accrues. But cuſtom cannot entitle the ſubject to *relicted* lands, or make them parcel of a manor. For the ſoil from under the water muſt needs be of the ſame propriety as it is when covered with water. If the ſoil of the ſea, while it is covered with water, be the king's, it cannot become the ſubject's becauſe the water hath left it. But in the caſe of *alluvio maris*, it is otherwiſe; becauſe the acceſſion and addition of the land by the ſea to the dry land gradually is a kind of perquiſite, and an acceſſion to the land; and therefore in caſe of private rivers, it ſeems by the very courſe of the common law, ſuch a gradual increaſe *cedit ſolo adjacenti;* and though it may be doubtful whether it be ſo *ex jure communi* in caſe of the king; yet, doubtleſs, it gives a reaſonableneſs and facility for ſuch right of *alluvio* to be acquired by cuſtom; for though in every acqueſt *per alluvionem* there be a reliction or rather excluſion of the ſea, yet it is not a receſs of the ſea, nor properly a reliction.

Hale, *ubi ſupra.* But, though it be regularly true, that *terræ relictæ per mare* cannot be preſcribed, yet a creek, arm of the ſea, or *diſtrictus maris*, may be preſcribed in point of intereſt; and, by way of conſequence or concomitance, the land *relicted* there, according to the extent of ſuch a precinct as was ſo preſcribed, will belong to the former owner of ſuch *diſtrictus maris*. But otherwiſe it would be, if ſuch preſcription before the reliction extended only to a liberty, or *profit apprendre*, or juriſdiction only within that diſtrict; as, liberty of free fiſhing, admiral juriſdiction, or the juriſdiction of a leet, hundred, or other court; for ſuch may extend to an arm of the ſea, as appears by 8 *E.* 2. *corone;* for theſe are not any acqueſts of the intereſt of the water and ſoil, but leave it as it found it. Therefore the diſcovery of the extent of the preſcription or uſage, whether it extends to the ſoil or not, reſts upon ſuch evidences of fact, as may juſtly ſatisfy the court and jury concerning the intereſt of the ſoil.

Hale, *ubi ſupra.* And the ſame rule, which hath been obſerved before touching acqueſts by the reliction or receſs of the ſea, or the arms or creeks thereof, holds with reſpect to iſlands ariſing within thoſe parts. Of common right and *primâ facie*, it is true, they belong to the crown: but, where the intereſt of *a diſtrictis maris*, or arm of the ſea, or creek, or haven, doth in point of propriety belong to a ſubject either by charter or preſcription, the iſlands that happen within the precincts of ſuch private propriety of a ſubject, will belong to the ſubject according to the limits and extent of ſuch propriety. And therefore, if the weſt ſide of an arm of the ſea belong to a manor of the weſt ſide, and an iſland happen to ariſe on the weſt ſide of *filum aquæ* inviroued with the water, the pro-

priety

priety of ſuch iſland will entirely belong to the lord of the manor of the weſt ſide: and if the eaſt ſide of an arm of the ſea belong to a manor of the eaſt ſide *uſque filum aquæ*, and ſuch an iſland happen between the eaſt ſide and ſuch a *filum aquæ*, it will belong to the lord on the eaſt ſide: and if the *filum aquæ* divide itſelf, and one part take the eaſt, and the other the weſt, and leave an iſland in the middle between both the *fila*, the one half will belong to the one lord, and the other to the other. But this is to be underſtood of iſlands that are newly made; for if a part of an arm of the ſea, by a new receſs from its ancient channel, encompaſs the land of another man, his propriety continues unaltered.]

4. Of his Prerogative in Swans and Royal Fiſhes.

The king, as a perpetual ſign and acknowledgment of his dominion of the ſeas, hath ſeveral creatures reſerved to him under the denomination of royal creatures, as ſwans, ſturgeons, and whales; all which are the natives of ſeas and rivers. 7 Co. 16.

But a ſubject may have a property in ſwans three manner of ways:

Firſt, by the acquiſition of tame ſwans; *viz.* by buying tame ſwans, or by grant of the king of wild ſwans, and taming them; and then the ſubject ſhall have the property in them whereſoever they are, as of any other tame animal. 7 Co. 16. b.

If the cock ſwans of one man get into the hen ſwans of another, by the cuſtom of *England* this brood ſhall be divided; and it ſhall not follow the female, according to the common right of acceſſion. And this is founded on a natural obſervation on the moderation of this ſort of creatures, that they will not couple with more than one; and ſo if they were to be ſeparated they could never be propagated. 7 Co. 17. a. 2 Bl. Com. 390-1.

A cuſtom that the owner of ſwans ſhould have two cygnets, and the owner of the manor the reſt, has been held good. 7 Co. 17. a.

Swans that are not the king's may be ſtrays in a manor as well as any other creatures; and a man may preſcribe to have ſwanning for them in another manor. 7 Co. 17. a.

Secondly, the property of wild ſwans may be in the ſubject by a grant of ſwan-mark from the king; for, in this caſe, all the ſwans marked with ſuch mark ſhall be the ſubjects whereſoever they fly. 7 Co. 17. a. 7 Co. 17.

A ſwan-mark may be granted over as well as the privilege of a park or warren. 7 Co. 17.

By the 22 *E.* 4. *c.* 6. "No perſon, other than the ſon of the "king, ſhall have any mark or game of ſwans, except he have "lands of freehold to the yearly value of five marks; and if any "perſon not having lands to the ſaid yearly value, ſhall have any "ſuch mark or game, it ſhall be lawful to any of the king's ſub-"jects, having lands to the ſaid value, to ſeize the ſwans as forfeit; "whereof the king ſhall have the one half, and he that ſhall ſeize "the other."

7 Co. 17. Thirdly, ſwans may be the ſubject's *ratione privilegii*; as, if the king grants to the ſubject the game of wild ſwan in ſuch a river; but in ſuch caſe, the ſubject cannot bring an action of treſpaſs, *quare cygnos ſuos ibid. nidificant.* or *gignent. cepit*; for a man cannot call that his own, which he hath only during particular occupancy and poſſeſſion in a certain place.

Hawk. P.C. c. 33. § 27. If a man take away ſwans marked or pinioned, or thoſe which are unmarked, if they be kept in a pond or private river, it is felony.

St. *de prærogat. rex regis*, 15 E. 2. c. 11. The king ſhall have wreck of the ſea, whales, and great ſturgeons taken in the ſea and elſewhere throughout the whole realm (*a*); except in places privileged by the king.

[(*a*) To give the crown a right to ſuch fiſh, they muſt be taken within the ſeas parcel of the dominion and crown of England, or in the creeks or arms thereof; for, if taken in the wide ſeas, or out of the precinct of the ſeas belonging to the crown of England, they belong to the taker. 39 E. 3. 35. *per* Belknap.—A ſubject might and may unqueſtionably have this franchiſe or royal perquiſite, 1ſt, by grant; 2d, by preſcription within the ſhore between the high-water and low-water mark, or in a certain diſtinct *diſtrictus maris*, or in a port, or creek, or arm of the ſea; and this may be had in groſs, or as appurtenant to an honour, manor, or hundred. Hale De Jure Maris, c. 7.]

## [5. Of his Prerogative in Ports and Havens.

Hale De Portibus Maris, c. 2. A port, ſaith my Lord *Hale*, is *quid aggregatum*, conſiſting of ſomething that is natural, *viz.* an acceſs of the ſea, whereby ſhips may conveniently come, ſafe ſituation againſt winds where they may ſafely lie, and a good ſhore where they may well unlade: ſomething that is artificial, as keys, and wharfs, and cranes, and warehouſes, and houſes of common receipt: and ſomething that is civil, *viz.* privileges and franchiſes, *viz. jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority.

*Id.* c. 3. To erect a publick port originally and *de novo*, is a part of the *jus regale* of the crown of *England*. And as it is not competent to a ſubject to inſtitute or erect a common port without the charter of the king, or a lawful preſcription, ſo neither is it competent to a ſubject without ſuch charter or preſcription to erect a port for the men of ſuch a fee or precinct, as for his own tenants. A lord of a county palatine, though he may have, and uſually had, ports by charter or preſcription, yet he cannot erect a common port within his palatine juriſdiction. For the concernment of a port muſt neceſſarily exceed the extent and limits of the *jura regalia* that are incident to a county palatine; for the ſafety of the kingdom, the commerce of the kingdom, and the king's revenue are concerned in it. Merchants and ſeamen of all parts and quarters of the world are let into the kingdom publickly, and under the publick protection, in a publick port: and, conſequently, it is not within the extent of a juriſdiction palatine *de novo* to erect a publick port.

*Id.* c. 5. In the erecting of a port the royal authority is not reſtrained, as in the grant of a market, by the vicinity of the new port to a former port. For though the old port may be greatly injured by the erection of the new port in its neighbourhood, yet that circumſtance

cumſtance will, of itſelf, be no objection to it, provided that the new port be not within the proper limits of the old port, and there be no obſtruction to the water or otherwiſe, but that ſhips may, if they will, arrive at the former port.

But, 1. it cannot be erected within the peculiar limits by charter or preſcription belonging to the former port, becauſe that is part of the intereſt of the lord of the former port. Neither can the firſt port be obſtructed or wholly defaced, or excluded for arrival of ſhips, but by act of parliament, as was done in the caſe of *Melcombe* tranſlated to *Poole*. *Rot. Parl.* 11 *H.* 6. *n.* 30. And the reaſon is, becauſe a publick intereſt is concerned; *viz.* the intereſt of the merchant at large, and the intereſt of the traders and mariners in that particular place or port, who have a right ſettled in them for the application, lading, and unlading of ſhips there.

2. If the king have an ancient port at *A.*, and he erect another port hard by, with a general prohibition that no man ſhall bring his goods or merchandizes by ſea to any other port within five miles but to that which is newly erected, this prohibition is good, as againſt the king's intereſt in the former port, though the new port be erected within the precincts of the old; for he may derogate from his own ſimple intereſt by his own reſtriction. But this reſtriction is not good againſt the ſubjects of the port of *A.*, who by uſage had a right to come with their own ſhipping, and lade and unlade: and this, although the goods might be cuſtomable goods; for the inhabitants of *A.* had an eaſement acquired to themſelves by preſcription.

3. But if the king erect by his own proclamation a port at *A.* where there was no arrival of ſhips before, and doth not grant it to another perſon, but keeps the intereſt in himſelf of this franchiſe; there, it ſeems the king may diſſolve this port, or erect another port, with a prohibition that no ſhip ſhall arrive within ſuch a diſtance, but at the new port; for there was no right of arrivage of any ſhips at the former harbour lodged in the inhabitants nor any other ſubject, but only permiſſive at the king's pleaſure, and he may derogate from his own right.

4. But if a ſubject hath a port and arrival of ſhips at *B.* by preſcription or charter, and afterwards the king erect a new port, within three or five miles within or without the precincts of the port of *B.*, with a prohibition that no ſhips ſhall arrive within five miles of the new-erected port elſewhere; this prohibition or reſtriction is void, as againſt the intereſt of the owner of the port of *B.*, or the inhabitants of *B.*, becauſe there was a former intereſt lodged in the owner and inhabitants of the port of *B.*, which cannot be taken from them without their own conſent, or by act of parliament.

5. But if a ſubject, or the king's fee-farmer, hath a port at *R.* by preſcription or charter, and the king grants that no ſhips ſhall arrive within five miles or ſuch like compaſs, the king cannot within that precinct erect *de novo* a port to the prejudice of that port to which he had precedently granted this privilege. For the grant is good as againſt the king, and any intereſt derived from

him after this grant: and although, as hath been ſaid, without this reſtrictive clauſe, the king might have erected a port near to the former, which would have had this concurrent power or franchiſe, yet the king hath bound up his hands by his own charter; and by this inhibition, the precinct, to which this inhibition extends, is become as it were, parcel of the precinct of the port.

*Id.* c. 6. The right in ports, according to Lord *Hale*, is threefold:—The *jus privatum*, or the intereſt of propriety or franchiſe. The *jus publicum*, or the common intereſt that all perſons have to reſort to or from publick ports, as publick ſea-marts or markets, with their goods, wares, and merchandizes. The *jus regium*, or the right of ſuperintendency and prerogative, which the king hath for the ſafety of the realm, or benefit of commerce, or ſecurity of his cuſtoms. The firſt, *viz.* the *jus privatum* divides itſelf into the ownerſhip of propriety, and the ownerſhip of franchiſe. The ownerſhip of propriety is, where the king, or a common perſon by charter or preſcription, is the owner of the ſoil of a creek or haven, where ſhips may ſafely arrive and come to the ſhore. This intereſt of propriety is *primâ facie* in the king, but may belong to a ſubject. But the ſubject hath not thereby the franchiſe of a port, nor may he ſo uſe or employ it, unleſs he hath had that liberty time out of mind, or by royal charter. Indeed he may bring thither for his own private uſe his own boats and veſſels to carry off and bring in his own goods that are not cuſtomable, as fiſh, *&c.*; but he may not uſe it as a publick port or admit foreigners, unleſs in caſe of neceſſity, nor take toll or anchorage there; for that is fineable, either by preſentment, or in a *quo warranto*.—The ownerſhip of franchiſe is that which gives the formality or denomination of a publick or lawful port, and becomes a free arrival of ſhips to lade and unlade their merchandizes, and this may be acquired by preſcription, or by creation by the king either by proclamation or by charter.

Before any port is legally ſettled, although the propriety of the ſoil of a creek or harbour may belong to a ſubject or a private perſon, yet the king hath his *jus regium* in that creek or harbour; and there is alſo a common liberty for any one to come thither with boats and veſſels as againſt all but the king. And upon this account, though *A.* may have the propriety of a creek or harbour or navigable river, yet the king may grant there the liberty of a port to *B.*, and ſo the intereſt of propriety and the intereſt of franchiſe ſeveral and divided. And in this no injury is at all done to *A.*, for he hath what he had before, *viz.* the intereſt of the ſoil, and, conſequently, the improvement of the ſhore, and the liberty of fiſhing; and as the creek was free for any one to paſs in it againſt all but the king, for it was *publici juris* as to that matter before, ſo now the king takes off that reſtraint, and by his licence and charter makes it free for all to come and unlade.

But if *A.* hath the *ripa* or bank of the port, the king may not grant a liberty to unlade upon that bank or *ripa*, without his conſent, unleſs cuſtom hath made the liberty thereof free to all, as in many places it is; for that would be a prejudice to the private intereſt

intereſt of *A.*, which may not be taken from him without ſuch conſent. And therefore in the creation of a new port either by proclamation or charter, it hath been the courſe to ſecure the intereſt of the ſhore beforehand, for the building of wharfs and keys for the application of merchandize, and for the building of houſes. So, that it is poſſible, though not ordinary, that the intereſt of propriety and the intereſt of franchiſe may be divided: but it is uſual and beſt in conjunction.

But, though the dominion either of franchiſe or propriety be lodged by preſcription or charter in a ſubject, yet it is charged or affected with that *jus publicum* that belongs to all men; and ſo it is charged or affected with that *jus regium*, or right of prerogative of the king, ſo far as the ſame is by law inveſted in the king. It is only with the *jus regium*, that we have to do at preſent, obſerving by the way, that the patronage and protection of all *jura publica* being intruſted by the common law to the king; the care of preventing and reforming publick nuiſances in ports is left to him, and his courts of juſtice, the proſecutions for them are in his name, and the fines for the defects or annoyances in them are part of his revenue.

*Ld.* c. 3. Though the queſtion of nuiſance be a queſtion of fact, and therefore proper for the cognizance of a jury, yet where the king claims and proves a right to the ſoil, where a purpreſture and nuiſance have been committed, he may proceed by information in equity, and have a decree to abate it. Caſe of the City of Briſtol v. Morgan, Trin. 11 Car. 1. cited in Lord Hale De Portibus Maris, pa. 81. and Attorney-General v. Richards, Anſtr. 603.

The *jus regium*, or prerogative of the king in the ports of the ſea, branches itſelf into three parts, as it relates firſt to the preſervation of the ſafety and peace of the kingdom; ſecond, to the trade and commerce of the kingdom; or, third, to the improvement and due anſwering of the ſhip's cuſtoms and ſubſidies ariſing by merchandize imported or exported. From the firſt ariſeth his power of inhibiting perſons to come into the realm, or of inhibiting perſons to go out of the realm, of both which ſee hereafter (C. 3, 4). From the ſecond ariſeth the power claimed by him of opening or ſhuting the ports in reference to goods exported or imported, of which we ſhall treat under this diviſion of the ſubject. With reſpect to his power in the laſt, it will be treated of under title (*Smuggling*).

As to his power of opening and ſhutting the ports in reference to goods exported or imported, we ſhall tranſcribe the words of Lord *Hale* upon this delicate point.

Concerning importation of foreign goods, and the prohibition of the importation of them, we may find *de facto* that ſuch inhibitions have been of two ſorts, *viz.* general inhibitions that ſuch or ſuch merchandizes ſhall not at all be imported, under pain of confiſcation or forfeiture; or elſe they have been inhibitions or reſtraints *ſub modo;* as, namely, they ſhall be imported only at ſuch ports or in ſuch ſhips.

*Firſt*, For general prohibitions of merchandizes of any particular kind. Theſe were ſometimes made, but very rarely; neither indeed could they be lawful without the help of an act of parliament, becauſe there have been in all times ſeveral ſtatutes made for the liberty and encouragement of merchants ſtrangers eſpecially to

to come into the kingdom and trade, which could not be derogated by a proclamation. *Magna Charta*, *c.* 30. 2 *E.* 3. *c.* 4. 9 *E.* 3. *c.* 1. 14 *E.* 3. *c.* 2. 25 *E.* 3. *c.* 2. and divers other ſtatutes.

And therefore, if at any time there were ſuch inhibitions by proclamation, they were commonly temporary upon an exigence of ſtate, and not perpetual, nor of any certain continuance. But when there were perpetual or long reſtraints of this nature, they were always done by parliament. 3 *E.* 4. *c.* 4. 1 *R.* 3. *c.* 12. 19 *H.* 7. *c.* 21. againſt importation of foreign manufactures therein ſpecified; 4 *E.* 4. *c.* 1. againſt importation of foreign clothes; 5 *Eliz.* *c.* 7. againſt importation of daggers, *&c.*; 27 *H.* 6. *c.* 1. an inhibition of the wares of *Brabant* and *Holland*, becauſe they there had made reſtraint of importation of *Engliſh* cloth; 23 *H.* 8. *c.* 7. an inhibition by act of parliament of the importation of *French* wines between *Michaelmas* and *Candlemas*; and very many more of the like kind. And the reaſons of theſe interpoſings of acts of parliament was, becauſe that proclamations proved very ineffectual to that purpoſe, partly becauſe it was at beſt doubtful whether they could at all be effectual againſt ſo many acts of parliament; but doubtleſs they could not without an act of parliament induce a forfeiture of the goods ſo imported, as hath been often reſolved; whereof more hereafter. See the reſolution of the caſe of monopolies, 11 *Rep.* 88. the grant of the ſole importation of foreign cards, though prohibited by act of parliament, ruled to be againſt law, and a monopoly. Much more were the things not prohibited by law to be imported. *Vide Peeth*'s caſe, *Rot. Parl.* 50 *E.* 3.

The only act of parliament, that ſeems to give a countenance to theſe kinds of inhibitions, is that of 3 *Ja. c.* 6. The king granted a charter to the merchants, that no *Spaniſh* wines ſhould be imported but by them. This act repealed that charter in a great meaſure, whereby ſome would infer that the patent was good, ſince nothing but an act of parliament ſeemed neceſſary to repeal it. But the conſequence is miſtaken. *In majorem cautelam*, an act of parliament was uſed in this caſe as the moſt ſafe and effectual means: but if any man conſider thoſe acts of parliament, that enact the ſea to be open, or the reſolutions of court in caſes of this nature, or the very preamble of the act itſelf, he will eaſily find that ſuch inhibitions cannot be without an act of parliament.

*Secondly*, as touching particular reſtraints; as, for inſtance, that malmſeys ſhall not be imported, but unto the port of *Southamptoy*; ſuch a grant is againſt law, and was accordingly reſolved in the caſe of *Southampton*, *T.* 1 *Eliz.* *Rot.* 73. cited in *Coke*'s comment upon *Magna Charta*, *c.* 30. and therefore there was a ſpecial act of parliament made the 5 *Eliz.* for the making good of that charter; and the like courſe hath been uſed to make good thoſe reſtrictions of foreign trade to particular companies; as, for inſtance, the *Muſcovy* Company, and ſome others.

2. Concerning exportation, and how far forth the ports may be ſhut in reference to goods and merchandizes exported, both the

*quid*

*quid facti* and the *quid juris* therein. Theſe prohibitions of exportation were never generally for all goods; for that were to deſtroy trade, but of ſome particular goods and merchandizes. And thoſe reſtraints were of two kinds, *viz.* general reſtraints, that they ſhould not be at all exported; or ſpecial and qualified reſtraints, that they ſhould not be exported, but in ſuch ſhips, or at ſuch places. Touching both theſe briefly: and firſt, touching the general inhibitions.

It is certain that inhibitions of this nature were very frequent by proclamation; and when they carried with them the apparent reaſonableneſs and fitneſs of the inhibition, they were not much diſputed. Thoſe inhibitions were for the moſt part touching ſuch commodities whereby the kingdom might be weakened, or ſcarcity occaſioned, by the exportation: as arms, ammunition, corn, victuals, gold, ſilver, horſes, timber, thread of yarn or woollen, and ſometimes of falcons. *Vide Clauſ.* 10 *E.* 2. *m.* 13. *dorſo. Clauſ.* 38 *E.* 3. *m.* 29. *Clauſ.* 41 *E.* 3. *m.* 24. *dorſo. Clauſ.* 43 *E.* 3. *m.* 3. *dorſo. Clauſ.* 45 *E.* 3. *m.* 4. *dorſo.* And ſometimes in the proclamation there was annexed a clauſe of impriſonment of offenders; ſometimes the forfeiture of the things imported; ſometimes the forfeiture of all their goods and lands. But theſe clauſes of forfeiture were only *in terrorem;* for, as we have before obſerved, a proclamation barely cannot induce a forfeiture of goods. But yet ſometimes the ſearchers and other officers did ſeize the goods; and when they had ſo done, they were compelled to account for the goods ſo ſeized in the Exchequer; and the parties, whoſe goods were ſo ſeized, were put to much trouble, before they could have their goods again. But the moſt uſual way to puniſh offenders againſt ſuch proclamations was by fine and impriſonment; for where the king may by law prohibit, the proclamation doth increaſe the offence. And theſe proceedings were by information at the king's ſuit, ſometimes in the King's Bench, as *H.* 1 *E.* 2. *B. R. Rot.* 38. againſt ſuch as exported horſes, arms, money, and plate, againſt the king's proclamation; ſometimes in the Exchequer, *Communia Trin.* 16 *E.* 3. *Rot. Mich.* 19 *E.* 3. *Rot. clauſ.* 64. *m.* 29. and ſometimes *coram concilio*, viz. in Chancery.

How far theſe proclamations might be warrantable by law in theſe particular caſes, I ſhall not poſitively determine; only thus far I ſhall ſay,

*Firſt*, That if it were admitted, that in theſe particular caſes of arms, ammunition, victuals, and money, ſuch proclamation might be made, and thereby the offenders might be ſubject to fine and impriſonment; yet it could not be extended to other things, neither ought or might this inhibition be an engine to gain money for licences. For if the proclamation had any ſtrength, it was becauſe of the inconveniences of the exportation of theſe things. If it were not a publick inconveniency, it could not be inhibited barely by proclamation; and if it were a publick inconveniency, it might not be licenſed for private profit. If it might, the ſtrength of the proclamation would conſequently ceaſe.

*Secondly*,

*Secondly*, If theſe proclamations were admitted lawful; yet they could not induce any forfeiture of lands or goods, or of the very goods ſo exported againſt that inhibition; becauſe that lies not within the ſtrength of any thing but a law.

*Thirdly*, Though poſſibly in the time of hoſtility, or publick danger, or common ſcarcity, ſuch prohibitions by proclamation of exportation of victuals and arms, might have a temporary effect and uſe; yet we may eaſily gueſs that they were not effectual for perpetuity, nor indeed ſufficient proviſions *pro tempore*; for the king and his council thought not fit to reſt upon ſuch ineffectual means, but acts of parliament have ſucceſſively paſſed for the inhibition of exportation of theſe very things, with penalties of forfeitures added to them. See 1 *E.* 4. *c.* 5. for horſes; 1 *E.* 2. *P. M. c.* 5. of corn, herring, butter, cheeſe, and wood; 25 *H.* 8. *c.* 5. of victuals of all ſorts; 9 *E.* 3. *c.* 1. 19 *H.* 7. *c.* 15. of bullion or money. The like might be inſtanced in divers other things.

Let us now come to particulars, or qualified reſtraints; and they are of two kinds:

*Firſt*, The reſtraint of exportation in any but *Engliſh* bottoms. This hath been attempted to be done by proclamation, as a good expedient for the increaſe of ſhipping and mariners, and the encouragement of trade and navigation. *Vide inde clauſ.* 41 *E.* 3. *m.* 25. of a proclamation to that purpoſe; but it proved ineffectual, till proviſion was made for it by acts of parliament, viz. 5 *R.* 2. *c.* 3.—6 *R.* 2. *c.* 8.—14 *R.* 2. *c.* 6.—4 *H.* 7. *c.* 10. But becauſe it provoked foreign princes to do the like, it was repealed by the ſtatute 1 *Eliz. c.* 13. with certain proviſions made in the caſe by that ſtatute and the ſtatutes of 5 *Eliz. c.* 5. and 13 *Eliz. c.* 15. But now, by a late act of parliament, 12 *Car.* 2. intitled, "An act for encouraging of navigation," the uſe of foreign ſhips is in a great meaſure reſtrained.

And upon the whole matter, it will appear from the ſeveral acts of parliament that have been made for the ſupport and increaſe of trade, and for the keeping of the ſea open to foreign and *Engliſh* merchants and merchandize, that there is now no other means for the reſtraint of exportation or importation of goods and merchandizes in times of peace, but only when and where an act of parliament puts any reſtraint. Several acts of parliament having provided, *que la mere ſoit overt*, it may not be regularly ſhut againſt the merchandize of *Engliſh*, or foreigners in amity with this crown, unleſs an act of parliament ſhut it out, as it hath been done in ſome particular caſes, and may be done in others.

Pref. to Harg. Hale's Tracts, v. 1. p. xxx. 18 E. 3. c. 3.

In another place Lord *Hale* hath theſe words: "Touching the "prohibitions of exportations and importations of commodities. "—It is true, that by divers graunts in parliaments the ſea ought "to be open for exportation and importation of merchandize. "*Rot. Parl.* 18 *E.* 3. *n.* 17. 22 *E.* 3. *n.* 8. *Item que paſſage de "leines et d'autres merchandiſes ſoient overts ſans faire apreſtes ouſter "la cuſtome a les merchaunts, que ont les cuſtumes du roi par un cer-*

"*tain,*

" *tain, quele apreſt turne al profit des dits merchaunts et outrageouſe* " *grevance & nuſchance a votre commun.* Reſp. *Soit le paſſage* " *overt, et que cheſcun poit paſſer fraunchement, ſavant au roi ſe que* " *lui eſt due.* Yet clerely the kinges of this realme always exer- " ciſed a power in reſtraint of the free paſſage of ſome commodi- " tyes of this realme by their own power, as well before as after " 22 *E.* 3. And though complaints were made of it, yet the " crown retained the power. *Vide* 25 *E.* 3. *n.* 22. 1 *H.* 5. " *n.* 41.

" Some inſtances of the particulars.

" (1.) For exportation prohibited.

" 1. The kinges have uſually before the ſtat. of 1 & 2 *P.&M.* " *c.* 4. & 13 *Eliz. c.* 15. prohibited the exportation of corne and " graine; becauſe the neceſſary ſuſtenance of the realme. And " this is in effect admitted legal, *Rot. Parl.* 17 *R.* 2. *n.* 39. " Upon a petition for a repeal of ſuch a reſtraint, the anſwer " was, *Le roi le voet a preſent, proviſo que bien liſe a ſon counſel a* " *reſtrainer le paſſage quant il ſemble beſoignable.* For ſuch reſtraints " *vide clauſ.* 5 *E.* 3. *parte* 1. *m.* 21. *dorſ. Rot. Parl.* 50 *E.* 3. " *n.* 156.

*Vide* clauſ. 41 E. 3. m. 21. dorſ. B. 15. Clauſ. 48 E. 3. m. 11. dorſ. B. 159. Clauſ. 46 E. 3. m. 21. dorſ. B. 118.

Clauſ. 47 E. 3. m. 12. dorſ. B. 127. Of wools and woolfels, 49 E. 3. m. 21. dorſ. B. 170.

" 2. The kinges of this realme have uſually prohibited the ex- " portation of coigne and bullion before any act to reſtrain it, " becauſe it is the riches and wealth of the realme. *Clauſ.* " 30 *H.* 3. *m.* 11.

" 3. The kinges of this realme have uſually prohibited the ex- " portation of armes, or ſuch other thinges as are for the neceſſary " defence or ſtrength of the realme. *Vide clauſ.* 10 *E.* 3. *m.* 31. " *dorſ.* a proclamation inhibiting the exportation of boards or " timber for ſhips. *Clauſ.* 38 *E.* 3. *m.* 29. a prohibition of ex- " portation of horſes, falchons, thread, bowes, arrowes, bow- " ſtringes, and arms, and to arreſt the ſhip and goods. The like " prohibition of commerce with enemies.

Clauſ. 43 E. 3. m. 3. dorſ. B. 50.

" 4. The kinges have uſually reſtrained the paſſage of cuſtom- " able goods to ſome particular ports for the better preventinge of " defraudinge of cuſtomes, and at theſe ports the cockets kept. " Thus did *E.* 3. *clauſ.* 5 *E.* 3. *parte* 1. *m.* 12. *dorſ.*

Now ſettled by the act of 1 Eliz. c. 11.

" And in theſe caſes prohibitions of this nature were legall, " and for the moſt part the cohertion was by ſtay of the ſhip or " goods prohibited; for no proclamation could induce a for- " feiture; and for that cauſe moſt of theſe thinges were provided " for by act of parliament, which ſubjected the party to a for- " feiture or other penalty.

*Vide* the penalty for breaking ſuch an arreſt, clauſ. 46 E. 3. m. 28. B. 110.

" (2.) Now for an inſtance of a reſtraint of foren trade or im- " portation.—Upon this the acts of *Magna Carta, c.* 30. 9 *E.* 3. " *c.* 1. 25 *E.* 3. *ſtat.* 4. *c.* 2. 2 *R.* 2. *c.* 1. lye heavy; and it hath " been ſeldom practiſed. *Vide* a reſtraint of foren trade in *Ire-* " *land*, 3 *R.* 2. *n.* 44.

" Thus much for the kinge's power of ſhuttinge the ports; " which, though it was ſometymes uſeful and profitable for the " kingdom,

" kingdom, yet oftentymes was made a meanes of great damage " and oppreſſion, which did ariſe by lettinge looſe the reſtraint to " particular men for profitt.

" And ſo ariſeth the next conſideration of the kinge's power of " openinge the ports.

*Vide* Clauſ. 46 E. 3. m. 22. dorſ. B. 118.

" The kinge might open the paſſage, which either by his own " proclamation he had reſtrained, or which by act of parliament " were reſtrained, either in reſpect of this or that particular " commodity; as when exportation of ſome particular wares were " reſtrained in reſpect of the place, as the tranſportation of wools " to the ſtaple. This is cleere and without queſtion, whereof " before. Theſe licences were alſo complained of, and often " enacted againſt, but could never be remedied. *Vide* 21 *R.* 2. " *n.* 82. and the procurers of ſuch licences puniſhed. 51 *E.* 3. " *n.* 17. *Vide* 27 *H.* 6. *n.* 29. 9 *H.* 6. *n.* 37."]

## 6. Of his Prerogative in *Beacons* and Light-Houſes.

4 Inſt. 148. 12 Co. 13. Carter, 90. 2 Keb. 114. 3 Inſt. 204.

It is clearly agreed, that the king only has a prerogative in (*a*) beacons and light-houſes; and that he may erect any ſuch, and in ſuch places as will be moſt convenient for the ſafety and preſervation of ſhips, mariners, and navigation. Alſo, it ſeems to be the better opinion, that this being for the publick utility, and one of the prerogatives which he is intruſted with for the ſafety of the whole realm, he may erect ſuch beacon, *&c.* as well in the ſoil or ground of a ſubject as in that of the crown; and that he may do this without the ſubject's conſent.

(*a*) Before the reign of E. 3. there were but ſtacks of wood ſet upon high places, which were fired when the enemy was deſcried; but in his reign, pitch-boxes were inſtead of theſe ſtacks of wood ſet up; and this is properly a beacon. 4 Inſt. 148.

*Vide* the authorities *ſupra*, and Carter, 90.

Alſo, it is clear, that the ſubject hath not any power to erect any ſuch beacon, *&c.* without the king's licence and authority for that purpoſe.

(*b*) Reſolved by the two Ch. Juſtices, Attorney and Solicitor General, that this act extended as well to light-houſes in the night, as to beacons, &c. by the day.

But by the 8 *Eliz.* it is enacted, " That the maſter, wardens, " and aſſiſtants of the Trinity-houſe of *Deptford Strond*, ſhall and " may lawfully from time to time at their will and pleaſure, and " at their coſts, make, erect and ſet up ſuch and ſo many beacons, " marks, and (*b*) ſigns for the ſea, in the ſea-ſhores and upland " near the ſea coaſts or forelands of the ſea only, for ſea-marks, " as to them ſhall ſeem meet; whereby the dangers may be " avoided, and the ſhips the better come to their ports; and all " ſuch *beacons*, marks, and ſigns ſo by them to be erected, ſhall be " continued, renewed, and maintained from time to time at the " coſts and charges of the ſaid maſter, wardens, and aſſiſtants." 4 Inſt. 149. in marg.

*Vide* title Court of Admiralty.

And although by the common law none but the king could erect *beacons*, light-houſes and ſea-marks, yet of later times, by letters patent granted to the Lord High Admiral, he hath power to erect *beacons*, ſea-marks and ſigns for the ſea; which power is now veſted in the Lords of the Admiralty.

And

And therefore a ſuit for the profits of the beaconage of a rock in the ſea near ——— in *Cornwall*, may be in the Court of Admiralty; for, as the profits of the beacons belong to the Admiral, ſo the ſuit for them ought to be in his court; though the rock be the freehold of another and part of his inheritance. Sid. 158. Croſs v. Liggs.

It hath been reſolved, that an order or decree for raiſing a tax for repairing a *beacon*, without ſetting forth, that it was in decay or out of repair, is good, in that it would be dangerous to wait until it became in decay: for the conſequence would be, that there would be no *beacon* in the mean time and during the reparation: beſides, that it cannot be preſumed, that the parties who contribute to the tax will tax themſelves unneceſſarily. Raym. 448. the Caſe of the Town of Winchelſea.

## 7. Of his Prerogative in Wreck.

By the common law (*a*) the king hath an undoubted right to wrecks; and his prerogative herein is founded on the dominion he has over the ſeas; and being ſovereign thereof, and protector of ſhips and mariners, he is entitled to the derelict goods of the merchant; which is the more reaſonable, as it is a means of preventing the barbarous cuſtom of deſtroying perſons who in ſhipwrecks approach the ſhore, by removing the temptations to inhumanity. Cro. Jur. Belli, 117. 132. 141. 2 Inſt. 167. Molloy, 237. Moor, 224.

[(*a*) Declared by ſtat. *de prærogativa regis*, 17 E. 2. c. 11.—King R. 1. in the ſecond year of his reign releaſed wreck through all England, as Spelman in his Gloſſary, title Wreck, cites it out of Hoveden. But his ſucceſſor reſumed the prerogative, and that before the above ſtatute of 17 E. 2.; and frequent inſtances thereof are long before that ſtatute in the times of E. 1., H. 3. and King John., Hale De Jure Maris, c. 7. pa. 40.]

There are four ſorts of ſhipwrecked goods, *flotſham*, *jetſham*, *ligam*, and *wreck*.

*Flotſham*, is when the ſhip is ſplit, and the goods float upon the water between high and low water mark.

*Jetſham*, is when the ſhip is in danger to be drowned, and for ſaving the ſhip the goods are caſt into the ſea.

*Ligam*, *lagan* or *ligan*, is when the heavy goods are caſt into the ſea with a buoy, that the mariners may know where to retake them.

*Wreck*, is where goods ſhipwrecked are caſt upon the land.

The *flotſham*, *jetſham*, and *ligan*, in ſhipwrecks belong to the king as well as the *wreck*; for when the mariners are caſt away, there is the ſame reaſon that the prerogative ſhould take place in theſe goods as in the *wreck*. 5 Co. 106.

But, though the king hath a prerogative herein, yet *wreck* may be in a ſubject by grant or preſcription: but, if the ſubject preſcribes in *wreck* alone, he ſhall not have *flotſham*, *jetſham*, or *ligan*; for the king's grant ſhall not be taken to be more extenſive than the natural import of the words will bear. 5 Co. 107.

Goods are ſaid to be wrecked at common law, when there are no marks or ſigns of their property whereby to prove an owner; which anciently, and before the methods of trading were well known, was very difficult to do; unleſs ſome living animal eſcaped 2 Inſt. 167.

to

to the ſhore, whereby they might take the tokens of a property.

Bract. lib. 3. fol. 120. Hence, ancient authors define it to be no wreck, if a dog or a cat eſcape alive; or, if certain ſigns were placed on the goods whereby they might be known. And becauſe this prerogative of wreck was abuſed, to the prejudice of the merchant, the ſtatute *Weſtm.* 3 *Ed.* 1. *c.* 4. has provided, that if a dog or cat eſcape alive (which in theſe caſes they took to be the moſt certain proofs of property) that then the ſheriff, coroner, or lord of the iſle might claim them; and if the owner came and made his claim within a year and day, he ſhould have his goods, otherwiſe they remained to the king.

2 Inſt. 167. The inſtance of a dog or cat are only for examples; for if any living thing eſcapes, the claim may be made.

2 Inſt. 167. Molloy, 239. If the mariners are purſued by enemies, and come aſhore and leave the empty floating ſhip, which comes to land without any perſon; yet ſhall they claim the ſhip when it comes on ſhore.

2 Inſt. 168. The year and the day mentioned in the ſtatute, ſhall be from the time of the ſeiſure; for from the time of ſeiſure there is a notoriety, in order for the party to make his claim.

5 Co. 107. But the property is in the king or the lord of the manor, againſt all but the right owner, from the time that the goods touch land, even before ſeiſure; for the king's intereſt herein is different from that of another occupant, who only acquires a right by the ſeiſure; for he is intruſted with this prerogative in order to prevent any other occupant.

2 Inſt. 168. If the owner dies within the year and the day, his executors or adminiſtrators may make claim thereto; becauſe it is not limited by the ſtatute to the owner at the time of the wreck.

5 Co. 107. 2 Inſt. 167. This law extends not only to wreck, but to *flotſham*, *jetſham*, and *ligam*: but the wreck muſt be claimed by action at (*a*) common law, the *flotſham*, &c. by ſuit in the Admiralty; becauſe the wreck is on the land, the *flotſham*, &c. in the ſeas.

(*a*) By the expreſs words of the ſtatute 15 R. 2. c. 3. the Admiralty cannot take cognizance of goods wrecked.

5 Co. 108. If the ſuit be commenced before the year and the day, it ſufficeth, though the verdict be not given; for the delay of the law muſt do no man an injury.

2 Inſt. 168. If wreck be embezzled both from the king and the owner, this may be inquired into on a commiſſion of *oyer* and *terminer*, and the party fined.

2 Inſt. 168. If a lord of the manor take the king's goods as wreck, the king may claim them after the year and the day; becauſe the king being perpetually employed in the buſineſs of the publick cannot be bound to a time.

If goods wrecked be *bona peritura*, the king or lord may ſell them before the year and the day be paſt; for the ſtatute ſhall not be underſtood to reſtrain them to keep theſe things that of their own nature cannot be kept.

5 Co. 107, 108. Sir Henry Conſtable's caſe. If wreck be granted to the lord of the manor, and he take *flotſham* and wreck, and the jury find this whole matter, and aſſeſs entire damages, judgment ſhall be given againſt the plaintiff; for the

the court will not give their judgment, when for part of the matter claimed the plaintiff hath no title; and it being matter of fact, the court cannot apportion the damages.

Tunnage is granted to the king for all goods imported into the realm as merchandize, by any merchant whatsoever: certain goods are wreckt, and the question was, Whether they should pay this duty? And resolved by *Vaughan*, that they should not; 1*st*, Because they could not be said to be imported; for importation is the bringing in of goods by artificial means, as by ships, &c. with deliberation, in order for some use; therefore these goods casually cast up, cannot be said to be imported. 2*dly*, They cannot be said to be imported for merchandize, but they are now as goods destined for sale; but they may be reserved to the proprietor. 3*dly*, They are not brought in by any merchant, for they are presumed to be deserted and derelict, and thence the property changed; and the king having a property in the whole, it is to no purpose to give him a part. Vaugh. 164. to 172.

Originally all wrecks were in the crown, and the king has a right to a way over any man's ground for his wreck; and the same privilege goes to the grantee thereof. 6 Mod. 149. *per cur.*

8. Of the King's Prerogative in relation to Coins and Mines.

It is clearly agreed, that by the common law the king hath a prerogative in, and is entitled to, all royal mines of gold and silver, and treasures of gold and silver hid in the earth; and that he is intrusted with the (*a*) coinage, and making money current; and that he alone can bring the mines and treasures of any conquered country into use, by coining them out into his money. And this prerogative is lodged in the king, as he administers justice to all; and therefore the power and regulation of that which is the (*b*) common standard and measure of all bartering and commerce is committed to his care. Dav. 19. 2 Roll. Abr. 166. 5 Co. 114. Co. 146.

(*a*) The legitimation of money, and the giving it its denominated value, is justly reckoned *inter jura majestatis*; and in England it is one special part of the king's prerogative. Hal. Hist. P. C. 188.

(*b*) Money is the common measure of all commerce almost through the world; it consists principally of three parts; 1. The materials whereof it is made; 2. The denomination or extrinsic value; 3. The impression or stamp. Hal. Hist. P. C. 183.—Sir John Davis mentions six things as essentials to the legitimation of coin; 1. Weight; 2. Fineness; 3. Impression; 4. Denomination; 5. Authority of the prince; 6. Proclamation. Davis, 19. in the case of mixed money—which last, viz. the proclamation, is not always necessary to the legitimation, says my Lord Ch. J. Hale; for the currency of money is a question of fact, and may be proved by the officers of the Mint or their indenture, on an indictment for clipping and counterfeiting the king's coin. Hal. Hist. P. C. 196. 2 Salk. 446. S. P.

Also, this prerogative is given to the king as a necessary consequence of the power of war and peace; for there can be no wars made without the expence and consumption of treasure. Plow. 315.—frequently called the Sinews of War. Co. Lit. 90. b. 11 Co. 91. 2 Roll. Rep. 298.

Besides, it was thought, that if any other persons had the power of mines of gold and silver, they might by these immense treasures grow too formidable, and wrest that authority from the king which was deposited in his hands only. Plow. 316.

Cotton, 4. Lock of Coin.

The uſe and neceſſity of money aroſe from the nature of trade; but more eſpecially from this, that the ſeveral proviſions of life are in their own nature periſhable, and not to be laid up in ſpecie. This made it neceſſary that ſome things ſhould be fixed on to paſs as tickets of credit in exchange for thoſe commodities: hence, the thing agreed on muſt have theſe qualities. 1*ſt*, It muſt be durable, becauſe otherwiſe it would not be more eaſily laid up than the proviſions themſelves. 2*dly*, It muſt be ſcarce, that a little of it may ſerve to be carried from place to place, in order to ſupply men's ſeveral occaſions. Upon theſe two accounts gold and ſilver were pitched on as the two metals moſt ſcarce and moſt durable, and therefore beſt able to anſwer both the purpoſes. If therefore gold and ſilver be taken up as the meaſures of all other things, it follows, that the compariſon of their value will ſtand thus: when the labour ſpent in digging, refining, and importing an ounce of ſilver, is equal to the labour in ſowing, reaping, and threſhing a buſhel of corn, then is an ounce of ſilver equal to a buſhel of corn; the induſtry in the acquiring is equal, and, conſequently, men's property in them is the ſame, that is, their values are equal; for, if the corn be more plenty than the ſilver, then a buſhel and a half of corn will poſſibly be worth an ounce of ſilver; if on the other hand, the ſilver be more plenty than the corn, then, poſſibly, an ounce and a half of ſilver will amount to no more than a buſhel of corn; and what is done by coining of ſilver is no more than aſcertaining the value of ſeveral pieces in order for commerce; as that the crown ſhall contain an ounce and the like, that the people may not be compelled to uſe their ſcale and touchſtone on every bargain.

Lock of Coin.

The policy in relation to the coin is, that the value remains unalterable; for the ſtandard cannot be varied without manifeſt injuſtice; as, ſuppoſe a man contracts for ten crowns, which is equal to ten ounces of ſilver, that ſuppoſe equal to ten buſhels of corn, and before payment the publick ſtandard ſhould alter; for inſtance, that the crown were leſſened to half an ounce, and yet we ſuppoſe that the induſtry in the acquirement is the ſame in relation to the ounce of ſilver and the buſhel of corn; it then follows that the ten crowns paid in publick money will be equal to but five buſhels of corn, and, conſequently, the man by the publick act will loſe half the value in which he had a property, by the contract: ſo, in caſes of foreign trade, where the meaſure of commerce is the intrinſick value of the ſilver or gold, there can be no variation of ſuch meaſure without injuſtice.

2 Inſt. 575. [(*a*) In this opinion Sir W. Blackſtone concurs with Lord Coke, 1 Bl. Com. 278.] Hal. Hiſt. P. C. 191.

And indeed the keeping to the common ſtandard is of that importance, that my Lord *Coke* ſeems to be of opinion (*a*), that the alteration of money in weight or alloy cannot be without an act of parliament; and in this grounds his opinion on the ſtatutes of 25 *E.* 3. *c.* 13. and 9 *H.* 5. *ſeſſ.* 2. *c.* 6. but herein the law ſeems to be as laid down by my Lord *Hale*.

1. That at the firſt inſtitution of any coin within this kingdom, the king, and he alone, ſets the weight, the alloy, the denominated value of all coin; and this is done commonly by indenture between the king and the maſter of the Mint.

2. He

2. He may by his proclamation legitimate foreign coin, and make it current money of this kingdom according to the value impoſed by ſuch proclamation; but the counterfeiting ſuch money was not treaſon till the ſtatute of 1 *Mar. c.* 6. made it ſo; nor the clipping, waſhing, impairing thereof was not treaſon till 5 *Eliz. c.* 11. and 18 *Eliz. c.* 1. but all theſe ſtatutes allow the power of legitimation thereof to the king by proclamation. Hal. Hiſt. P. C. 192.

3. He may enhance the external denomination of any coin already eſtabliſhed, by his proclamation; and thus it hath been gradually done almoſt in all ages (*a*). This is ſometimes called imbaſing of coin, and ſometimes enhancing of it; and it is both; it is an enhancing of coin in reſpect of the extrinſick value or denomination, but an imbaſing in reſpect of the intrinſick value; as for inſtance, when in the time of *Edward* IV. a noble was raiſed to a higher rate by twenty pence. Hal. Hiſt. P. C. 192. (*a*) Though it be not abſolutely an imbaſement of the coin in the ſpecies, yet it hath very near the ſame effect. Hal. Hiſt. P. C. 194.

4. He may by his prerogative imbaſe the ſpecies or material of the coin, and yet keep it up in the ſame denominated or extrinſick value as before; namely, to mix the ſpecies of money with an alloy below the ſtandard. Hal. Hiſt. P. C. 192. Dav. 18. 2 Roll. Abr. 166.

As to my Lord *Coke*'s opinion, all he ſays that can be inferred from it is, that it is not ſafe nor honourable for the king to debaſe his coin below ſterling; and that if it be at any time done, it is fit to be done by aſſent of parliament; but certainly all it concludes is that *fieri non debet*, but *factum valet*. Hal. Hiſt. P. C. 194.

From the king's prerogative in coins it hath been adjudged, that at common law, and without any ſtatute, an information lay againſt perſons for tranſporting large quantities of money, being againſt the policy of the ſtate and government. Hob. 270. Courteen's caſe, and Poph. 149. where it is held, that engroſſing a great quantity of money is an offence; & *vide* Roll. Rep. 299.

But, though mines of gold and ſilver belong to the king, yet mines of tin and copper belong to the ſubject; for by none of the above-mentioned reaſons are theſe to be annexed to the crown. Plow. 323. 2 Inſt. 578. 12 Co. 12.

But herein there hath been a great queſtion, *viz.* Whether, if the mine of copper or tin contained gold or ſilver, as they often do, whoſe it ſhould be, the king's or the ſubject's? And the judges here made a very extended conſtruction, and held, that gold and ſilver being the nobler and more valuable metals ſhould attract the leſs valuable, and belong to the king; as likewiſe for the following reaſon, that the king's property cannot be held in jointure with the ſubject, and that the king's property, though ever ſo ſmall, ſhall not be loſt by mixture with the ſubject's. Plow. 323. 328. 336.

But upon this caſe the reporter very juſtly obſerves, that in all baſe metals of copper, tin, &c. there is a mixture of gold and ſilver, which mixture is of no value in compariſon to the other metal, and the gold or ſilver is the life of the mine, without which it cannot be worked; ſo that this was declaring all copper and tin mines in the king. Plow. 339.

And therefore by the ſtatute 1 *W. & M. ſtat.* 1. *c.* 30. § 4. it is enacted, "That no mine of copper, tin, iron, or lead, ſhall be

" adjudged a royal mine, although gold or ſilver may be extracted " out of the ſame."

And by the 5 *W. & M. c.* 6. § 2. " All proprietors of mines " wherein any ore ſhall be found in which there is copper, tin, " iron, or lead, ſhall hold and enjoy the ſame, notwithſtanding " that ſuch mines or ores ſhall be claimed to be royal mines; " *provided* that their majeſties, and all claiming royal mines under " them, may have the ore of ſuch mines, (other than the tin ore " in the counties of *Devon* and *Cornwall*) paying to the proprie- " tors within thirty days after the ore is laid on the banks, and " before the ſame is removed, the rates following, *viz.* for all ore " waſhed wherein is copper, 16 *l. per* ton; and for all ore waſhed " wherein there is tin, 40 *s. per* ton; and for all ore waſhed " wherein there is iron, 40 *s. per* ton; and for all ore waſhed " wherein there is lead, 9 *l. per* ton; and in default of payment " it ſhall be lawful for the proprietors to diſpoſe of the ore."

Plow. 336. *& vide poſtea.* The king by expreſs words may grant away royal mines as well as inveſt a ſubject with any property in the aforementioned chattels, but then it muſt be by expreſs words; for, if the king grants to *J. S.* lands and the mines therein contained, and royal mines are found in them, they ſhall not paſs to the ſubject; for the king's grant ſhall not be taken to a double intent, becauſe they are records that ought to have the ſtricteſt truth and certainty; and the moſt obvious intent is, that they ſhould only paſs the common mines that are grantable to a common perſon.

12 Co. 12. It hath been held by the judges aſſembled at *Serjeant's Inn*, that the king may enter into any man's ground and dig ſalt-petre for making gunpowder; and that the king hath a prerogative herein, being neceſſary for the ſafety of the realm, although it be a thing of a new invention.

12 Co. 13, 14. And herein my Lord *Coke* obſerves, 1*ſt*, That it muſt be done with as much conveniency and as little to the prejudice of the owner of the ground as poſſible; and, conſequently, that the digging in a man's houſe, barn, outhouſe, *&c.* or weakening the walls of any ſuch houſe, *&c.* is unlawful.

12 Co. 12. 2. That the ſoil or ground muſt be made and left as commodious to the owner as it was before.

12 Co. 13. 3. That this is in nature of a purveyance, and an incident inſeparable to the crown, and cannot be granted, demiſed, or tranſferred over to another.

12 Co. 14. 4. That the owner of the land cannot be reſtrained from digging and making ſalt-petre; the king not having an intereſt in it as he hath in gold and ſilver in the land of the ſubject.

## 9. Of his Prerogative in derelict Goods; and therein of Waiſs, Strays, and Treaſure Trove.

Bro. tit. Prero. pl. 12. 2 Vent. 267-8. All derelict goods, and in which no man hath a property, belong to the king as well as derelict lands; ſo (*a*) of extraparochial tithes, though things of an eccleſiaſtical nature.

(*a*) 5 Co. 18. 2 Inſt. 646.——That a perſon may be guilty of felony in taking goods, the owner whereof is unknown, in which caſe the king ſhall have the goods, and the offender ſhall be indicted for taking *bona cujuſdam ignoti*. Hawk. P. C. c. 33. § 29.

So,

So, if a perſon dies inteſtate and without kindred, his goods and chattels belong to the king. And herein the uſual courſe is ſaid to be for a perſon to procure the king's letters patent, and then the ordinary admits the patentee to adminiſtration. Salk. 37. pl. 3.

As to goods waived, theſe belong to the king, and are in him without any office; becauſe the property is in nobody, and therefore by publick agreement is put out of the finder, in whom it was by the ſtate of nature, and is veſted in the king in recompence for his trouble and charge in the execution of juſtice. 5 Co. 109.

But at the common law, the owner purſuing the felon, and the felon waiving the goods, the owner may retake them. Alſo, upon an appeal of felony the owner is entitled to a writ of reſtitution; and as a farther encouragement for the proſecution of felons, by the 21 *H.* 8. *c.* 11. it is provided, that if the party come in as evidence on the indictment and attaint the felon, he ſhall have a writ of reſtitution awarded by the judge of aſſize. How far a ſale in a market overt alters the property in thoſe caſes, *vide* tit. Fairs and Markets.

If a felon in flight waive his own goods, and the king ſeize them, theſe alſo are waifs; for they are relinquiſhed, and the property is in nobody. Bro. Eſtray, (9). 29 E. 3 19.

In trover the defendant pleads in bar, that the queen was ſeiſed of the manor of *Newport Pagnel*, and that in the ſaid manor the goods were found waived, and doth not ſay, that they were waived in flight; this is no bar; for if the goods were only laid upon the manor, and not waived in the purſuit, they are no ſuch waived or derelict goods as the king may claim by his prerogative. 5 Co. 109. Cro. Eliz. 694. Foxley's caſe.

The owner may at any time retake the goods waived, if they are not ſeiſed by the king or lord of the manor; for the lord's property begins from the ſeizure; for ſince there is no property altered by the wrong and theft of the felon, it follows that the right remains till they are ſeized for the king as guardian of the publick ſafety, upon the purſuit, or forfeited to him upon the conviction. 21 E. 4. 16. Kitchen, 82.

Waifs and ſtrays are not neceſſarily incident to a leet, but they may be appurtenant to it by grant from the king; for the original prerogative is in the crown, and comes from thence to the ſubject at the pleaſure of the king. 8 H. 7. 1. Bro. Eſtray, 15.

And though a lord of a private manor may have waifs and ſtrays by preſcription, yet he cannot have *bona felonum* and *fugitivorum* without grant from the king; becauſe no man can preſcribe for them, for every preſcription muſt be immemorial, and the goods of felons and fugitives cannot be forfeited without record, which preſuppoſes the memory of that continuance. Bro. Eſtray, 13. 5 Co. 109. 43 E. 3. 16.

The king may grant the privilege of ſtrays to the lord of a manor, or he may claim it by preſcription, which ſuppoſeth a grant loſt; but no lord of a manor can take the king's beaſts as ſtrays, becauſe the grant of the king muſt be ſuppoſed to extend no farther than this particular prerogative of the king, that is, to take the cattle of common perſons. 44 E. 3. 19. 5 Co. 105. Kitchen,

Where the lord of a manor hath not a grant or preſcription for ſtray, there, the ſheriff ſhall ſeize it in behalf of the king, and ſhall account for it to the king in the Exchequer. 24 H. 6. 5. Bro. title Eſtray, 5.

Co. Lit. 121. b. If *A.* be ſeiſed of a manor whereunto the franchiſes of waif and ſtray be appendant, and the king purchaſe the manor with the appurtenances, the royal franchiſes are re-united to the crown, and not appendant; becauſe the ſtray belongs to the king by his prerogative, and when the manor comes to him, the ſtrays are in him *jure coronæ:* but, if he grant the manor in as ample a manner as *A.* had it, this grants the ſtrays by reference to the former grant.

29 E. 3. 3. Bro. title Eſtray, 4. In the caſe of the king, if a man juſtifies, as beaſts taken in behalf of the king, yet he muſt ſay that the beaſts were taken and proclaimed; for otherwiſe the king's mere ſeizure ſhall not be a ſufficient preſumption in behalf of his property.

Bro. Eſtray, (5). 24 H. 6. 5. Cro. Eliz. 694. The ſheriff or bailiff of the king cannot pray in aid of the king in an action of treſpaſs brought againſt him; for the aid of the king cannot be demanded to come in to juſtify the acts of his miniſters, but they are anſwerable for their own acts; and the taking any chattels is only a fact of the king's miniſters; but in matters of titles of land which are no fact of the king's miniſters, but relate to his permanent revenue, the particular tenant ſhall pray in aid of the king in reverſion.

Cro. Eliz. 694. Alſo, the pleading of the officer is not good unleſs he ſays, he hath anſwered the value of them to the king; for the officer cannot juſtify the taking in his own right.

Yely. 96. The king or lord of the manor hath property from the time of the ſtray's coming upon the manor againſt all others but the right owner; but in relation to the right owner, he hath only the cuſtody, and not the property.

3 Inſt. 133. Kitch. 80. The king hath a prerogative in treaſure trove, that is, treaſures of gold and ſilver which muſt be hid in the earth, and in which no man hath a property; but treaſures of gold and ſilver found on the ſurface of the earth, or found in the ſea, belong to the finder.

3 Inſt. 133. Hal. Hiſt. P. C. 506. This prerogative was thought to be of that conſequence to the crown, that it is ſaid, that anciently the concealing of treaſure trove was puniſhed with death; but it is now only puniſhable with fine and impriſonment.

## 10. Of his Prerogative in Fines and Forfeitures.

2 Vent. 268. *Vide* title Forfeiture. Fines and forfeitures for offences at law, go to the king as the head of the government; and are given to him as well for the publick good as for the increaſe of his revenue.

Hal. Hiſt. P. C. 253. Hence it is held, that if a perſon be attainted of high treaſon, all his lands of whomſoever holden are forfeited to the king, and that though the lands are immediately held of the king, yet he hath them not as royal eſcheats, but *jure coronæ* or *prærogativa regalis.*

Moor, 238. 7 Co. 36. 11 Co. 68. Alſo, where a ſtatute giveth a forfeiture, either for nonfeaſance or misfeaſance, the king ſhall have it, unleſs it be otherwiſe particularly directed by the ſtatute.

And

And on this foundation it hath been adjudged, that an archdeacon having ſold the office of regiſtrar of the archdeaconry, which is a forfeiture within the ſtatute 5 & 6 *E.* 6. *c.* 16. the right of nomination belonged to the crown, and not to the biſhop of the dioceſe. 2 Vent. 267. Woodward v. Fox.

*Vide plus* titles *Forfeiture* and *Outlawry*.

## (C) Of his Prerogative over the Perſons of his Subjects: And herein,

### 1. Who ſhall be ſaid his Subjects.

ALL perſons born in any part of the king's dominions and within his protection are his ſubjects, as are all thoſe born in *Ireland*, *Scotland*, *Wales*, the king's plantations, or on the *Engliſh* ſeas; who by their births owe ſuch an inſeparable allegiance to the king that they cannot by any act of theirs renounce or transfer their ſubjection to any foreign prince. 7 Co. 1. &c. Calvin's caſe. Molloy, 370. Co. Lit. 129. Dyer, 300. *vide* title Aliens.

Alſo, the ſubjects of a foreign prince, coming into *England* and living under the protection of our king, may, in reſpect of that local ligeance which they owe to him, be guilty of high treaſon, and indicted that they *contra dominum regem* (the words *naturalem dominum ſuum* being omitted) did compaſs, *&c. contra ligeantiæ ſuæ debitum*. And it is ſaid that even an ambaſſador, committing a treaſon againſt the king's life, may be condemned and executed here, and that for other treaſons he ſhall be ſent home. 3 Inſt. 4, 5. Dyer, 145. Hob 271. 2 Salk. 630. pl. 2. Hawk. P. C. c. 17. § 5. Haſ. Hiſt. P. C. 59.

But aliens who in a hoſtile manner invade the kingdom, whether their king were at war or peace with ours, and whether they come by themſelves or in company with *Engliſh* traitors, cannot be puniſhed as traitors, but ſhall be dealt with by martial law. Hawk. P. C. c. 17. § 6.

If the king of *England* makes a new conqueſt of any country, the perſons there born are his ſubjects; for by ſaving the lives of the people conquered he gains a right and property in ſuch people, and may impoſe on them what law he pleaſes. Dyer, 224. Vaugh. 281.

But until ſuch laws given by the conquering prince, the laws and cuſtoms of the conquered country ſhall hold place; unleſs where theſe are contrary to our religion, or enact any thing that is *malum in ſe*, or are ſilent (*a*); for in all ſuch caſes the laws of the conquering country ſhall prevail. 2 P. Wms. 75, 76. (*a*) That where the laws are rejected or ſilent, the conquered country ſhall be governed according to the rule of natural equity. 2 Salk. 412.

If there be a new and uninhabited country found out by *Engliſh* ſubjects, as the law is the birthright of every ſubject, ſo wherever they go they carry their laws with them; and therefore ſuch new found country is to be governed by the laws of *England*; though, after ſuch country is inhabited by the *Engliſh*, acts of parliament made in *England*, without naming the foreign plantations, will not bind them. 2 P. Wms. 75. 2 Salk. 411. pl. 1. Like point. 2 Ld. Raym. 1245.

2. That he is entitled to the Service and Allegiance of his Subjects; and therein, of the Oaths injoined them.

Sav. 43. Moor, 111. 2 Vent. 247-8. 4 Mod. 269. Salk. 167. pl. 1. Ld. Raym. 29. Skin. 574. pl. 1. Carth. 306.

It is clearly agreed, that the king hath an intereſt in all his ſubjects, and is entitled to their ſervices, and may employ them in ſuch offices as the publick good and the nature of our conſtitution require; and on this foundation it hath been held, that the king may oblige a perſon to ſerve the office of ſheriff, and that no perſon can be exempt from ſuch office but by act of parliament or letters patent.

7 Co. Calvin's caſe. Hal. Hiſt. P.C. 59. 61. (*a*) 1 Vent. 3. [For the miſapplication of their allegiance to the regal capacity or crown, excluſive of the perſon of the king, (among other things,) were the Spencers baniſhed in the reign of Edward the ſecond. Hal. Hiſt. P. C. 67.] —— That the obligation of allegiance is not to be applied nor laid upon private cauſes; for no man can make a cauſe of allegiance other than ſuch as the law makes, and as concerns the faith and loyalty that the ſubject oweth to his ſovereign in points of ſtate. Hob. 271, 272.

The allegiance that is due from every ſubject to the king is of two kinds. 1*ſt*, Original, virtual, and implied. 2*dly*, Expreſſed or declared by oaths or promiſes. The firſt of theſe ariſes from that protection which every ſubject hath from the king and the laws, and is (*a*) ſaid to be due to the natural and not to the politick perſon of the king; and from the breach thereof ariſeth the crime of high treaſon.

1 Bl. Comm. 369. Sir M. Foſter obſerves, that "the well-known maxim which the writers of our law have adopted and applied to this caſe, *nemo poteſt exuere patriam*, comprehendeth the whole

[Natural allegiance cannot be forfeited, cancelled, or altered by any change of place, time, or circumſtances, nor by any thing but the united concurrence of the legiſlature. For it is a principle of univerſal law, that the natural-born ſubject of one prince cannot by any act of his own, no, not by ſwearing allegiance to another, put off or diſcharge his natural allegiance to the former: for this natural allegiance was intrinſick, and primitive, and antecedent to the other; and cannot be deveſted without the concurrent act of that prince to whom it was due. Indeed the natural-born ſubject of one prince, to whom he owes allegiance, may be entangled by ſubjecting himſelf abſolutely to another; but it is his own act that brings him into theſe ſtraits and difficulties, of owing ſervice to two maſters; and it is unreaſonable that, by ſuch voluntary act of his own, he ſhould be able at pleaſure to unlooſe thoſe bands, by which he is connected to his natural prince.]

"doctrine of natural allegiance." Foſt. Cr. L. 184. This is exemplified by a ſtrong inſtance in the report which that learned Judge hath given of Æneas Macdonald's caſe. He was a native of Great Britain, but had received his education from his early infancy in France, had ſpent his riper years in a profitable employment in that kingdom, and had accepted a commiſſion in the ſervice of the French king: acting under that commiſſion, he was taken in arms againſt the king of England, for which he was indicted and convicted of high treaſon; but was pardoned upon condition of his leaving the kingdom, and continuing abroad during his life. *Id.* 59.—By ſt. 26 G. 3. c. 60. it is enacted, that no regiſtry of any ſhip or veſſel ſhall thenceforth be made, until the owner or owners of ſuch ſhip or veſſel ſhall have taken an oath therein ſet forth in manner therein directed, containing, among others, the words following: "That I the ſaid *A. B.* (and the ſaid other owners, *if any*) am (or are) truly and "*bonâ fide* a ſubject (or ſubjects) of Great Britain, and that I the ſaid *A. B.* have not (nor have any "of the other owners, to the beſt of my knowledge and belief) taken an oath of allegiance to any "foreign ſtate whatever, except under the terms of ſome capitulation (*deſcribing the particulars "thereof*)." And by ſt. 27 G. 3. c. 19. § 4. reciting the above clauſe, it is enacted, that any oath which

which ſhall have been, or may be taken, for the ſole purpoſe of acquiring the rights of a citizen or burgher in any foreign city or town in Europe, to be enjoyed during the time that the perſon or perſons taking ſuch oath ſhall reſide in ſuch city or town, and for a limited time after ſuch reſidence ſhall have expired, ſhall not be deemed an oath of allegiance to a foreign ſtate, within the true intent and meaning of the above act.

The expreſs allegiance, or by oaths and promiſes, is either by the common law, or by particular acts of parliament. By the common law, beſides the oath due by tenure or *ratione feodi*, all perſons above the age of twelve were obliged in the torn or leet to take an oath of fidelity and allegiance, whether ſuch perſons held any lands of the king or not; and in all oaths of fealty, as likewiſe in the profeſſion of homage to any inferior or ſubordinate lord or prince, it was with a *ſalvâ fide et ligeantiâ domini regis*, which ſaving to omit was puniſhable in ſuch lord. Spelm. title Fidelitas. Co. Lit. 85. Finch of Law, 241. 2 Inſt. 147. Hal. Hiſt. P. C. 64. &c.

The particular acts of parliament relating to this matter are the 1 *Eliz.* *c.* 1. which enjoins the oath of ſupremacy, 3 *Jac.* 1. *c.* 4. which inſtituted the oath of obedience, the ſtatutes 7 *Jac.* 1. *c.* 2 & 6. 13 *Car.* 2. *ſtat.* 2. *c.* 1. 13 & 14 *Car.* *c.* 3 & 4. 25 *Car.* 2. *c.* 2. 30 *Car.* 2. *ſtat.* 2. *c.* 1. which are abrogated by 1 *W.* & *M.* *ſeſſ.* 1. *c.* 1 & 8. and new oaths appointed in their room by the 1 *W.* & *M.* *ſeſſ.* 2. *c.* 2 & 3. 3 *W.* & *M.* *c.* 2. 13 *W.* 3. *c.* 6. 8 *Ann.* *c.* 22. 4 *Ann.* *c.* 8. 6 *Ann.* *c.* 7. 14. 23. 1 *Geo.* 1. *c.* 13. 13 *Geo.* *c.* 29. 2 *Geo.* 2. *c.* 31. 9 *Geo.* 2. *c.* 26. 6 *Geo.* 3. *c.* 53.

By the 2 *Geo.* 2. *c.* 31. it is enacted, "That all perſons that "ſhall be admitted into any office civil or military, or ſhall "receive any pay by reaſon of any grant from his Majeſty, or "ſhall have command or place of truſt under his Majeſty, or by "authority derived from him, in *England*, or in his Majeſty's "navy, or in *Jerſey* or *Guernſey*; or that ſhall be admitted into "office in the houſehold of his Majeſty, or of the Prince of *Wales*, "or any other of his Majeſty's iſſue; and all eccleſiaſtical perſons, "heads and other members of colleges and halls in the univer-"ſities, that are of the foundation and enjoy any exhibition, being "of the age of eighteen years; and all perſons teaching or read-"ing to pupils, and all ſchool-maſters and uſhers, and all "preachers of ſeparate congregations, high conſtables, and every "perſon who ſhall act as a ſerjeant at law, counſellour, barriſter, "advocate, attorney, ſolicitor, proctor, clerk, or notary, by "practiſing as ſuch in any court in *England*, who ſhall after the "21*ſt* of *January* 1728, be admitted into any of the above-men-"tioned preferments, &c., or ſhall come into any ſuch capacity, "&c., ſhall take the oaths appointed by 1 *Geo.* 1. *c.* 13. as by the "ſaid ſtatute is directed in the court of Chancery, King's Bench, "Common Pleas, or Exchequer, at any time (*a*) before the end "of the next term after he ſhall be admitted, &c., or before the "end of the next quarter-ſeſſions where ſuch perſons ſhall "reſide."

[(*a*) By the 9 G. 2. c. 26. the time is enlarged to ſix calendar months after ſuch admittance, &c. And ſtatutes are annually paſſed for the purpoſe of enlarging the time and indemnifying thoſe who have omitted to qualify.]

Perſons neglecting, to incur the penalties in 1 *Geo.* 1. *c.* 13. viz. diſability to, &c., or to be guardian or executor, or capable of

of any legacy or deed of gift; or to be in any office, or to vote at any election for members of parliament, and ſhall forfeit 500*l.*

3. That he may reſtrain his Subjects from going abroad; and herein, of the Writ *de Ne exeat Regno.*

F. N. B. 85. Dyer, 165. 196. 2 Roll. Rep. 12. 3 Mod. 131. Lit. Rep. 27. Stile, 442.

By the common law every ſubject may go out of the kingdom for merchandize or travel, or other cauſe, as he pleaſes, without any licence for that purpoſe: this appears from the (*a*) *ſtatute* 5 *R.* 2. *c.* 2. made to reſtrain perſons paſſing out of the realm, but excepts lords, great men, and notable merchants; as alſo by the ſtatute 26 *H.* 8. *c.* 10. which gave power to the king during his life to reſtrain perſons from trading to ſome certain countries (*b*); which acts had been vain and idle, if the king by his prerogative might have done it.

(*a*) This ſtatute is repealed by 4 Jac. 1. c. 1.

(*b*) Noy, 182.

12 Co. 33. 11 Co. 92. Fitz. N. B. 89. 2 Inſt. 54.—One reaſon, ſays Sir John Davis, why the king is entitled to cuſtoms, is, his permitting his ſubjects to go beyond ſea when he might reſtrain them. Dav. 9.

But, notwithſtanding this general freedom and liberty allowed by the common law, it appears plainly that the king by his prerogative, and without any help of an act of parliament, may prohibit his ſubjects from going out of the realm; but this muſt be by ſome expreſs prohibition; as (*c*) by laying on embargoes, which can be only done in time of danger, or by writ of *ne exeat regno*, which, from the words *quam plurima nobis et coronæ noſtræ prejudicialia ibidem proſequi intendis*, appears to be a ſtate writ, but is never granted univerſally, but to reſtrain a particular perſon, upon oath made that he intends to go out of the realm. Indeed *Fitzherbert* ſays, that the king may reſtrain his ſubjects by proclamation; and aſſigns as a reaſon for it, that the king may not know where to find his ſubject, ſo as to direct a writ to him.

(*c*) *Vide* title Merchant. 4 Mod. 179.

Dyer, 179. Moor, 109. 3 Inſt. 179. Comb. 53. Skin. 166.

It is agreed, that the matter alleged in the writ of *ne exeat regno* is not traverſable, and that the king may avoid it without ſhewing any cauſe; and though it may be objected, that if the king may, without aſſigning any reaſon, grant it in one caſe, he may in five hundred, *&c.*, the anſwer is, that this is a royal truſt repoſed in the king, which the law does not preſume that he will abuſe or make uſe of to the prejudice of the ſubject.

F. N. B. 85. Lane, 29. 2 Co. 17. b. 76. 11 Co. 92.

This writ may be awarded under the privy ſeal or ſignet, as well as the great ſeal.

The writ of *ne exeat regno*, though a prerogative or ſtate writ, hath been introduced into the court of Chancery. It was at firſt but tenderly made uſe of, but is now become the common proceſs of that court. The plaintiff, by a ſtanding order made in my Lord *Cowper*'s time, is to make oath of his debt; and the writ is always marked for the ſum ſworn in the affidavit, in words at length and not in figures; and the plaintiff ſwears the defendant is going out of the kingdom, which if he ſhould do, the debt may be

be loſt; the order is till anſwer or further order; and it was formerly thought, that upon the party's putting in a full anſwer the writ ſhould be diſcharged; but of late, the party hath been obliged to give ſecurity to abide the order on hearing, before the court will diſcharge the writ; which ſecurity is taken by recognizance before a maſter, as all other ſecurity is; and it is in the penalty of what is ſworn due, and the ſheriff takes bail accordingly when he arreſts the party thereon, the ſum ſworn due being conſtantly indorſed on the *ne exeat regno*, as a guide for the ſheriff to take bail by.

Skin. 13 Chan. Ca. 115. 2 Chan. Ca. 245. 7 Mod. 9. Ld. Raym. 696. Caſes in B. R. 562. Stil. 441, 442.

A writ of *ne exeat regno* may be granted in any caſe where there is danger of ſubterfuge from the juſtice of the nation, though of a private concern.

2 Chan. Ca. 245.

Giving out that he intends to go beyond ſea, aſſigned as a reaſon for awarding a writ of *ne exeat regno*, and it was granted.

2 Chan. Rep. 20.

A ſolicitor's bill being taxed and reported overpaid 60 *l.* on motion and affidavit of his going beyond ſea, a *ne exeat regno* was granted, though no bill was in court whereon to ground this writ (*a*).

Prec. Chan. 171. Lloyd v. Cardy. [(*a*) But it hath been ſince determined, that this writ cannot be granted but *on bill filed*. *Ex parte* Brunker, 3 P. Wms. 312.]

A motion was made for a *ne exeat regno* againſt Sir *Jerom Smithſon*, for that his wife had ſued him in the eccleſiaſtical court for alimony, and it was ſuſpected that he would go beyond ſea to avoid the ſentence; and the writ was granted; and the Lord Chancellor ſaid, that it had been ſo done before, for this court was to aid the eccleſiaſtical court in ſuch caſes.

2 Vent. 345. Sir Jerom Smithſon's caſe. [So, Read v. Read, 1 Ch. Ca. 715. Anon. 2 Atk. 210. Pearne v. Liſle, Ambl. 76.]

It hath been held, that a *ne exeat regno* lies to prevent one from going into *Scotland*, it being out of the juriſdiction of Chancery; and the proceſs thereof not reaching thither, is equally miſchivous to the ſuitor here as if he actually went out of the kingdom: and in this caſe it is ſaid, that the condition muſt be not to go out of the realm, or to *Scotland*; but in (*a*) a latter caſe it is held, that there is no occaſion that the order ſhould be particular as to *Scotland*; and that even ſince the *union*, the writ in the general form will reſtrain the party from going into *Scotland* as well as any of the king's other dominions that are out of the proceſs of this court.

1 P. Wms. 263. pl. 60. Done's caſe. (*a*) Hunter v. Maccray. Ca. temp. Talb. 196.

A *ne exeat regno* having been awarded againſt the defendant, *J. S.* (who was the now petitioner) became his ſurety to the ſheriff; after anſwer put in *J. S.* petitions to be diſcharged, but was denied; then the cauſe was heard, and 19,000 *l.* decreed againſt the defendant, and he committed for non-payment; and then *J. S.* petitions again to be diſcharged, becauſe being a *manucaptor*, and the party in priſon, there can be no danger of his going beyond ſea. *Lord Keeper*: If ſo, then his ſurety is in no danger, and would not diſcharge him.

Prec. Chan. 230. Le Clea v. Trot.

[It

*Ex parte* Brunker, 3 P. Wms. 312.

[It hath been determined, that this writ ſhall not iſſue on a mere legal demand, for which the defendant might have been holden to bail.

Anon. 2 Atk. 410. Pearne v. Liſle, Ambl. 76. Atkinſon v. Leonard, 3 Br. Ch. Rep. 218. Parker v. Appleton, *Id.* 427. But from the caſe of Atkinſon v. Leonard it ſeems, that it *ſhall* iſſue in matters where the courts of law and equity have *concurrent* juriſdiction.

Anon. 1 Atk. 421.

Nor ſhall it iſſue on a demand which is not certain.

Shearman v. Shearman, 3 Br. Ch. Rep. 370. Anon. 1 Br. Ch. Rep. 376.

Rico v. Gualtier, 3 Atk. 501. Anon. 2 Vez. 489.

In general, the application for it muſt be ſupported by an affidavit, ſwearing poſitively to the debt: but on a bill for an account, it is ſufficient for the plaintiff to ſwear to the balance *as to his belief.*

Anon. 2 Vez. 489.

Where the demand is againſt an adminiſtrator, *&c.*, the plaintiff ſhould alſo ſwear to his belief of aſſets come to the defendant's hands.

Jerningham v. Glaſs, 3 Atk. 409. Ambl. 62. S. C. and Moor v. Melliſh, therein cited.

This writ may iſſue againſt a feme covert executrix, whoſe huſband is out of the juriſdiction.

Baker v. Dumareſque, 2 Atk. 66. Jerningham v. Glaſs, 3 Atk. 409. Ambl. 62. S. C. Robertſon v. Wilkin, Ambl. 177. Atkinſon v. Leonard, 3 Br. Ch. Rep. 218.

As the real object of the writ, when applied to private concerns, is to compel the defendant to abide the event of the ſuit, the court always inclines to diſcharge the writ upon ſuch ſecurity being given.

Whether the writ ſhall iſſue againſt a foreigner or perſon uſually reſident *out* of the juriſdiction, in reſpect of a demand which originated *abroad*, and is *there* ſuable, *vide Pearne* v. *Liſle*, *Robertſon* v. *Wilkie*, *Atkinſon* v. *Leonard*, *ubi ſupra*.]

4. That he may command his Subjects to return Home; and therein, of awarding a Privy Seal.

Dyer, 128. b. Lane, 44. Moor, 109. 3 Inſt. 179.

As the king may reſtrain any of his ſubjects from going abroad, in like manner it is clearly agreed, that he may command them to return home; and that the diſobeying a privy ſeal to this purpoſe is the higheſt contempt. 1*ſt*, It is a diſobedience to the command of the king himſelf directed to the party. 2*dly*, The command is, that he ſhall return upon his faith and allegiance, which is the ſtrongeſt compulſion that can be uſed. 3*dly*, The thing required by the king is the principal duty of a ſubject, *viz.* to be at the ſervice of his king and country.

(*a*) And when he does return he ſhall be fined. Hawk. P. C. c. 22. §4.

The puniſhment for this offence is, the ſeizing the party's eſtate (*a*) till he return; and of this there are divers inſtances in our books.

Dyer, 128. b. Vouched in a caſe there.

As that of *William de Brittain* in the 19th year of *Ed.* II. who refuſing to return upon the king's writ, his goods and chattels, lands

lands and tenements, were thereupon ſeized into the king's hands: and the like was done in the caſe of (a) *Edward of Woodſtock* Earl of *Kent*, in the ſame reign. Lan. 44. S. C. cited and ſaid to be proved by other precedents. (a) Leon. 10. cited.

So, in the caſe of one *Bartue* who married the Ducheſs of *Suffolk*, they obtained a licence from Queen *Mary* to go out of the realm, under pretence of recovering ſome debts they were entitled unto as executors to the duke; when in reality it was on account of the religion eſtabliſhed by Queen *Mary*, and living with other fugitives under the protection of the *Palſgrave* of the *Rhine* in *Germany*, who was an eminent *Calviniſt*, were ſent to by privy ſeal; but the meſſenger in endeavouring to ſerve them with his letters, being obſtructed, beat and abuſed by their ſervants and attendants, a certificate was made of this, and their lands and tenements ſeized. Dyer, 176. Jenk. Cent. 220. Bartue's caſe.

So, in the caſe of Sir *Francis Englefield*, who departed the kingdom on a licence obtained for three years; but not returning at the expiration of the three years, a privy ſeal was ſent to him by Queen *Eliz.* which he not obeying, and this matter being certified into Chancery by the queen under her ſign manual, in the fifth year of her reign by virtue of a commiſſion under the great ſeal directed to Sir *Henry Nevil* and others, his lands and tenements were ſeized. Leon. 9. Moor, 109. Dyer, 375. And. 95. S. C. Sir Francis Englefield's caſe. *Vide* alſo 7 Co. 18. Poph. 18. 4 Leon. 135.

So, in the caſe of Sir *Robert Dudley*, who, intending to travel, obtained a licence from King *James* I. to go to *Venice*; but, before his departure, he by indenture enrolled for valuable conſideration, as was expreſſed in the deed (but none paid), conveyed the manor of *Killingworth*, with other lands, to the Earl of *Nottingham* and others in fee, with a proviſo, that upon tender of an angel of gold all ſhould be void; and with a covenant on the part of the bargainees, that they ſhould make all ſuch eſtates as the ſaid Sir *Robert* ſhould appoint: the bargainees were not parties to the deed, nor had they notice of it until ſome time after; but afterwards they made a leaſe to Sir *Robert Lee*, to the intent that Lady *Dudley* ſhould take the profits of part of the premiſes for ten years, if their eſtate continued ſo long unrevoked. The king, hearing that Sir *Robert* had been guilty of ſome bad practices beyond ſeas, in the fifth year of his reign, ſent his privy ſeal to him, which he not obeying, the great queſtion in this caſe was, whether thoſe lands thus conveyed were forfeited? And adjudged that they were, the conveyance being fraudulent as to the king. Lane, 42, &c. The King v. Earl of Nottingham. Paſch. 7 Ja. 1. in *Scac.*

In theſe caſes it hath been held, that the king hath only an intereſt in the offender's lands till he return; and (a) that his reſtoring of them to him is not a matter of grace but of right. (a) Lane, 43. *per* Tanfield, Ch. Baron.

But, though the lands are to be reſtored to the offender, yet it is held, that till his return the king hath a greater intereſt than the perception of the profits; and that he may aſſign or grant them, *quamdiu in manibus ſuis fore contigerint;* and that he or his patentee are entitled to woodfals, may make leaſes, and grant copyholds, being *domini pro tempore.* Sav. 7, 8. Leon. 9. Dyer, 176. in marg. Moor, 112.

And

Moor, 109. Dyer, 375. And on this foundation it was holden, in Sir *Francis Englefield's* caſe, that where Q. *Eliz.* in the eighth year of her reign, and after the forfeiture of Sir *Francis*, granted a manor, part of Sir *Francis*'s eſtate, with all the profits, *quamdiu in manibus noſtris fore contigerit*; and afterwards the acts 13 *Eliz. c.* 3. & 14 *Eliz. c.* 6. were made for veſting the eſtates of fugitives in the crown; after which the queen made a ſecond ſeizure of thoſe lands, and by her letters patent appointed a ſteward, who held a court, took ſurrenders, and granted admittances in right of the queen; yet it was reſolved, that this ſecond ſeizure, by virtue of theſe acts, gave the queen no greater eſtate or intereſt than ſhe had before by the common law; conſequently, that the firſt grant was good, and the courts holden, ſurrenders and admittances by her ſteward were void.

Dyer, 176. And. 95. (*a*) The writ ought to be ſerved by ſome meſſenger, who upon his oath is to make a certificate of it in Chancery. The regular courſe in thoſe caſes is for the meſſenger to certify his proceedings into Chancery, of which, by *mittimus*, a certificate is ſent into the Exchequer, out of which court a commiſſion iſſues to inquire, *&c.* and ſeize the lands of the delinquent; and it is ſaid, that this certificate admits of no traverſe, becauſe no venue can be laid here for its trial, the matter being tranſacted beyond ſea: but it is ſaid, that the (*a*) meſſenger ought to make oath of the ſervice of the writ of privy ſeal.

3 Inſt. 180.

Leon. 9. And it is ſaid, that there is no need of a date to the privy ſeal for that the matter therein contained is not traverſable, nor is it returned as other writs are, but the king who iſſues it is to receive the meſſage or anſwer of the party, and he is the judge of the contempt.

Lane, 46. The contempt incurs from the very time notice is given the party; for the words of the writ are *quod indilate*, &c.

Lane, 46. & *vide* Dyer, 176. It is held, that though the party hath a licence at the time of his going abroad, that yet he is obliged to obey the privy ſeal; for that ſuch licence is countermandable, being only an authority or diſpenſation, and not like an intereſt moving from the king.

3 Inſt. 180. It is ſaid that the king cannot recall the party, but by the great ſeal or privy ſignet.

## (D) Of the King as the Fountain of Juſtice, and intruſted with the Execution of the Laws: And herein,

### 1. That all Civil Juriſdiction flows from the King.

Fleta, c. 17. Co. Lit. 99. a. 114. *vide* title Courts. ALL juriſdiction exerciſed in theſe kingdoms that are in obedience to our king, is derived from the crown; and the laws, whether of a temporal, eccleſiaſtical, or military nature are called his laws; and it is his prerogative to take care of the

due execution of them. Hence, all judges must derive their authority from the crown, by some commission warranted by law; and must exercise it in a lawful manner, and without any the least deviation from the known and stated forms.

So, although the king is the fountain of justice, and intrusted with the whole executive power of the law, yet he hath no power to change or alter the laws which have been received and established in these kingdoms, and are the birthright of every subject; for it is by those very laws that he is to govern; and as they prescribe the extent and bounds of his prerogative, in like manner do they declare and ascertain the rights and liberties of the people, and therefore admit of no innovation or change but by act of parliament. 4 Inst. 164. 2 Inst. 54. 478. 2 Hal. Hist. P. C. 131. 282. Vaugh. 418. 2 Salk. 510.

From the inherent right inseparable from the king to distribute justice among his subjects, it hath been held, that an appeal from the *Isle of Man*, lies to the king in council without any reservation in the grant of the *Isle of Man* of any such right; and it was said, that though there had been exclusive words, that yet the grant must have been construed to be void upon the king's being deceived, rather than the subject should be deprived of a right inseparable to him as a subject, of applying to the crown for justice. 1 P. Wms. 329. Christian v. Corren.

## 2. Of the King's Prerogative in Ecclesiastical Matters.

The supremacy of the crown of *England*, in matters ecclesiastical, is a most unquestionable right, which, as my Lord *Hale* says, may be proved by records of undoubted truth and authority; and though, as he says (*a*), the Pope made great usurpations and encroachments on this right, yet these were always complained of as illegal; and those encroachments are now pared off by the statutes 25 *H.* 8. *c.* 19, 20, 21. and 26 *H.* 8. *c.* 1. Hal. Hist. P. C. 75. (*a*) The pope by degrees, and whilst the people were blinded with superstition, usurped the royal authority in all matters ecclesiastical, as is manifest by the statute of provisors, which was made as a remedy for this grievance, *&c.* Ld. Raym. 25. *& vide* 5 Co. Cawdry's case. Cro. Eliz. 542. and the statutes 26 H. 8. c. 1. and 1 Eliz. c. 1. whereby such authority as the pope had, claiming as supreme ordinary, is annexed to the crown, and is declared to belong thereto of right; for which *vide* 4 Inst. 341. Lit. Rep. 232. Moor, 463. Dyer, 237. Selden *Janus Anglo.* 27. Co. Lit. 134. Dav. 88. 2 Inst. 580. 584.

(*b*) So that the King of *England* doth not recognize any foreign authority superior or equal to him in this kingdom, neither do the laws of the Emperor or Pope of *Rome*, as such, bind in the kingdom of *England*; but all the strength and obligation that either the papal or imperial laws have obtained in this kingdom, is only because they are and have been received and admitted in this kingdom, either by consent of parliament or by immemorial usage and acceptation in some particular courts and matters, and not otherwise. (*b*) The laws of England have no dependance on the civil law, nor are governed by it, but are binding by their own authority. Hal. Hist. P. C. 16.

The king therefore is said to have two jurisdictions, one temporal, the other ecclesiastical; the latter of which is derived from the common law, though the form of the proceedings and the coercive power exercised in the ecclesiastical courts, is after the form Show. Rep. 218. Roll. Abr. 530. 4 Co. 29.

of

7 Co. 42. 5 Co. 7. 2 Vent. 43.

of the canon and civil law; and this being indulged to them, the judges of the common law will give credit to their proceedings and ſentences in matters in which they have a juriſdiction, and believe them conſonant to the law of holy church, although againſt the reaſon of the common law; and if there be a *Gravamen* it muſt be redreſſed by appeal.

*Vide* title Courts.

But, if theſe courts exceed their juriſdiction, and the bounds and limits preſcribed them by the laws and ſtatutes of the realm, they are ſubject to the controul of, and may be prohibited by, the king's temporal courts; for the canon and civil law did not bind originally in *England*, nor have they been received univerſally; and therefore are called *leges ſub graviore lege*, the common law ſtill maintaining its ſuperintendancy over them.

(*a*) *Vide* 1 Eliz. c. 1. a ſtatute entitled An act for reſtoring to the crown the ancient juriſdiction eccleſiaſtical; and the 16 Car. 1. c. 11. by which this court is aboliſhed——and for the juriſdiction it exerciſed, *vide* 12 Co. 45, & 13 Co. 2 Roll. Abr. 224. 4 Inſt. 332. Noy, 149. Moor, 917. March, 80. Gibſ. Cod. 50.

The king being delivered from papal uſurpation, might by common law grant a commiſſion to hear and determine eccleſiaſtical cauſes. Hence the juriſdiction of the High Commiſſion Court was acknowledged as deriving its authority immediately from the crown: but it was held, that that court, without the (*a*) help of an act of parliament, could not in matters of eccleſiaſtical conuſance uſe any temporal cenſure or puniſhment, as fine or impriſonment.

*Vide* title Eccleſiaſtical Courts.

Alſo, the common law hath annexed unto certain offices eccleſiaſtical juriſdiction, as incident to the offices: thus, every biſhop by his election and confirmation, even before conſecration, hath eccleſiaſtical juriſdiction annexed to his office, as *judex ordinarius* within his dioceſe; and divers abbots anciently, and moſt archdeacons at this day, by uſage, have the like juriſdiction within certain limits and precincts; all which they derive from the crown, although the proceſs in the eccleſiaſtical court runs in the name and under the ſeal of the biſhop or eccleſiaſtical judge.

2 Inſt. 488. Vaugh. 212. (*b*) They cannot hold plea of a legal perjury, or perjury in contracts, but for perjury in their courts they may puniſh. —So, where one forged letters of ordination, it was held, that the ſpiritual court may proceed to deprive him. Sid. 217. Lev. 138. Keb. 721. Keilw. 39.——So, where a pariſh clerk was guilty of ſcandalous crimes, and being proceeded againſt in the ſpiritual court, it was held on a motion for a prohibition, that they may proceed to deprive him for theſe crimes, though they were in their nature only puniſhable in the temporal courts. 2 Ld. Raym, 1507. & *vide* Dyer, 293. Comp. Incumb. 53. Hob. Searle's caſe L. P.——Cannot puniſh for writing a libel, being an offence indictable at law. Comb. 71.——For ſacrilege the party may be proceeded againſt in the ſpiritual court,

The matters of eccleſiaſtical conuſance are of two kinds, criminal and civil: their criminal proceedings extend to ſuch crimes as by the laws of the land are of eccleſiaſtical conuſance (*a*), as hereſy, fornication, adultery, and ſome others, wherein their proceedings are *pro reformatione morum*, and *pro ſalute animæ*; and the reaſon why they have the conuſance of theſe and the like offences, and not of others, as murder, theft, &c. is not from the nature of the offence, for the one is as much a ſin as the other; and therefore if the conuſance were of offences *quatenus peccata contra Deum*, it ſhould extend to all ſins againſt God's law; but the true reaſon is, becauſe the law of the land hath indulged them with the conuſance of ſome crimes, and not of others.

court, although the robbery is likewiſe puniſhable in the temporal courts. 37 H. 6. 39. Bro. Appeal 31. 45. 2 Inſt. 492. 2 Keb. 23. Sid. 281.——So, an action at law lies for an aſſault and battery on a ſpiritual perſon, as alſo a ſuit in the ſpiritual court for irreverence to his perſon. 6 Mod. 156. Cro. Eliz. 655.——But for calling a woman whore and thief, the party cannot be proceeded againſt in the ſpiritual court and by action at law, being one continued act. 2 Roll. Abr. 259. So, for ſolicitation of chaſtity which is attended with force and violence. *Vide* 4 Co. 20. 2 Salk. 552. pl. 15. 7 Mod. 78. 2 Ld. Raym. 809, 1101.

The civil cauſes committed to their conuſance, wherein the proceedings are *ad inſtantiam partis*, ordinarily are the buſineſs of tithes, rights of inſtitution and induction to eccleſiaſtical benefices, matters of matrimony and divorce, and teſtamentary cauſes, and the incidents thereunto, as the inſinuation of teſtaments, legacies of goods and money, *&c.* wherein they proceed according to the canon law, and the civil law, which is taken as a director in points of expoſition and determination. *Vide* title Eccleſiaſtical Courts, let. (D).

[The king is patron paramount of all the benefices in *England*. In virtue of which, the right and care of filling all ſuch churches as are not regularly filled by other patrons belongs to the crown; whether it happen through the neglect of others, (as, in the caſe of lapſe,) or through incapacity to preſent, as, if the patron be attainted, or outlawed, or an alien, or have been guilty of ſimony, or the like. Gibſ. Cod. 763.

Upon which ground, the king hath right to preſent to all dignities and benefices of the advowſon of biſhopricks and archbiſhopricks during the vacation of the reſpective ſees. Not only to ſuch as ſhall become void after the ſeizure of the temporalties, but to all ſuch as ſhall become void after the death of the biſhop, though before actual ſeizure. And becauſe it is a maxim in law, that the church is not full againſt the king, till induction; therefore, though the biſhop hath collated, or hath preſented, and the clerk is inſtituted upon that preſentation, yet will not ſuch collation or inſtitution avail the clerk, but the right of preſenting devolves to the king. *Ibid.* Watſ. c. 9.

And it is ſaid, that this privilege which the king hath of preſenting by reaſon of temporalties of a biſhoprick being in his hands, ſhall be extended unto ſuch preferments, to which the biſhop of common right might preſent, though by his compoſition he hath transferred his power to others And therefore when the temporalties of the archbiſhoprick of *York* are in the king's hands, the king ſhall preſent to the deanery of *York*, although by compoſition between the archbiſhop and the chapter there, the chapter are to elect him: and this, becauſe the patronage thereof *de jure* doth belong to the archbiſhop, and his compoſition cannot bind the king, who comes in paramount, as ſupreme patron: for of the whole biſhoprick the king is ſupreme patron, although it be diſmembered into divers branches, as deans, and other dignities; and of ancient time all the biſhopricks were of the king's gift, but afterwards the king gave leave to the chapter to elect; yet the patronage notwithſtanding remains in the king. Watſ. c. 9. 2 R. Ab. 343.

Upon promotion of any perſon to a biſhoprick, the king hath a right to preſent to ſuch benefices or dignities as the perſon was poſſeſſed of before ſuch promotion; though the advowſon belongeth to a common perſon (*a*). This right of preſenting upon pro- Gibſ. Cod. 763. (*a*) Lord Chief Juſtice De Grey, ſpeak-

ing of this right, ſaith, It appears in Bro. Preſentment, 61. to be as old as Edw. the 3d's time. It was exerciſed under H. 8., and *Qu.* Eliz. The law concerning it was doubted in Car. 2d's time, and ſince, but finally determined in favour of the crown

motion by the king, as making the avoidance which would not otherwiſe happen, did ſpring from the practice of the popes, and is now an unconteſted right of the crown; and hath been eſtabliſhed not only by long practice, but by many judgments upon full and ſolemn hearings; and that, whether the churches are new or old, and how often ſoever this happens ſucceſſively by promotions to biſhopricks from the ſame benefice or dignity: as was adjudged in the caſe of *St. Martin's* and *St. James's* (a). Of late, the great queſtion hath been, on ſuppoſition of the right, how far it is anſwered, and the term of the crown ſatisfied, by the grant of a *commendam* to retain ſuch promotions, or any part of them, together with the biſhoprick. Of which queſtion the ſolution hath been, that by a *commendam* for life, and for the time of continuing in ſuch a biſhoprick, the turn of the crown is anſwered, and in ſuch caſe the proper patron ſhall preſent, upon death or tranſlation; but that the right of the crown ſhall not be defeated by a *commendam* granted for a term of months or years, certain and limited.

in King William's time, K. v. Bp. of London, 4 Mod. 202. This is not a right of patronage in the king; nor is it a right of eviction, for it ejects nobody: nor an uſurpation; for it is a rightful act. But it is a contingent, caſual right, ariſing upon a particular event, the incumbent's becoming a biſhop. 2 Bl. Rep. 773.—— (a) 4 Mod. 200. 3 Lev. 377. S. C. Lev. Intr. 344. S. C. 1 Show. 413. 443. 493. S. C. 1 Ld. Raym. 23. S. C. Show. P. C. 164. S. C. Carth. 313. S. C.

Burn's E. L. title Benefice, 128. title Biſhops, 192. But in Woodley,

But in *Ireland*, the law is, that a man ſhall not be promoted to a biſhoprick there, until he hath reſigned all the preferments which he hath in *England*: which preferments being void before the acceptance of the biſhoprick, it ſeemeth, that in ſuch caſe the king ſhall loſe the preſentation.

v. Bp. of Exeter, Cro. Jac. 691. it is holden, that this prerogative right of preſenting accrues as well where the incumbent is promoted to an Iriſh, as an Engliſh biſhoprick. But, as the report of this caſe hath been lately conſidered in other reſpects as rather apochryphal, it may not be ſafe to rely upon its authority in this particular.

Grocers' Company v. Archbiſhop of Canterbury, 2 Bl. Rep. 770. 3 Wilſ. 214. S. C.

It hath been determined, that where the advowſon is in common, ſo that the patrons are to preſent by turns, the prerogative preſentation doth not paſs for the turn of the otherwiſe rightful patron; for the prerogative right doth not ſupply, but only ſuſpends or poſtpones the turn of the patron, and of all the patrons, if more than one, and doth not take away the right of the one, and leave the reſt entire; for that would be rank injuſtice, and this, being the act of law, *nemini facit injuriam.*

Cailland v. Troward, 2 H. Bl. 324. Judgment affirmed in B. R.

And as the intervention of the prerogative preſentation doth not ſatisfy or diſappoint the turn of the otherwiſe rightful patron, neither doth it deſtroy the effect of a prior grant of the next preſentation by the owner of the advowſon.

6 Term Rep. 439. and afterwards in the Houſe of Lords, May 16, 1796. According to the report of the caſe of Woodley v. Biſhop of Exeter, Cro. Ja. 691. and Winch. Rep. 94. it was holden, that the right of the crown in this caſe defeats the right of a grantee who hath the next avoidance, for his right is only to the next, and the next he cannot have, and therefore ſhall have none. But this report we have already obſerved is of very doubtful authority. Lord Hobart, though at that time one of the judges by whom it was determined, takes no notice of it in his Reports. Lord Chief Juſtice De Grey ſaith, (2 Bl. Rep. 774.) That caſe is not clearly ſettled to be law. And in an anonymous note in the margin of Dyer, 228. b. (which is apparently the ſame caſe) it is ſtated, that the court reſolved, "that the grantee "ſhould have the next avoidance after the prerogative preſentation, becauſe that was the act of law, and "the prerogative of the king, which excluded him from the firſt preſentation, injures no one."

admitting such a determination to have been made, the court may have gone upon the peculiar terms of the deviſe, which in Winch's Entries, p. 877. are, "*Dedit et legavit cuidam Johanni Baſſett, filio ſuo primam et proximam advocationem prædictæ eccleſiæ de L. quæ primo et proximè contingeret poſt mortem ipſius Arburi*;" and which ſeem expreſsly to confine the power of preſenting to the firſt turn.

But, if the incumbent of a *donative* is made a biſhop, the king ſhall not preſent to the donative, becauſe ſuch a promotion doth not make an avoidance by *ceſſion*, for the incumbent is the creature of the founder, and is not ſubject to ordinary and epiſcopal viſitation.] Agreed *per cur.* 4 Mod. 213.

### 3. Of his Prerogative in creating Officers.

The king as the fountain of juſtice hath an undoubted prerogative in creating officers, and all officers are ſaid to derive their authority mediately or immediately from him: thoſe who derive their authority from him are called the officers of the crown, and are created by letters patent; ſuch as the great officers of ſtate, judges, *&c.*, and there needs no greater or ſtronger evidence of a right in the crown herein, than that the king hath created all ſuch officers time immemorial. Dyer, 176. 2 Rol. Abr. 152. 4 Co. 32. 2 Inſt. 425. 540. 12 Co. 116. Roll. Rep. 206. Show. Par. Ca. 111.

But, though all ſuch officers derive their authority from the crown, from whence the king is termed the univerſal officer and diſpoſer of juſtice, yet it hath been held, that he hath not the office in him to execute it himſelf, but is only to grant or nominate; nor can the king grant any new powers or privileges to any ſuch officers, but they muſt execute their offices according to the rules eſtabliſhed and preſcribed them by the law. Lev. 219. Co. Lit. 3. 114. 2 Vent 270. 4 Inſt. 125. 6 Co. 11, 12.

Neither can the king create any new office inconſiſtent with our conſtitution, or prejudicial to the ſubject. Moor, 808. 2 Inſt. 540. 2 Sid. 131. 4 Inſt. 200.

And on this foundation it was held, that an office created by letters patent for the ſole making of all bills, informations, and letters miſſive in the council of *York*, was unreaſonable and void. Jon. 231. Mounſon v. Leiſter.

So it hath been held, that the king could not grant to any perſon to hold a court of equity, it being a ſpecial truſt committed to the king, and not by him to be intruſted to any other except his Chancellour. Hob. 63.

So, a commiſſion to ſeize the goods and impriſon the bodies of all perſons who ſhould be notoriouſly ſuſpected of felonies or treſpaſſes, without any indictment or legal proceſs againſt them, was held illegal and void. 4 Aſſ. 5. Br. Commiſſion 3. 15. 16. 2 Inſt. 54.

So, commiſſions to aſſay weights and meaſures, being of new invention, were condemned by (*a*) parliament. 4 Inſt. 163. (*a*) 18 E. 3. c. 1. 4.

So, when one *Chute* petitioned the king to erect a new office for regiſtering all ſtrangers except merchant ſtrangers, and to grant the ſaid office to the petitioner with or without fees, it was reſolved by all the judges, that the erection of ſuch office for the benefit of a private perſon was againſt law. Co. 116.

So, it is held by Lord *Coke*, that the king could not authoriſe perſons to take care of rivers and the fiſhery therein, according to the method preſcribed by the ſtatute of *Weſtm.* 2. (13 *E.* 1. *ſt.* 1.) *c.* 47. before the making of that ſtatute. 2 Inſt 478.

[By ſtat. 22 *G.* 3. *c.* 82. if any office of the name, nature, deſcription, or purpoſe of the offices thereby aboliſhed, ſhall be eſtabliſhed hereafter, the ſame ſhall be deemed and taken as a new office.]

*Vide* Head of *Office and Officers.*

## 4. Of his Prerogative in making War and Peace.

Hal. Hiſt. P. C. 159. 7 Co. 25.

The power of making war or peace is *inter jura ſummi imperii*, and in (*a*) *England* is lodged (*b*) ſingly in the king; though, as my Lord *Hale* ſays, it ever ſucceeds beſt when done by parliamentary advice.

(*a*) The *jus gladii*, both military and civil, is one of the *jura majeſtatis*; and therefore no man can levy war in this kingdom without the king's commiſſion. 3 Inſt. 9.——(*b*) The diſputes touching the diſpoſition of the *militia* are now ſettled, and declared to be the right of the crown, by the ſtatutes of 13 Car. 2. c. 6. and 13 & 14 Car. 2. c. 3. Hal. Hiſt. P. C. 130.

Hal. Hiſt. P. C. 163.

A general war, according to my Lord *Hale*, is of two kinds:

1. *Bellum ſolemniter denunciatum.* 2. *Bellum non ſolemniter denunciatum.* The firſt is, when war is ſolemnly declared or proclaimed by our king againſt another prince or ſtate, which is the moſt formal ſolemnity of a war now in uſe. 2*dly*, When a nation ſlips ſuddenly into a war without any ſolemnity, which happens by granting the letters of *marque*, by a foreign prince invading our coaſts, or ſetting upon the king's navy at ſea: and hereupon a real, though not a ſolemn war, may and hath formerly ariſen; and therefore to (*c*) prove a nation to be at enmity with *England*, or to prove a perſon to be an *alien enemy*, there is no neceſſity of ſhewing any war proclaimed; but it may be averred, and ſo put upon the trial of the (*d*) country, whether there was a war or not.

(*c*) When the courts of juſtice are open, and the judges and miniſters of the ſame may by law protect men from oppreſſion and violence, and diſtribute juſtice to all, it is ſaid to be time of peace; ſo, when by invaſion, inſurrection, and rebellions, &c. the peaceable courſe of juſtice is diſturbed, then it is ſaid to be time of war; and the trial hereof is by the records and judges of the courts of juſtice. Co. Lit. 249. (*d*) Owen, 45. [Cro. Eliz. 142. Freem. 41.]

Hal. Hiſt. P. C. 159.

Peace is of two kinds: 1*ſt*, Poſitive or contracted. 2*dly*, Such a peace as is only a negation or abſence of war. A poſitive peace is ſuch as ariſeth by contracts, capitulations, leagues, or truces between princes or ſtates that have *jura ſummi imperii*, and is of two kinds. 1. Temporary, which is properly (*e*) a truce, which is a ceſſation from war already begun; and then, the term being elapſed, the princes or ſtates are *ipſo facto* in the former ſtate of war, unleſs it be protracted by new capitulations, or be otherwiſe provided in the inſtrument or contract of the truce. 2. Perpetual *ſine termino* or indefinite, which regularly continues according to the tenor or conditions of the agreement, until ſome new war be raiſed between the princes or ſtates upon ſome emergent injury ſuppoſed to be done by the one party or the other; and this is properly called a (*f*) league *fœdus*, and makes the princes and ſtates *confœderati*; and though this may be variouſly diverſified, according to the capitulations, conditions, and qualifications of ſuch leagues, yet they are ordinarily of theſe kinds. 1*ſt*,

(*e*) The difference between a league and truce is, that a truce is a ceſſation from war for a certain time, but a league is an abſolute ſtriking of peace. 4 Inſt. 156. *vide* Molloy, c. 7, 8.

(*f*) In all leagues the

1*st*, Leagues offenſive and defenſive, which oblige the princes not only to a mutual defence, but alſo to be aſſiſting to each other in their military aggreſſes upon others, and makes the enemies of one in effect the common enemies of both. 2*dly*, Defenſive but not offenſive, obliging each to ſuccour and defend the other in caſes of invaſion or war by other princes. 3*dly*, Leagues of ſimple amity, whereby the one contracts not to invade, injure, or offend the other, which regularly includes alſo liberty of mutual commerce and trade, and ſafeguard of merchants and traders in either's dominions.

municipal laws of each country are excepted. 2 Show. 369.

2. A peace, which is only a negation or abſence of war, is where no league or articles of peace intervene, nor yet any denunciation of war; as among divers princes in the world who never capitulated one with another, and yet there is no ſtate of war between them; and the general rule is, *ubi bellum non eſt pax eſt.*

Hal. Hiſt. P. C. 160.

The king, in conſequence of his power in making war and peace, hath a prerogative in the coin and royal mines, in ſaltpetre and gunpowder; may (*a*) enter into a man's lands to make fortifications; may lay on embargoes, grant (*b*) letters of *marque* and repriſal, preſs (*c*) ſoldiers, ſailors, *&c.*; and though in many inſtances relating to theſe matters, the ſtrict letter of the law may be exceeded, yet from the neceſſity of order, government, and diſcipline, are they countenanced and allowed; *quod neceſſitas cogit defendit.*

(*a*) 1 Roll. Rep. 152. (*b*) Molloy, 30. 2 Roll. Abr. 175. —No perſon can take the ſhip or goods of the adverſe party unleſs he hath a commiſſion from the king, the admiral, or thoſe that are ſpecially appointed thereunto. Hal. Hiſt. P. C. 162. Vern. 54. ——By the law of the Admiralty, the property of a ſhip taken upon the high ſea without letters of *marque*, veſts in the king upon the taking. Carth. 399. ——Clauſe in a charter which empowers the ſeizing the goods of every perſon is illegal and void. Show. 137. (*c*) 6 Co. 27. Hutt. 134*. ——* As to the preſſing of ſailors, ſee Foſter Rep. The caſe of Alexander Broadfoot, fo. 154. and 1 Black. Com. 418. and ſee alſo Comb. 245.

The king may declare war againſt one part of the ſubjects of a prince, and may except the latter part; as was done by King *William* in his declaration of war with *France*, where he excepted the *French* proteſtants; and of ſuch proclamations all ought to take notice, becauſe the war begins only by the king's proclamation.

Ld. Raym. 283. *per* Treby, C. J.

## 5. Of his Prerogative as *Parens Patriæ* in taking Care of Infants, Idiots, Lunaticks, and Charitable Uſes.

The king, as *parens patriæ*, hath the protection of all his ſubjects; and in a particular manner is to take care of all thoſe who by reaſon of their want of underſtanding are incapable of taking care of themſelves and their affairs. By virtue of this high truſt, infants, who by reaſon of their nonage are under incapacities, are under the protection of the crown; and hence ariſes allegiance, as a debt of gratitude, which can never be cancelled, though the ſubject owing it goes out of the kingdom, or ſwears allegiance to another prince.

*Vide* Head of Infants.

This truſt lodged in the king, and the juriſdiction exerciſed herein, originally belonged to the court of Chancery, and now,

1 P. Wms. 103.

upon the diſſolution of the court of wards, is again devolved on that court. Hence it is every day's practice in that court to determine as to the right of guardianſhip, to puniſh abuſes in relation to their perſons, &c.

2 P. Wms. 706. in the caſe of the Duke of Ormond, who was appointed guardian to the Duke of Beaufort.

If a perſon appointed guardian is attainted, or otherwiſe becomes incapable, the truſt devolves on the great ſeal as the general guardian of all infants.

*Vide* Head of Idiots and Lunaticks.

In the like manner and for the ſame reaſon it is, that idiots and lunaticks, who are incapable of taking care of themſelves, are provided for by the king as *pater patræ*.

*Vide* Head of Charitable Uſes and Mortmain. 2 P. Wms. 319.

In like manner in the caſe of charities, the king *pro bono publico* has an original right to ſuperintend the care thereof; ſo that abſtracted from the ſtatute 43 *Eliz. c.* 4. relating to charitable uſes, and antecedent to it as well as ſince, it has been every day's practice to file informations in Chancery in the Attorney-General's name, for the eſtabliſhment of charities, &c.

## 6. Of his Prerogative in Pardoning.

Co. Lit. 114. b. H.P.C. 104. 3 Inſt. 233. Show. 284.

This high prerogative is (*a*) inſeparably incident to the crown, and the king is intruſted herewith upon a ſpecial confidence, that he will ſpare thoſe only whoſe caſe, could it have been foreſeen, the law itſelf may be preſumed willing to have excepted out of its general rules, which the wiſdom of man cannot poſſibly make ſo perfect as to ſuit every particular caſe.

(*a*) It is a perſonal truſt and prerogative in him for a fountain of bounty and grace to his ſubjects, as he obſerves them deſerving or uſeful to the publick, which he can neither grant or otherwiſe extinguiſh; *per* Holt, Ch. J. Ld. Raym. 214. & *per* Rokeby, J. As he cannot but have the adminiſtration of publick revenge, ſo he cannot but have a power to remit it by his pardons when he judges it proper. *Idem.*

*Vide* Title *Pardon.*

## 7. Of Diſpenſations and *Non Obſtantes.*

2 Roll. Abr. 179. Dav. 69. 2 Mod. 261.

The power and prerogative of diſpenſing with laws and granting *non obſtantes*, hath always been looked upon with a jealous eye, and are ſaid to have been firſt invented in *Rome* and brought into this kingdom by the pope and clergy.

11 Co. 88. Finch, 234. Dyer, 54. pl. 17.

But, though they have not been favoured in the courts of juſtice, yet it hath been always held, that the king had a prerogative in certain caſes to grant diſpenſations and *non obſtantes*, which is founded *in plenitudine poteſtatis*: and upon this reaſon, that it is impoſſible for law-makers by human prudence to foreſee ſeveral particular caſes that may happen, wherein a law that is good in general might be miſchievous in ſome particular caſes; and therefore and for the publick good the law intruſts the king (who is intruſted with the execution of the law) to judge of ſuch circumſtances; and when ſuch particular caſe happens, to exempt it out of the penalty of the general law.

12 Co. 29. Dav. 75. 5 Co. 35.

The prevailing diſtinction herein hath been, that the king cannot by any previous licence or diſpenſation make an offence diſ-

puniſhable

puniſhable which is *malum in ſe*; but that in certain matters, which are only *mala prohibita*, he may to certain perſons and on ſome ſpecial occaſions; and this diſtinction the Ch. J. (*a*) *Vaughan* admits, being well underſtood and rightly applied, is the beſt guide in theſe matters.

(*a*) In the caſe of Thomas and Sorrel, Vaugh. 330. to 359.

where this learning is fully diſcuſſed; and in Lev. 217. Sid. 6, 7. S. C.

On this diſtinction it was always held, that the king could not diſpenſe with the laws againſt murder, adultery, ſtealing, inceſt, ſacrilege, extortion, perjury, treſpaſs, and others of the (*b*) like kind; and that a pardon for any ſuch like offence that was *malum in ſe* before it happened was void.

Vaugh. 334.

(*b*) Hence the reſolution in the Year-Book 11 H. 7. pl. 35.

that the king's grant to the Biſhop of Saliſbury and his ſucceſſors having the cuſtody of a priſon, that they ſhall be quit of all eſcapes, &c. having been allowed in *eyre*, ſhould be a good diſcharge from any fine for a negligent eſcape out of ſuch priſon, is doubted of in 2 Hawk. P. C. c. 37. § 28.

But, where a thing lawful in its own nature is made unlawful by act of parliament only, as the carrying bell-metal or beer, *&c.* out of the realm, importing certain merchandizes in foreign ſhips, *&c.*, ſelling wines beyond a certain price, exporting wool to any other place than *Calais*, coining money of a baſe alloy, and other matters of the like nature; it ſeems formerly to have been taken for granted, that generally the king might diſpenſe with it as to a particular time or place, or perſon, or even corporation aggregate, ſo far as the publick was concerned in it.

2 Hawk. P. C. *ubi ſupra*, and ſeveral authorities there cited.

Yet, where ſuch diſpenſation could not but be attended with great inconvenience, as the introducing a monopoly, or fruſtrating the end for which the law was made, as, the licenſing of a particular perſon to import foreign cards or wines prohibited by parliament, and *à fortiori*, if it tended to ſuſpend the whole ſtature in general, it was commonly agreed to be void.

2 Hawk. P. C. *ubi ſupra*.

Alſo, wherever an act of parliament gives a particular intereſt or right of action to the party grieved by the breach of it, as the ſtatutes of mortmain, which give an entry to the next immediate lord for an alienation to a corporation, the ſtatutes againſt maintenance, forcible entries, carrying diſtreſſes out of the hundred, ſuffering one in execution to eſcape, *&c.* which give an action to the party grieved by the offence prohibited; it ſeems to have been always agreed, that no charter by the king can be of any force to bar the right of the party grounded upon ſuch ſtatute; becauſe it is a ſettled rule, that the king cannot prejudice the intereſt of the party.

Hawk. P. C. *ubi ſupra*. Hob. 214. Hard. 110.

Alſo, where a ſtatute is expreſs, that the king's charter againſt the purport of it, whether with or without a clauſe of *non obſtante*, ſhall be void; it is ſaid by (*c*) Sir *Ed. Coke*, that no clauſe of *non obſtante* can diſpenſe with it, unleſs it tend to reſtrain ſome prerogative ſolely and inſeparably incident to the perſon of the king; as the right of pardoning, or of commanding the ſervice of the ſubject for the publick weal; which being, as he ſeems to argue, founded on the law of nature, are ſo far inſeparable from the king, that by a clauſe of *non obſtante* he may diſpenſe with any ſtatute whatſoever which tends to deprive him of them.

2 Hawk. P. C. *ibid.*

(*c*) 12 Co. 18.

2 H. 7. 6. b. *vide* 2 Hawk. P. C. *ibid.*

On this foundation the reſolution of the Judges in the *Year-Book H.* 7. is ſaid to be maintainable; in which it is adjudged, that where the ſtatute of 23 *H.* 6. *c.* 8. expreſsly enacts, that patents to ſheriffs to continue longer than a year ſhall be void, and the party diſabled to bear the office of ſheriff notwithſtanding any clauſe of *non obſtante*; yet the king by the clauſe of *non obſtante* might make a good patent of ſuch office for life.

In the reign of King *James* II. when the king's diſpenſing power was endeavoured to be extended, a difference was taken and attempted to be eſtabliſhed in thoſe caſes, which was, that as to a general law made for publick government, and in which all the king's ſubjects were equally intereſted, the king might diſpenſe with it, but not where any right or intereſt veſted in a particular perſon; and it was ſaid to be no objection to ſuch diſpenſing power, that the law was made *pro bono publico*; for that though it was *pro bono ſubditorum*, yet not being *ſingulorum*, but *populi complicati*, the king might diſpenſe with it.

Comb. 21. 2 Show. 475. pl. 440. Clift. 133.

Alſo the following points were determined in Sir *Ed. Hale's* caſe in the ſame reign. 1. That the king is ſovereign or abſolute prince. 2. That the laws of the land are the king's laws. 3. That to diſpenſe with penal laws, where the ſubject hath no particular damage, for neceſſary and urgent occaſions, is an inſeparable prerogative of the king. 4. That the king is ſole judge of ſuch neceſſity. 5. That this truſt reſiding in him came not from the people, but was a ſovereign right of the king *ab antiquo*. 6. That the diſpenſation in this caſe, becauſe it came within three months before any diſability incurred, was a good bar to the plaintiff's action.

Theſe reſolutions being thought of dangerous conſequence, as tending in effect to make the execution of the moſt neceſſary laws precarious, and merely dependent on the pleaſure of the king,

By the 1 *W. & M. ſeſſ.* 2. *c.* 2. it is declared and enacted, "That (*a*) *from and after this preſent parliament*, no diſpenſation "by *non obſtante* of or to any ſtatute or any part thereof be allowed, "but that the ſame ſhall be held void and of none effect, except "a diſpenſation be allowed in ſuch a ſtatute."

[(*a*) It is remarkable, that the convention ummoned by the Prince of Orange, did not even when they had the making of their own terms *in the Declaration of Rights*, venture to condemn the diſpenſing power in general, which had been uniformly exerciſed by the former kings of England. They only condemned it ſo far, *as it had been aſſumed and exerciſed of late*. But in *the Bill of Rights*, which paſſed about a twelvemonth after, the parliament took care to ſecure themſelves more effectually againſt a branch of prerogative, incompatible with all legal liberty and limitations; and they excluded, in poſitive terms, all diſpenſing power in the crown; yet, even then, the Houſe of Lords rejected that clauſe of the bill, which condemned the exerciſe of this power in former kings, and obliged the Commons to reſt contented with aboliſhing it for the future. There needs no other proof of the irregular nature of the old Engliſh government, than the ſubſiſtence of ſuch a prerogative, always exerciſed and never queſtioned, till the acquiſition of real liberty diſcovered, at laſt, the danger of it. Hume's Hiſt. vol. 8. p. 241, 2. See alſo the Journals.]

As the above-mentioned caſe of Sir *Ed. Hale* is the moſt remarkable caſe on this ſubject, it may not be improper to inſert it at large as taken from a MS. report, together with the argument of Sir *Ed. Northey*.

This

Anthony Goden v. Sir Ed. Hale, Trin. 2 Jac. 2. in B. R.

This is an action of debt for 500 *l.* founded on a conviction of the defendant for exercising the office of a colonel of a foot regiment, after neglect to take the oath of allegiance and supremacy injoined to be taken by the statute 25 *Car.* 2. *c.* 2. by which statute the defendant hath forfeited the sum of 500 *l.* to him that sues for the same.

The declaration sets forth, that the defendant Sir *Ed. Hale*, the 20th of *Nov. ann.* 1 *regni* of this king, at *Hackington* in the county of *Kent*, was advanced to be a colonel of a foot regiment in the said county (which the plaintiff avers to be a military office and place of trust under his said Majesty, and by authority from him derived); and that the defendant held and exercised the said office for three months then next following, and to the time of exhibiting the bill of the plaintiff, and did and doth inhabit in the said parish and county, and did not either in the court of Chancery or in this court, in the next term or in the next quarter-sessions of the peace holden for the said county of *Kent* or place where he did reside, or within three months after his admission to the same, take the several oaths of supremacy and allegiance; but did wholly neglect to do the same, and did continue after his neglect to execute the said office, and yet doth execute the same, contrary to the form of the statute in that case made and provided.

The declaration further sets forth, that the said Sir *Ed. Hale* the defendant 29th *March* last, at the assizes held at *Rochester* in the county of *Kent* before the Ld. Ch. J. *Jones* and Mr. *J. Withens*, Justices of *oyer* and *terminer* for the said county, was indicted for the said neglect, and for executing the said office after the said neglect contrary to the form of the said statute; and thereon was in due form of law convicted, as by the record thereof may appear; and the plaintiff entitles himself to the said 500 *l.* forfeited by the defendant by the said act on his said conviction, and saith the defendant hath not paid him the same.

To this declaration the defendant pleads in bar, that the king's Majesty that now is, after the defendant's admission to the said office, and within the three months next ensuing, and before the next term or quarter sessions of the peace after the same, and before the exhibiting the bill of the plaintiff in this court, *viz.* the 9th Day of *January* in the first year of the reign of his present Majesty, his said Majesty by his letters patent under the great seal of *England*, did dispense, pardon, remise, and discharge, to and with the said defendant, of and from taking the said oaths of allegiance and supremacy, and from receiving the sacrament according to the use of the church of *England*, and from subscribing the test mentioned in the act of 25 *Car.* 2. (*c.* 2.) or mentioned and contained in any other acts of parliament, and of and from all crimes, convictions, penalties, forfeitures, damages, and disabilities incurred or to incur at any time then after for executing the said office, after he should omit, neglect, or refuse to do and perform any of the said matters injoined to be done by the said act; and further, that his said Majesty by his said letters patent did grant unto the defendant, that he should be enabled to hold the

said

ſaid office without taking the ſaid oaths or ſubſcribing the ſaid teſt, as if the ſaid act had never been made.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

Mr. Northey. I am counſel with the plaintiff in this caſe, and am humbly to ſhew your Lordſhip and the court the cauſes of this demurrer.

This action is grounded on the ſtatute made 25 *Car.* 2. *c.* 2. which requires, that all and every perſon or perſons, that ſhould be admitted, entered, placed, or taken into any office or offices civil or military, or ſhould receive any pay, ſalary, fee, or wages by reaſon of any patent or grant of his then Majeſty, or ſhould have command or place of truſt from or under his ſaid late Majeſty, his heirs or ſucceſſors, or by his or their authority, or by authority derived from him or them within this realm of *England*, &c., after the firſt day of *Eaſter term* 1673, and ſhall inhabit, be, or reſide, when he or they is or are ſo admitted or placed, within the cities of *London* or *Weſtminſter*, or within thirty miles of the ſame, ſhall take the ſeveral oaths of ſupremacy and allegiance in his Majeſty's high court of Chancery or in the court of King's Bench in the next term after ſuch his or their admittance or admittances into the office or offices, employment or employments aforeſaid; and that all and every ſuch perſon or perſons to be admitted as aforeſaid, not having taken the ſaid oaths, ſhall, at the quarter-ſeſſions of that county or place where he or they ſhall reſide, next after ſuch his admittance or admittances into any of the ſaid reſpective offices or employments aforeſaid, take the ſaid ſeveral reſpective oaths as aforeſaid, and ſhall receive the ſacrament of the Lord's Supper, according to the uſage of the church of *England*, within three months after his or their admittance into or receiving the ſaid authority and employment, in ſome publick church on ſome *Sunday* immediately after divine ſervice or ſervice and ſermon, and ſhall ſubſcribe the teſt in the ſaid act mentioned at the time when he ſhall take the ſaid oaths.

And by the ſaid act it is further enacted, that all and every the perſon and perſons aforeſaid, that do or ſhall neglect or refuſe to take the ſaid oaths and ſacrament in the ſaid courts and places, and at the reſpective times as aforeſaid, ſhall be *ipſo facto* adjudged incapable and diſabled in and to all intents and purpoſes whatſoever to have, occupy, and enjoy the ſaid office or offices, employment or employments, &c., and every ſuch office and place, employment and employments ſhall be void, and is by the ſaid act adjudged void.

Then comes the clauſe of forfeiture, by which the plaintiff is entitled to this action, which is, that all and every ſuch perſon or perſons that ſhall neglect or refuſe to take the ſaid oaths, or the ſacrament as aforeſaid, within the times and in the places aforeſaid, and yet after ſuch neglect and refuſal ſhall exerciſe any of the ſaid offices or employments after the ſaid terms expired wherein he or they ought to have done the ſame, being thereupon lawfully convicted in or upon any information, preſentment, or indictment in any of the king's courts at *Weſtminſter*, or at the aſſiſes

every ſuch perſon and perſons ſhall be diſabled from thenceforth to ſue or uſe any action, bill, plaint, or information in courſe of law, or to proſecute any ſuit in any court of equity, or to be guardian of any child, or executor or adminiſtrator of any perſon, or capable of any legacy or deed of gift, or to bear any office within the realm of *England*, &c., and ſhall forfeit the ſum of 500*l.* to be recovered by him or them that ſhall ſue for the ſame, to be proſecuted by an action of debt, ſuit, bill, plaint, or information in any of his Majeſty's courts at *Weſtminſter*, wherein no eſſoin, protection, or wager of law ſhall lie.

In this caſe, my Lord, I ſhall lay down and endeavour to maintain theſe two things:

Firſt, That the plaintiff hath well entitled himſelf by his declaration to recover the 500*l.* demanded by him againſt the defendant, according to the ſaid act 25 *Car.* 2. *c.* of the late king.

Secondly, That the defendant hath not by his plea alleged any matter that can bar the plaintiff from the recovery of the ſame.

As to the firſt, I conceive, that by the ſaid act four things are neceſſarily required before the informer can be entitled to bring an action for the 500*l.*

Firſt, That ſuch perſon hath been admitted into ſome office, place, or employment within the deſcription and intention of the ſaid act.

Secondly, That ſuch perſon after his admiſſion into ſuch office hath neglected or refuſed to take the ſaid oaths at the times and places by the ſaid act directed.

Thirdly, That ſuch perſon after ſuch neglect or refuſal hath continued to execute ſaid office.

Fourthly, That ſuch perſon be convicted thereupon in one of his Majeſty's courts at *Weſtminſter*, or at the aſſiſes, at the ſuit of the king, by information, preſentment, or indictment.

The plaintiff hath ſhewn all theſe things in his declaration.

1. It is ſet forth, that the defendant was admitted to be colonel of a foot regiment, which is expreſsly averred to be a military office and a place of truſt under his preſent Majeſty, and by authority from him derived, according to the words of the ſaid act of parliament.

2. It is expreſsly ſhewn, that the defendant did neglect to take the oaths of allegiance and ſupremacy in the next term in the court of Chancery or this court, or in the next quarter-ſeſſions for the county or place where he did then inhabit, or within three months next after his admiſſion to the ſame, which are times and places limited and appointed by the ſaid act for the taking of the ſaid oaths.

3. It is expreſsly averred, that the defendant did execute the ſaid office after the times expired, and his neglect to take the ſaid oaths.

4. Laſtly, it is ſet forth in the declaration, that the defendant was by indictment at the aſſiſes in *Kent* before Sir *Tho. Jones* and Mr. Juſtice *Withens*, Juſtices of *oyer* and *terminer* for the ſaid county of *Kent*, lawfully convicted for executing the ſaid office after

after his neglect to take the ſaid oaths, contrary to the form of the ſaid ſtatute; which is a conviction by one of the means, *viz.* by indictment, and in one of the courts, *viz.* at the aſſiſes, in the ſaid ſtatute mentioned.

Theſe, my Lord, I conceive are made neceſſary by the ſtatute, but it is not incumbent on the informer to make them all appear to be ſo; for as to the three firſt, they muſt be proved on the information, preſentment, or indictment at the king's ſuit, before ſuch officer can be convicted; but when there is a conviction, the informer need only ſhew the record thereof.

If then the plaintiff hath entitled himſelf to his action, the next thing to be conſidered is, the matter alleged by the defendant in bar thereof.

In ſpeaking to this I ſhall conſider two things.

Firſt, Whether the defendant ſhall be now admitted to plead this diſpenſation in bar of this action, and whether he hath not loſt the benefit of it, by not pleading of it in bar to the indictment whereon he hath been convicted.

Secondly, Admitting he may plead the ſame now, whether the ſame be good in law to enable the defendant to execute the ſaid office without taking the ſaid oaths, ſo that he ſhall be exempted from the penalty inflicted by the ſaid act of parliament for executing the ſaid office after his neglecting to take the oaths.

As to the firſt point, I ſhall obſerve to your Lordſhip the times mentioned in the record now before you: the defendant was admitted to the office of colonel the 20th *Nov.* *anno* 1. of this king; the offence in executing the ſaid office after his neglect to take the oaths of allegiance and ſupremacy, is alleged to be the 10th of *March*, *anno* 2. of this king; and the conviction for the ſame appears to have been the 29th of *March*, *anno* 2.; and the diſpenſation pleaded by the defendant was granted to him the 9th day of *Jan.* *anno* 1. of this king, which was before the offence and conviction; ſo that as to this point the caſe will be but this:

An act of parliament doth enact, that he who doth neglect to take the oath of allegiance within the certain prefixed time, and ſhall be convict of the ſame by indictment, ſhall forfeit 500 *l.* to him who will ſue on ſuch conviction for the ſame; the defendant neglects to take the ſaid oath, having a diſpenſation of the ſame granted to him before the time lapſed for taking the ſaid oath; and which (to make a caſe) is admitted to be a good excuſe, and may be pleaded in bar of any indictment for that neglect.

The defendant is after indicted for that neglect, and pleads not guilty to the ſame; and an action is brought by the plaintiff againſt him for the 500 *l.* on the ſaid conviction, and the defendant pleads the ſaid diſpenſation in bar. I conceive, with ſubmiſſion, he comes too late; for the defendant had his election to have pleaded the ſaid diſpenſation in bar of the indictment, and to have relied on it; and that was his proper time to make uſe of the ſame or to waive it, and inſiſt on his innocence, and plead not guilty; and when he pleads not guilty, and does not make uſe of the diſpenſation for his defence, the law conſtrues it to be a waiving

ing of it; and he ſhall at all times after be eſtopped by his plea and conviction thereon to ſay, that he did not waive the ſame.

To make this plain, I humbly ſubmit to your Lordſhip's conſideration, that after the conviction the defendant could never have made uſe of his diſpenſation to have ſtaid the judgment on the ſame, which is the expreſs opinion in the 11 *H.* 4. *Bro.* tit. *Chartres de Pardon, pl.* 15. the words of the book are, "He who "pleads not guilty cannot plead a pardon afterwards, unleſs the "pardon be of a later date than the time of his plea."

In 3 *Cro.* 4 *Margaret* and *Marſhall*'s caſe, the difference there taken makes out the reaſon of it to be what I have before offered. *Marſhall* in the reign of Queen *Mary* had committed petit treaſon; the 10 *Eliz.* there was a general pardon, notwithſtanding which ſhe was outlawed for the petit treaſon after, and ſhe brought a writ of error to reverſe the ſame; and it was there reſolved, that ſhe may aſſign the general pardon for error, becauſe ſhe had no day in court to have pleaded it, but always made default; but that it had been otherwiſe if ſhe had ever appeared in court, and had not pleaded the ſame.

In a *ſcire facias* upon a recognizance, if the defendant appear, and having a releaſe that he may plead, do not plead it, and judgment be given againſt him, he hath totally loſt the benefit of his releaſe, and ſhall not be relieved in an *audita querela* on the ſame againſt the ſaid judgment, for he hath waived the benefit of it himſelf; but, if judgment had been given againſt him by default on a *nihil* returned, there, he ſhould be relieved by *audita querela*; for that he never had any time before to have pleaded it: This is agreed, my Lord, in the caſe cited of *Marſhall*, and in *Roll. Abr.* 306. where divers caſes to this purpoſe are collected together.

By this I conceive it is very clear, that as to the king, the defendant by pleading not guilty to the indictment did thereby loſe the benefit of his diſpenſation, and could not help himſelf by the ſame againſt the conviction on the ſaid indictment, either in arreſt of judgment, or by error. In the next place, I conceive, that the defendant ſhall be no more admitted to uſe the ſaid diſpenſation againſt the plaintiff than he could againſt the king; for on the plaintiff's bringing his action for the 500 *l.* forfeited, the ſtatute veſts the benefit of the conviction in him, and creates a privity between the plaintiff and defendant as much as if the plaintiff had been party to the record of the conviction; by the words of the ſtatute this appears very plain, for the words are, *and being thereof convicted ſhall forfeit the ſum of* 500 l. *to be recovered by him who will ſue for the ſame*; this action I take therefore to be in nature of an execution of that conviction, and therefore the defendant ſhall not be admitted to plead any matter precedent to the ſame in bar of this action.

The plaintiff in this action, may, I conceive, be reſembled to an adminiſtrator *de bonis non*, who by the ſtatute 18 *Car.* 2. *c.* 8. may ſue forth execution on a judgment obtained by an executor or adminiſtrator before him; and certainly no man ever thought but that ſtatute put the adminiſtrator *de bonis non*, to all intents and purpoſes,

purpoſes, in the ſame condition as the executor or adminiſtrator who obtained the judgment was in; and that the defendant cannot allege any matter whatſoever againſt him, which he could not have alleged againſt him who obtained the ſaid judgment.

My Lord, I conceive there is a great difference where a record of a conviction is the foundation of an action, ſuch as without which the action will not lie; and where it is an evidence only which the plaintiff may make uſe of or may let it alone, and yet maintain his action; as in caſe of a conviction on an indictment of battery, which is evidence the plaintiff in an action for the ſame battery may make uſe of, or maintain his declaration by other proof. In the firſt of theſe caſes the record muſt be taken to be true according to the tenor of it, till it be reverſed by error; but in the other caſe the defendant is not at all concluded by it, for the plaintiff doth not, nor can rely on the ſame as he doth on the firſt; for there the conviction is ſo much the foundation of the plaintiff's action, that I conceive he might have declared only on the ſame, and have ſet nothing out in his declaration, but that the defendant was indicted and convicted for the offence contained in the indictment.

If the defendant ſhall be admitted to plead this plea now, he ſhall thereby falſify the record of the conviction in the very point tried; which he ſhall never be admitted to do, as appears by Lord *Coke*'s *P. C. fol.* 230.

For theſe reaſons and authorities, I ſhall conclude as to the firſt point, that the defendant by pleading not guilty to the indictment, hath waived the benefit of his diſpenſation, and ſhall never have advantage of the ſame to avoid the execution of the judgment in the conviction on that indictment, which is to be executed by this action according to the direction of the ſtatute.

The ſecond and grand point.

But admitting this point to be againſt the plaintiff, and that the defendant hath liberty to plead the diſpenſation to this action, I conceive it is no bar; but that, notwithſtanding the ſame, the plaintiff ſhall recover; for that the diſpenſation was merely void in law, and could not enable the defendant to execute the ſaid office, without taking the ſaid oaths, nor exempt him from the penalties inflicted by the ſaid act on his executing the ſaid office after his neglect to take the ſaid oaths according to the ſaid act.

I ſhall not trouble your Lordſhip with a diſcourſe on *non obſtante* in general, nor how nor where they were brought into the world; and ſhall not deny but agree, that the king hath, by his prerogative, a power of diſpenſing with penal laws in many caſes; and it is a great uſe and advantage to the ſubject as well as to himſelf, that he hath ſuch a power; for although acts of parliament paſs with the greateſt deliberation that can be, yet the judgments of the law-makers are but finite and fallable, and they cannot poſſibly foreſee all events that may happen; and that which was well intended and ſpecious in the theory, may be fatal in the practice; and to particular perſons there may be, without the aid of this prerogative, the greateſt injuſtice many times done by the help of a law; but though the king have ſuch a prerogative, yet that prerogative

rogative is bounded by the law; and with ſome acts of parliament the king cannot diſpenſe at all to any perſons in any caſes; with other acts though he may diſpenſe, yet not to all perſons nor in all caſes.

That the king cannot diſpenſe with ſome acts of parliament to any perſon, will appear from 11 *H.* 7. *fol.* 11, 12. the king cannot diſpenſe with a law that prohibits an act that is *malum in ſe*; as the king cannot licenſe a man to kill another, nor do any nuiſance to the common highway; and if ſuch licences be granted, they are void.

The king cannot diſpenſe with an act of parliament which is of publick concernment, and in which the people have any intereſt; for that is ſo veſted in them that the king cannot diveſt it. The ſtatutes of 13 *R.* 2. *c.* 3. 15 *R.* 2. *c.* 5. and 2 *H.* 4. *c.* 11. being ſtatutes declaring the juriſdiction of the court of the admiral, for that all the ſubjects of the realm have intereſt in them, cannot be diſpenſed with by any *non obſtante*; this appears by *Coke's Juriſ. of Courts, fol.* 135. Whether the law now diſpenſed with be not of publick concernment, and the people have not an intereſt in it, I ſhall leave to the conſideration of the court, on conſideration of the ſtatute.

This I only offer to your Lordſhip, to ſhew your Lordſhip, that this great prerogative of the king may be bounded.

I ſhall confine myſelf in my further diſcourſe touching the bounding of this great prerogative of the king, purely to the ſtatute now before your Lordſhip; and I ſhall lay down this rule, that wherever an act of parliament doth abſolutely and directly injoin and prohibit the doing of any action, and doth create a diſability to any purpoſe to fall on any perſon on the doing or not doing of ſuch act, (let the concern of ſuch ſtatute be what it will,) the king, with ſubmiſſion I conceive, by reaſon of the clauſe of diſability, cannot diſpenſe with ſuch law by a *non obſtante*, either before the doing or not doing ſuch action injoined or prohibited or after; although he might have diſpenſed with the ſame if ſuch action had been prohibited only *ſub modo*, as on a penalty given to the king. This I ſhall endeavour to make out by authorities; for that clearing the ſame will, I conceive, determine the queſtion on this ſtatute now before your Lordſhip; which I ſhall then come ſhortly to conſider.

By the ſtatute 31 *Eliz. c.* 6. it is enacted, that every admiſſion, inſtitution, and induction, on any ſimoniacal contract to any eccleſiaſtical benefice, ſhall be utterly void; and the perſon ſo corruptly taking ſuch benefice, ſhall thereupon and from thenceforth be adjudged a diſabled perſon in law to have and enjoy the ſame. If a perſon be ſimoniacally inducted to any benefice, the ſame by this act immediately becomes void; and the incumbent is ſo abſolutely diſabled for ever after to be preſented to that church, as that the king himſelf (to whom the law giveth the title of preſentation in that caſe) cannot preſent him again to that living; for the act binds the king in that caſe, and he cannot diſpenſe with the ſame; and this only by reaſon of the diſability therein.

This,

This, my Lord, appears by *Co. Lit.* 120. 3 *Inſt.* 154. where the difference between an act of parliament's making a diſability, and prohibiting any matter *ſub modo*, is taken; and ſo it hath been often reſolved on the ſtatute; *Cro. Jac.* 385. *The King* againſt *The Biſhop of Norwich* and others, and the ſame caſe *Hob.* 75. are expreſsly ſo reſolved; ſo is the caſe of *Smith* v. *Sherborn*, *Mor. pl.* 1299.

By the ſtatute 5 *E.* 6. *c.* 16. it is enacted that every perſon that ſhall give or contract to give any ſum of money for any office, or ſhall make any promiſe, agreement, or aſſurance for any office mentioned in the ſame act, ſhall immediately thereon be adjudged a diſabled perſon in law to all intents and purpoſes to have and enjoy ſuch office. Sir *Robert Vernon* being cofferer to K. *Jam.* I. contracted with Sir *Arthur Ingram* to ſell his office (the ſame being an office within the ſaid act) to the ſaid Sir *Arthur*, and agreed to ſurrender it, to the intent that Sir *Arthur* might obtain a grant thereof; which was done, and Sir *Arthur* obtained a grant from the king of the ſame: The office was adjudged after to be void; and that Sir *Arthur* was a perſon diſabled by the ſtatute to take that office; and that no *non obſtante* could diſpenſe with the ſaid act to enable him. *Co. Lit.* 234. *Hob.* 75. *Cro. Jac.* 386.

From theſe caſes it is plain, the king cannot diſpenſe with an act enacting a diſability on the doing or not doing any action, after the action injoined or prohibited to be done is done, or omitted to be done, contrary to the act; and that if this diſpenſation to Sir *Ed. Hale* had come after his refuſal to take the oaths, and his exerciſing the office contrary to the act, it had been ineffectual to enable him againſt this ſtatute.

Now, my Lord, I ſhall conſider whether the king may diſpenſe with ſuch act enacting ſuch diſability on the doing or not doing any action, after the action injoined or prohibited to be done is done, or omitted to be done, contrary to ſuch ſtatute; and I conceive he cannot; for, with ſubmiſſion, the reaſon why the king cannot in the caſes cited diſpenſe with theſe perſons, is, not becauſe diſability is attached, but becauſe the king cannot controul an act of parliament, and make a perſon capable againſt the expreſs proviſion of the ſame; which he doth as much do when he grants a diſpenſation precedent to the offence, as when it is granted ſubſequent. This, my Lord, I ſhall a little enlarge on when I come to conſider the ſtatute now in queſtion.

As for inſtance, if the king ſhould licence any perſon who hath an office within the ſtatute of 5 & 6 *E.* 6. *c.* 16. to ſell the ſame, and another to buy it *non obſtante* the ſaid ſtatute of *E.* 6. this certainly would be a void *non obſtante*, although it were before any contract made for ſuch office; and ſuch *non obſtante* would not hinder, but that the ſtatute would avoid the ſaid office, and the purchaſer would become and remain diſabled to hold ſuch office. This was agreed by all the judges who argued for the king's prerogative to diſpenſe with penal laws in the caſe of *Thomas* v. *Sorrel*, touching wine-licences, which was in the Exchequer-chamber about ten years ſince; and ſo it doth appear by my

my Lord *Vaughan*'s argument in his *Rep. fol.* 354. which cannot, I humbly conceive, be diſtinguiſhed from this caſe now before your Lordſhip.

Now, my Lord, I ſhall conſider this ſtatute whereon this queſtion ariſes; and with ſubmiſſion I conceive this diſpenſation of that ſtatute, though granted before the offence committed, can no more be maintained to be lawful than can the diſpenſations in the caſes before cited on the ſtatutes of the 5 & 6 *E.* 6. *c.* 16. of offices, and 31 *Eliz. c.* 6. of ſimony; but this ſhall be ineffectual for enabling the defendant againſt this act, for the ſame reaſons that thoſe diſpenſations were uſeleſs againſt the diſabilities created by thoſe laws.

For by this ſtatute it is directed and poſitively enacted, That every perſon admitted to any office, *&c.* ſhall take the oaths of allegiance and ſupremacy, either in the court of Chancery or in this court, in the next term after his admittance to the ſame, or at the quarter-ſeſſions for the county or place where he ſhall reſide, next after ſuch his admittance; and ſhall receive the ſacrament within three months after his admiſſion to the ſame.

Then comes the diſabling clauſe, That every perſon that doth or ſhall neglect or refuſe to take the ſaid oaths and ſacrament in the ſaid courts and places, and at the reſpective times aforeſaid ſhall be *ipſo facto* adjudged incapable and diſabled in law to all intents and purpoſes whatſoever, to have, occupy, or enjoy the ſaid office; and every ſuch office ſhall be void, and is thereby void.

Every man by the common law had a double capacity as to offices.

1. He was capable to take the ſame.

2. He had a capacity to hold the ſame for any time whatſoever.

The ſtatute works not at all upon the firſt capacity, but every perſon remains notwithſtanding as capable of taking as ever; but it quite changes his capacity of holding, and annexes a condition precedent to the ſame; on performing which condition only he ſhall be capable; and till that be performed, by judgment of this act he is incapable.

This, I conceive, may properly be called an incapacity; for that he, who is incapable to any one purpoſe, is as properly ſaid to be a perſon incapable as if he was diſabled to all purpoſes.

The intent of the ſtatute appears to be the ſame as if it had been enacted in theſe words, That no man ſhall hold an office above three months, unleſs within the three months he take the oath of allegiance, in which caſe it would be plain, that a diſability to hold beyond three months, would attach on every one who ſhould accept an office ſo ſoon as he ſhould accept the ſame; which could not be removed but by qualifying himſelf as the act directs.

If the diſpenſation plegded will enable the defendant to hold the office without qualifying himſelf by taking the oaths, then may the king enable a man in a point wherein he is diſabled by act of

parliament; which is expreſsly contrary to the reaſon of the caſes I before cited; and here it doth appear the diſability was attached in the defendant before the diſpenſation granted; for he was admitted to the office the 28th *November*, and the diſpenſation was not granted till *January;* and therefore, according to what I have offered, it comes too late.

By the ſtatute 7 *Jac. c.* 6. for taking the oath of allegiance, it is enacted, That every member of the Houſe of Commons, at any parliament or ſeſſion to be aſſembled, before he ſhall be permitted to enter into the ſaid Houſe, ſhall take the ſaid oath before the perſons mentioned in the ſaid ſtatute.

By the opinion of Lord *Vaughan*, the king cannot diſpenſe with that act; for that every member, ſo ſoon as choſen, is *perſona inabilis*, and ſhall not be permitted to enter the Houſe without the oath taken.

My Lord, by the very diſpenſation it appears, that the king's counſel, who drew it, were willing to make what proviſion they could againſt the diſability incurred by the taking the ſaid office of a colonel, which the defendant had not three months when the diſpenſation was granted; yet he is thereby expreſsly diſcharged from all diſabilities incurred by the ſaid act; which ſeems to admit there was a ſort of incapacity then on the defendant; to remove which the diſpenſation cannot be of any avail for the authorities I have before cited.

I ſhall humbly offer this farther matter to your Lordſhip's conſideration, that this caſe as to the ſtatute is *primæ impreſſionis;* and that this prerogative was never made uſe of herein ſince the making of the ſtatute, although many perſons at the time of the making of this act ſtood in need of the aid of it, and for want of which they loſt their employments, and the late king the benefit of their ſervices.

I ſhall in the next place conſider the authorities of Sir *Ed. Coke* in his 12 *Rep.* 18. which I foreſee will be objected to me, and I ſhall ſtate it, and give ſuch anſwer to it as occurs to me, and ſubmit the whole matter to your Lordſhip's conſideration.

There my Lord *Coke* ſaith, that no act can bind the king from any prerogative which is ſole and inſeparable to his perſon, but that he may diſpenſe with it by a *non obſtante*, as a ſovereign power to command any of his ſubjects to ſerve him for the weal publick; and that this royal power cannot be reſtrained by any act of parliament; and for that he relies on a caſe 2 *H.* 7. *fol.* 6. which is on the ſtatute 23 *H.* 6. *c.* 8. which enacts, that all patents made or to be made of any office of a ſheriff, &c., for a term of years, for life or longer, ſhall be void and of no effect, any clauſe or parole of *non obſtante* put or to be put in ſuch patents to be made notwithſtanding; and further, whoever ſhall take upon him or them to accept or occupy ſuch office of ſheriff, by virtue of ſuch grants or patents, ſhall ſtand perpetually diſabled to be or bear the office of ſheriff within any county in *England;* yet, ſaith my Lord *Coke*, there the king by his royal prerogative may command any perſon to ſerve him for the weal publick as ſheriff of any county

county for years or for life; ſo he ſaith it was reſolved by all the judges of *England* in the Exchequer-chamber in that caſe.

This and ſome other matter of the like nature, which are put together by my Lord *Coke*, are, with ſubmiſſion, the only authorities in the law that ſeem to give countenance to this diſpenſation now before your Lordſhip. I ſhall very briefly conſider, whether that be any authority or not; and if it be, whether it differs from the caſe now before your Lordſhip.

To the firſt, I conceive it is the ſingle opinion of Sir *Ed. Coke*, but he is miſtaken in the caſe on which he relies; for by the book 2 *H.* 7. 6. on which he relies, it appears plainly that there never was any ſuch reſolution as he cites, but a ſudden opinion given, and at that time the judges declared they would not be bound by what they then ſaid, but adviſed the king's counſel to conſider well the point; and ſo they ſaid they would; and by *Bro. Abr.* tit. *Pard.* 45. 109. where he rather repeats than abridges the caſes, it appears, nothing more was ever done in that matter, but it reſted and was never adjudged. The great foundation failing, the ſuperſtructure of Lord *Coke* thereon, and his opinion, muſt needs fall and be rejected as an opinion grounded on a palpable miſtake.

But admit that caſe and the reaſon of it to be law, that the king cannot be deprived of the power of commanding any of his ſubjects to ſerve him, yet I think it differs quite from the caſe now before your Lordſhip; and the reaſon of it can now be no rule in this caſe, for theſe reaſons.

The ſtatute 23 *H.* 6. *c.* 8. was an act purely reſtraining that power the king had of commanding, and was rather a diſabling the king than the ſubject; for it took away the power the king had of granting the office for years, life and inheritance, and by conſequence was a total depriving him of the uſe of ſome of his ſubjects at ſome times; and I may very well allow, that ſuch act of parliament did not, nor can bind the king; but, my Lord, in the act of parliament now in queſtion, the prerogative nor the power of the king is not any manner touched; for the king may grant an office to any perſon, or may command any perſon to ſerve him, as he might have done before this law; and he is in no ſort deprived of the uſe of his ſubject by any thing in the ſtatute; for this ſtatute is a direction and obligation on the ſubjects to qualify themſelves according to the act, to obey the command the king ſhall lay on them; and there is nothing in this act that excuſes any perſon from ſerving the king, when he by his royal command requires his ſervice, but he is at his peril to qualify himſelf for that ſervice and to do the ſame; and if he be one incapable, it is by his own voluntary neglect, and he is puniſhable by law for the ſame, as every other man is who without any reaſon refuſes to ſerve the king in what ſtation he is pleaſed to require his ſervice in.

This, my Lord, will appear plain from the reſolution of the caſe of Sir *John Read*, which was in the Exchequer *Hil.* 27 & 28 *Car.* 2. Sir *John Read* was by the late king made ſheriff of *Hertfordſhire*,

*fordſhire*, and Sir *John* was duly ſworn into the ſaid office; but after neglecting to take the oaths and receive the ſacrament injoined by the law now before your Lordſhip, the office became void; whereupon an information was exhibited againſt Sir *John Read* in the Exchequer, ſetting forth the ſtatute of 25 *Car.* 2. *c.* 9., and that he was appointed and ſworn ſheriff for that county, and did neglect to qualify himſelf by taking the oaths according to the ſaid act, whereby the office became void by his voluntary neglect; and the publick juſtice in the adminiſtration thereof in that county, as to the office of ſheriff, was obſtructed. On this information the ſaid Sir *John Read* was convicted and fined in the ſaid court; for the court there was of opinion that the ſtatute never intended to put it in the power of any man by his own act to diſcharge himſelf of that duty he owed the king, but hath poſitively enacted that every officer ſhall qualify himſelf for his duty, the not doing of which is an offence for which he is puniſhable; ſo that from hence it is plain there is no reſemblance between the ſheriff's caſe and any caſe on this ſtatute.

There is likewiſe another difference between the ſheriff's caſe and this caſe at bar. In the ſheriff's caſe, the diſpenſation is in the very ſame patent that the office is granted, and in the ſame clauſe, and enables the grantee before the diſabilities are in any ſort attached on him; but here the office was granted in *November* to the defendant, by which immediately, for the reaſons I have before offered, he is diſabled by this act; and in *January* after is this diſpenſation granted, which, for reaſons I have before offered, I conceive comes too late.

For theſe reaſons and authorities I conclude therefore, that this diſpenſation, granted to the defendant, is void in law.

## 8. Of his Proclamations.

Forteſ. de Laud. c. 9. 12 Co. 74, 75. 11 Co. 87. Daliſ. 20. pl. 10. 2 Roll. Abr. 209. 3 Inſt. 162. 12 Co. 74. Hob. 251.

It is plain that the king by his prerogative may in certain caſes and ſpecial occaſions make and iſſue out proclamations for the prevention of offences, to ratify and confirm an ancient law, or, as ſome books expreſs it, *quoad terrorem populi*, to admoniſh them that they keep the laws on pain of his diſpleaſure; and ſuch proclamatious being grounded on the laws of the realm are of great force.

It is likewiſe clear, that the ſubject is obliged on pain of fine and impriſonment to obey every proclamation legally made; and that though the thing prohibited were an offence before, that yet the proclamation is a circumſtance which highly aggravates it; and upon which alone the party diſobeying may be puniſhed.

Bro. Proclamat. pl. 1. 12 Co. 75. Crom. Jur. 41.

It is clearly agreed, that no (*a*) private perſon can make a proclamation of a publick nature except by cuſtom, as is uſual in ſome cities and boroughs; this being a prerogative act with which alone the king is intruſted.

(*a*) Sir Edmund Knightly, executor of Sir William Spencer, made proclamation in certain market towns, that the creditors ſhould come in by a certain day and prove their debts; he was fined and impriſoned for this, becauſe, as the book ſays, he did it publickly and without any authority. Bro. Proclamat. pl. 10.

But

But notwithſtanding the king's prerogative herein, it ſeems clearly agreed, that the king cannot by his proclamation change any part of the common law, ſtatutes, or cuſtoms of the realm; nor can he by his proclamation create any offence which was not an offence before; for that theſe things cannot be done without a (*a*) legiſlative power, of which in our conſtitution the king is but a part. Dalis. 20. pl. 10. 12 Co. 75. 12 Co. 87. b. (*a*) By the 31 H. 8. c. 8. (now repealed) it was enacted, That proclamations made by the king and the greater part of his council, ſhould have the force of acts of parliament; but there was a proviſo that ſuch proclamation ſhould not croſs any ſtatute or laudable cuſtom of the realm. N. Bacon's Hiſt. 2 Part. fol. 215.

And on this foundation it hath been held, that the king's proclamation prohibiting the importation of wines from *France* upon pain of forfeiture, was againſt law, and void; there being no war at that time ſubſiſting between the two nations. 2 Inſt. 63.

So, where an act was made by which foreigners were licenſed to merchandiſe within *London;* and *Hen.* IV. by proclamation prohibited the execution of it, and ordered that it ſhould be in ſuſpenſe *uſque ad proximum parliamentum;* this was held to be againſt law. 12 Co. 75.

Upon a conference between ſome lords of the privy council and the two chief juſtices (of which the Lord *Coke* was one) and Ch. B. and Baron *Altham*, the queſtions were, *1ſt*, Whether the king by proclamation might prohibit new buildings in about *London?* *2dly*, If the king might prohibit the making of ſtarch of wheat? And the judges were of opinion, that the ſubject could not be reſtrained in theſe particulars by the king's proclamation. 12 Co. 74.

But, notwithſtanding the above-mentioned opinion, there are inſtances of perſons who have been ſentenced in the Star-chamber upon proclamations againſt the increaſe of buildings; and particularly in *Hob.* where a perſon was fined in the Star-chamber for building without brick, though upon an old foundation; and it is there ſaid, that ſuch buildings had an ill effect from the danger of fire, conſumption of timber, and difficulty of feeding, cleanſing, and governing the city; and it was ſaid in general, that proclamations were ſo far juſt as they were made *pro bono publico*, and for publick utility. Hob. 251. Armeſted's caſe.

The king by proclamation may call or diſſolve parliaments, may declare war or peace; for theſe are prerogative acts with which he is intruſted as the executive part of the law: but (*b*), if there be an actual war between us and a foreign nation, it is not neceſſary in pleading to ſhew that ſuch war was proclaimed. 3 Inſt. 162. Hal. Hiſt. P. C. 163. (*b*) Owen, 45. Raſt. Ent. 605.

The king by proclamation may legitimate foreign coin, and make it current money of this kingdom, according to the value impoſed by ſuch proclamation: he may legitimate baſe coin or mixt below the ſtandard of ſterling (*c*): he may enhance coin to a higher denomination or value; and may decry money that is current in uſe and payment (*d*); and in all theſe caſes a proclamation with a proclamation-writ under the great ſeal is neceſſary. Co. Lit. 207. b. 5 Co. 114. b. Dav. 21. Hal. Hiſt. P. C. 192. 197.

[(*c*) This value, Sir W. Blackſtone thinks, ought to be by compariſon with the ſtandard of our own coin; otherwiſe the conſent of parliament will be neceſſary. 1 Bl. Com. 278. (*d*) By ſtat. 14 G. 3. c. 70. all officers of the revenue are required to cut every piece of gold coin tendered to them, if it is not of the current weight according to the king's proclamation.]

Comp. Incumb. 354. The king by proclamation may appoint faſts and days of thankſgiving and humiliation; and iſſue proclamations for preventing and puniſhing immorality and profaneneſs; and injoin the reading of the ſame in churches and chapels.

Dec. 1780. [The king by proclamation may authoriſe the lords of the admiralty to grant letters of marque and repriſal, as was done in the commencement of the late war againſt the *Dutch*.]

Cro. Car. 180. Keley v. Manning, *& vide* Roll. Rep. 172. A proclamation muſt be under the great ſeal, and if denied is to be tried by the record thereof: but, if a man pleads that he was prevented from doing a thing by proclamation, it ſeems the better opinion that he need not aver that ſuch proclamation was under the great ſeal; for alleging that ſuch proclamation was made, it ſhall be intended to have been duly made.

## (E) How the Rules of Law differ with reſpect to the King and a private Perſon: And herein,

### 1. Of what Things incapable from the Dignity of his Perſon and Office.

(*a*) Cannot do any wrong, Co. Lit. 19. Co. 45. 11 Co. 72. 85. Bracton, l. 3. c. 9. Stamf. P.C. 102. Hal. Hiſt. P.C. 43, 44. FROM the dignity of his office and perſon the law preſumes him (*a*) incapable of doing any wrong *: but, if the king command an unlawful act to be done, the offence of the inſtrument, as my Lord *Hale* ſays, is not thereby indemnified; for, though the king is not under the coercive power of the law, yet in many caſes his commands are under the directive power of the law; which, conſequently, makes the act itſelf invalid, if (*b*) unlawful, and ſo renders the inſtrument of the execution thereof obnoxious to the puniſhment of the law.

(*b*) If two men combat together at barriers in time of peace for trial of ſkill, and one kill the other, it is homicide; but if it were by the command of the king, not felony. 11 H. 7. 23. a. *& vide* 3 Inſt. 56, 160.

* In his politick capacity he is under the happy inability of doing wrong, becauſe acting by his officers, and limited by law. Conſ. on Law of Forfeiture, &c. 101.

2 Inſt. 187. 2 Hal. Hiſt. P. C. 131. The king cannot arreſt in perſon nor impriſon, nor can he command another to impriſon; but it muſt be done by ſome order, writ, or precept, or proceſs of ſome of his courts.

—— cannot ſit in judgment upon any indictment. 2 Hawk. P. C. c. 1. —— Cannot be a witneſs. 2 Hal. Hiſt. P. C. 282.

Bro. Prerog. 125. Co. Lit. 3. b. 8 Co. 55. 2 Vent 270 The king cannot execute any office relating to the adminiſtration of juſtice, although all ſuch offices derive their authority from the crown, and although he hath ſuch offices in him (*c*) to grant to others.

(*c*) If lands with the office of foreſter be granted to *J. S.*, remainder to the king in fee, this is a good remainder, though the king cannot be an officer to any man, becauſe he may grant it over. 1 H. 7. 31. Bro. Done, pl. 51.

Bro. Feof. to Uſes, 338. Poph. 72. Dyer, 383. pl. 3. The king cannot be ſeiſed to an uſe, becauſe there is no means to compel him to perform it; for the Chancery has only a delegated power from the king over the conſciences of his ſubjects; and the king, who is the univerſal judge of property, and who is equally

equally concerned for the good of all his ſubjects, ought to be perfectly indifferent, and not to take upon him the particular defence of any man's eſtate as a truſtee. Cro. Jac. 50. Hard. 468.

If one hath the nomination to a church, and another the preſentation, and ſuch right of preſentation doth accrue to the king, he that hath the nomination ſhall have (*a*) all; by reaſon that it is indecent for the king to do any thing as ſervant to another. Dyer, 48. (*a*) But by Dodderidge, J. the nominator ſhall in ſuch caſe nominate to the Lord Chancellor, who in the name of the king ſhall preſent to the ordinary. Pop. 158.

The king cannot be tenant, nor can he hold by any ſervices from his ſubjects; for his poſſeſſions are called *ſacra patrimonia* and *dominica coronæ regis;* and on this foundation it hath been adjudged, that where lands, holden of the ſubject, came to the poſſeſſion of the king by the ſtatute of 1 *E.* 6. *c.* 14. of *chantries*, and the king granted thoſe lands over to another, though there was a ſaving in the ſtatute to the donor, of the *ancient rents, ſervices*, &c., that yet the patentee ſhould hold of the king, according to his patent, and not of the ancient lord; and that the ſaving in the ſtatute, as to the ſervices, was controuled and made void by the common law; ſo that the patentee was to pay the rent, by which the ſaid lands were before holden, as a rent ſeck diſtrainable of common right, to the lord and his heirs, of whom the lands were before holden, but diſcharged of the ſervices. Co. Lit. 1. Dav. 2. 4 Leon. 40. Dyer, 313. And. 45. Stroud's caſe; *& vide* 1 Co. 47. 8 Co. 114. b. Cro. Car. 82. 2 Roll. Rep. 246. Jon. 234. Lit. Rep. 43.

The king, in regard to decency and order, cannot ſuffer a common recovery; for in ſuch recovery he muſt be either tenant or vouchee; and in both caſes the demandant muſt count againſt him, and there muſt be judgment againſt him, which the law does not ſuffer; ſo, he cannot come in as tenant by receipt; but if the party have any warranty he muſt pray in aid. Cro. Car. 96, 97. Pigot, 74-5.

The king cannot be tenant at will; ſo that if he takes a leaſe at will, though he may determine his will, yet the tenant cannot otherwiſe do it but by ſurrender. Ld. Raym. 51.

The king may be appointed an executor; but, as it cannot be preſumed that he has ſufficient time and leiſure to engage in a private concern, the law allows him to nominate ſuch perſons as he ſhall think proper to take upon them the execution of the truſt; againſt whom all perſons may bring their actions: alſo, the king may appoint others to take the accounts of ſuch executors. 4 Inſt. 335. Godolph. Repert. 76.

## 2. What Things enure to him in his natural, what in his political Capacity.

The king has two capacities, the one natural the other politick; in which laſt he is conſidered as a ſole corporation, capable of taking in ſucceſſion, as a biſhop or dean. In his natural capacity it is ſaid, that he may purchaſe lands to him and his heirs; and that ſuch lands, as alſo lands deſcending to him from an anceſtor, ſhall go to his heir, in caſe he is removed from the royal eſtate. Plow. 234. in the caſe of Wilſon v. Ld. Berkley.

But my Lord *Coke* ſays, that all the lands and poſſeſſions whereof the king is ſeiſed *jure coronæ*, ſhall *ſecundum jus coronæ* attend upon Co. Lit. 15. b. 7 Co. 10, 12. in Cal-

vin's case. 9 Co. 123. and follow the crown; and therefore, to whomsoever the crown descends, those lands and possessions descend also; and that the lands and the crown are *concomitantia*.

Co. Lit. 16. a. If the king purchase lands to him and his heirs, he is seised thereof *in jure coronæ; à fortiori*, when he purchases lands to him, his heirs and successors.

Plow. 205. a. Co. Lit. 15. b. So, if lands in gavelkind descend to the king and his brother, the king shall take one moiety and his brother the other: but, if the king dies, his moiety shall descend to his eldest son, and not according to the rules of descent in gavelkind; for the king was seised of his moiety *jure coronæ*, therefore it shall attend the crown, and, consequently, go to the eldest son.

7 Mod. 78. *per* Holt, Ch. J. The king can have nothing in his natural capacity, unless in right of his duchy, or an estate-tail, by the statute *de donis*, and duchy lands would now be in the crown if not kept separate by (*a*) act of parliament.

(*a*) The statute of 1H 4. provides that when the duchy lands come to the king, they shall not be under such government and regulation as the demesnes and possessions belonging to the crown; for the act says, *Quod taliter, & tali modo & per tales officiarios & ministros gubernentur, ac si ad culmen dignitatis regiæ assumpti minime fuissent.* Raym. 90.

2 Roll. Abr. 211. If the king has a title to present to a church which is void, and dies before presentment, his successor shall have the presentment, and not his executor.

2 Roll. Abr. 211. So, if the king be seised of a ward and die, his successor shall have it, and not his executor.

11 Co. 92. 2 Roll. Abr. 211. The treasure and other valuable chattels are so necessary and incident to the crown, that in case the king dies, they shall go with the crown to the successor, and not to the executors.

Co. Lit. 90. a. 11 Co. 92. a. So, a lease for years to the king and his successors is good, and shall go accordingly, and not to his executors and administrators.

Co. Lit. 18. b. (*b*) Cro. Car. 344. The ancient jewels of the crown are heir-looms, and shall descend to the next successor, and are not devisable by testament; but, it hath been said (*b*), that the king may dispose of them in his life-time by letters-patent.

Ld. Raym. 26. If the king be seised in fee of an advowson, and he create the incumbent bishop, he shall present as patron, that being a title precedent to that of the prerogative.

### 3. Of the Difference in the Rules of Law as directing the King's Property, otherwise than that of a Subject.

Co. Lit. 47. Plow. 227. in Ld. Berkley's case. The king may reserve rent out of inheritances which are incorporeal, as commons, tithes, fairs, &c., because the king by his prerogative may distrain in all (*c*) other the lands of the lessee for such rent; and having such remedy, the law adjudges the reservation good.

(*c*) That this must be understood of all such other lands as his tenant has in his actual possession, and not in the possession of his lessee for life, years, or at will. 2 Inst. 134. 4 Inst. 119. & *vide* 5 Co. 4. 56. 1 Rol. Abr. 670. 2 Rol. Abr. 159. Lane, 59.——Whether he may distrain on other lands of the tenant that are under sequestration out of Chancery, *vide* 2 Vern. 714. 1 P. Wms. 306-7.——That this prerogative shall not extend to the king's grantee. Bro. tit. Prerog. 68.

So,

So, if a rent-charge is granted to the king to be iſſuing out of the manor of *D.*, the king may diſtrain in any other the lands of the grantee. So, the king may diſtrain for a rent-ſeck, which in the caſe of a common perſon is not diſtrainable by common law. Bro. Prerog. 77. 3 Leon-124. 5.

The king may reſerve rent payable to a ſtranger, contrary to the rule of law, which makes void ſuch reſervation in the caſe of a common perſon. Moor, 162. Co. Lit. 143. 2 Roll. Abr. 447.

But, where the king made a leaſe of his houſe belonging to his houſe-keeper of *Whitehall*, reſerving a rent to the houſe-keeper for the time being, it was held an ill reſervation; for though the king may reſerve rent to a ſtranger, yet ſuch a reſervation as this is ill, becauſe he cannot reſerve rent to an officer who is removeable at the will of the king. Ld. Raym. 36.

The rule of *poſſeſſio fratris* does not hold in the deſcent of the crown or its poſſeſſions, neither is half blood any impediment in ſuch caſe; for the brother of the half blood ſhall be preferred to the ſiter in the enjoyment of the crown, as the moſt capable perſon of the two, by the advantages and prerogative of his ſex, to diſcharge the important and weighty buſineſs of the crown. Co. Lit. 15. b.

So, if the king hath iſſue a ſon and a daughter by one *venter*, and a ſon by another *venter*, and purchaſes lands and dies, and the eldeſt ſon enters and dies without iſſue, the daughter ſhall not inherit theſe lands nor any other fee-ſimple lands of the crown, but the younger brother ſhall have them together with the crown. Co. Lit. 15. b.

If lands are given to the king by deed enrolled, without the words (*a*) *ſucceſſors* or *heirs*, a fee-ſimple paſſeth; for he is conſidered as a corporation that never dies. Co. Lit. 9. Plow. 250. S P. and that the adding of ſucceſſors in grants to the king, was but of late time, and a new device; *per* Jenk. 209. 271. S. P. Dyer, Ch. J. ſhall bind the ſucceſſors. Plow. 176. Yelv. 13.

(*a*) So, a grant by the king, without mentioning ſucceſſors,

If the king gives lands to a man and a woman and the heirs of their bodies, and the woman dies without iſſue, the man ſhall be tenant in tail *apres* poſſibility, *&c.*; but, if the king gives lands to a man with a relation of his in frank-marriage, and the woman dies without iſſue, the man ſhall not be tenant *apres* poſſibility, *&c.*, but his intereſt in the land ceaſes upon the death of his wife without iſſue. This is a privilege of the king's which is not extended to a common perſon; and the reaſon of it may be this; the wealth and demeſne lands of the crown are not only neceſſary for the honour and credit, but alſo for the ſafety and protection of the nation; and therefore in this particular caſe it is but reaſonable, that if land applied to ſuch particular uſes and purpoſes be granted away, ſuch grant ſhould bind the king no longer than the conſideration and cauſe of the grant continues; and therefore, in the firſt caſe, the man may be tenant in tail *apres* poſſibility, *&c.*, becauſe the ſervices, which were the cauſe of the gift, are ſtill owing, and to be performed by the tenant to the king; but in the laſt caſe, where the woman, who was the cauſe of the gift, dies without Co. Lit. 21. b.

iſſue,

iſſue, the cauſe of the gift, which was the proviſion for the deſcendants of that marriage, ceaſes; and, conſequently, if the grant continued, the tenant would hold the land free from all ſervices.

Dyer, 1. pl. 7. Cro. Jac. 179, 180. The king may grant a *choſe in action*, as an obligation forfeited to him upon an outlawry, *&c.*, and the grantee may ſue by action in his own name, or by extent in the king's name, although there are not the uſual words in the grant to ſue in the king's name.

31 H. 7. 19. Bro. Prerog. 40. So, a *choſe in action*, as an obligation, may be granted or aſſigned to the king, and he may bring an action in his own name, though the deed of gift be not enrolled.

Bro. Prerog. pl. 23. Jenk. 65. S. P. though one of the obligees might have releaſed the obligation. Lucas Rep. 245. S. P. *per* Parker, Ch. J. If a man enters into an obligation to two, and one of the obligees aſſigns to the king, or is outlawed, the king may bring an action in his own name, and ſhall recover the (*a*) whole debt to his own uſe.

(*a*) If lands deſcend to the king and a common perſon, the king ſhall have but a moiety; for to take the whole would be a wrong, which the king cannot do by his prerogative. Plow. 247. a.

Bro. Aſſur. pl. 6. Bro. tit. Recovery, 31. tit. Tail, 41. Co. Lit. 372. Plow. 483, 553. Dyer, 344. Moor, 344. Piggot of Recoveries, 85. Before the ſtatute *de donis*, when the king created a conditional fee, there was no reverſion but a poſſibility; and if the donee had iſſue and aliened, the king's poſſibility was barred as well as that of a common perſon; but after the ſtatute *de donis* had turned that poſſibility into a reverſion, and after common recoveries were allowed to be common conveyances, and to bar remainders and reverſions, it became a queſtion, how far a recovery could bar a remainder or reverſion veſted in the king. And herein the judges determined, that though a recovery ſuffered by tenant in tail barred the eſtate-tail, that yet it did not (*b*) diveſt any intereſt the king had in the remainder or reverſion, it being unreaſonable to ſtrip the king of any part of his revenue upon the conſideration of an imaginary recompence; but they allowed that the eſtate-tail, as to the iſſue, was barred; for that otherwiſe the eſtate-tail in the ſubject muſt be perpetuated, which is againſt the policy of the law.

(*b*) The act of the party, as a fine or common recovery, ſhall never diveſt any eſtate, remainder, or reverſion out of the king; but by act in law a remainder or reverſion may be diveſted out of the king. ——As, if there be tenant in tail, remainder to *A.* in fee, tenant in tail diſcontinue in fee, and take back an eſtate to himſelf for life, remainder to the king in fee; tenant in tail die; the iſſue is remitted, and the remainder pulled out of the king, and veſts in *A.* ——So, if a recovery be on a good title againſt tenant in tail, and the king have the remainder by a defeaſible title, there, it ſhall diveſt the remainder out of the king, and reſtore and remit the right owners. ——But, if a gift be made to *A.* in tail, remainder to *B.* in tail, remainder to the king in fee; if in this caſe *A.* ſuffer a common recovery, this bars *A.* and his iſſue, and the remainder to *B.*, but not the king's reverſion; for that cannot be diſcontinued or put to a right, or plucked out of him by the act of a third perſon. Piggot of Recoveries, 86, 87.

2 Jon. 252. But in the reign of *Hen.* VIII. an act of parliament was made to invalidate even recoveries againſt the iſſue in tail, where the reverſion or remainder was in the crown; the intention of which act was, to perpetuate thoſe eſtates in families which the king himſelf had given, or for money or other conſideration had procured to be given to any ſubject, as a reward for his ſervices to the crown; that the deſcendants of that ſtock might never forſake the intereſt of

of the crown which had ſo liberally rewarded their anceſtor's loyalty.

And therefore by the 34 & 35 *H.* 8. *c.* 20. it is enacted, that if the king give any of his own manors, lands, *&c.*, or cauſe or procure another in conſideration of money or other lands, to give any manors, *&c.*, to any of his ſubjects or ſervants in tail, in recompence of their ſervice, remainder to the king in fee-ſimple or fee-tail, ſuch eſtates-tail are not to be barred; nor ſhall any feigned recovery to be had by aſſent of parties againſt any tenant or tenants in tail of any lands, *&c.*, whereof the reverſion or remainder at the time of ſuch recovery had ſhall be in the king, bind or conclude the heirs in tail; but after the death of every ſuch tenant in tail, againſt whom ſuch recovery ſhall be had, the heirs in tail may enter, hold and enjoy the lands, *&c.* recovered, according to the form of the gift in tail, the ſaid recovery notwithſtanding.

In the conſtruction of this ſtatute, the following opinions have been holden:

That if a reverſioner or remainder-man upon an eſtate-tail grant the reverſion or remainder to the king, this is no ſecurity to the iſſue in tail, becauſe the eſtate-tail was neither of the gift or other proviſion of the king, and conſequently not within the act. Moor, 195. Yelv. 149. 2 Co. 15. Wiſeman's caſe.

So, if a man make a gift in tail, and the crown deſcend on him, or if the king's anceſtor, not being king, make a gift in tail, and the reverſion deſcend on him, the eſtate-tail may be barred. 2 Co. 15. Co. Lit. 372.

If a man makes a gift in tail, remainder in fee, he in remainder grants his eſtate to another for life, remainder to the king in fee, on condition to be void on payment of money; recovery by tenant in tail bars the king's remainder and condition; for the grant was void. 2 Co. 52. Noy, 132. Yelv. 149. Leon. 8.

If a ſubject by the king's proviſion or procurement makes a gift in tail, and then grants the reverſion to the king for life or years only, in this caſe the eſtate-tail, remainders, and reverſions may be all barred; for the reverſion or remainder in the King, muſt be in fee or in tail. Piggot of Recoveries, 88, 89.

If the king grant an eſtate-tail, reſerving the reverſion to himſelf, and after grant the reverſion to another, tenant in tail may ſuffer a recovery, and thereby bar the reverſion. Piggot, 88.

Therefore where *Hen.* VIII. gave lands to *Michael Stanhope* and his wife and the heirs of their body, in conſideration of ſervices, *&c.* *Michael* died, and his ſon and heir petitioned the queen to grant the reverſion to ſome perſons in fee, to the intent that he might make a leaſe for ninety-nine years by way of mortgage; and entered into a recognizance to the queen, conditioned that nothing ſhould be done whilſt the reverſion was out of the crown, prejudicial to the crown; and accordingly the queen conveyed the reverſion to the Lord *Burleigh* and Sir *Walter Mildmay*, in fee; then the ſon made a leaſe for ninety-nine years, and ſuffered a recovery; and then the truſtees reconvey to the queen; it was reſolved, 1*ſt*, That the grant of the queen was good. 2*dly*, That during Raym. 288. 358. 2 Jon. 251. Gardner v. Bambridge.

during the time the reverſion was out of the crown, the ſon was not reſtrained from aliening within the ſtatute, and ſo the recovery good to bind the iſſues; but a fine or recovery, after the regrant to the queen, would not have been good to bind the iſſue, as it ſeems; becauſe that act doth not require that the reverſion ſhould continue (*a*) always in the king, but it ſufficeth if it be in him at the time of the fine levied or recovery ſuffered.

(*a*) Q. & *vide* Hard. 409.

2 Jon. 250-1. Earl of Ormond's caſe cited to have been adjudged by eleven judges, 13 Car. 1.

If tenant in tail of the gift of the king, makes a gift in tail, the ſecond donee is not within the ſtatute; for his eſtate, as far as it could, diſaffirms the reverſion of the king, though it could not take it out of him; and his poſſeſſion was injurious to the eſtate given by the king.

Raym. 260. 286. 319. 350. 2 Jon. 249. Earl of Derby's caſe.

King *R.* III. by letters patent gave ſeveral lands to the Earl of *Derby* and the heirs male of his body, in conſideration of great ſervices to the crown, *&c.* afterwards by a private act made 4 *Jac.* 1. ſeveral alterations were made in this eſtate; as that *Charles* then Earl of *Derby*, ſhould hold and enjoy them for his life; and after his death, that they ſhould go to *James* his ſon and heir apparent, and the heirs male of his body; and ſo to the ſecond, third, *&c.* and ſeventh ſon of Earl *Charles*; and then to ſeveral others in tail male, who by the limitation of the letters patent would have ſucceeded to the eſtate upon failure of iſſue male of Earl *Charles*; with power for Earl *Charles* and the ſons ſucceſſively to make leaſes for lives or years, and jointures for wives. After Earl *Charles*'s death, his ſon Earl *James* levied a fine of theſe lands and ſold them to a ſtranger; yet upon ſpecial verdict in ejectment, brought after his death by his ſon, it was reſolved by all the judges in the Exchequer-chamber, except three, that the fine was no bar; for that the reverſion continued in the crown, and that theſe eſtates given by 4 *Jac.* 1. were no new eſtates, but all within the compaſs of the firſt tail created by the letters patent, and only a diſtribution of the enjoyment of them, and all to the ſame perſons who would be entitled under the letters patent; and the power to make leaſes was with conformity to the power of tenant in tail; and that to make jointures was in lieu of dower: beſides, there was a ſaving to the king, and all other perſons, all ſuch rights, *&c.* ſo as the prerogative of the king, by his reverſion to reſtrain the tenant in tail from barring his iſſue, was ſaved; and the eighth, ninth, and all other ſons inheritable by virtue of the entail let in, though the firſt, *&c.* and ſeventh only were named; and the alterations were only in accidents, not in the ſubſtantial parts of the limitations; and ſo within 34 & 35 *H.* 8. *c.* 20.

Co. Lit. 372. Piggot, 91.

If the king in conſideration of money, or other conſideration by way of proviſion, procure a ſubject to ſettle his lands on one of his ſervants in tail, for recompence of ſervice, by deed of bargain and ſale enrolled, with remainder to the king in fee; and all this appear on record; the tenant in tail cannot bar his iſſue, being protected by the expreſs words of the ſtatute.

It

It hath been held, that the latter words of this act, *viz. had done or ſuffered by or againſt any ſuch tenant in tail*, muſt be intended where tenant in tail is party or privy to the act, be it by doing or ſuffering that which ſhould work the bar, and not by mere permiſſion. As, if tenant in tail of the gift of the king, reverſion to the king, be diſſeiſed, and diſſeiſor levy a fine, and five years paſs, this bars the eſtate-tail; and ſo, if a collateral warranty be made by the anceſtors of the donee, and the donee ſuffers the warranty to deſcend, without any entry made in the life of the anceſtor, this binds; becauſe he is not party or privy to any act either done or ſuffered by or againſt him. 11 Co. 78. And. 46. Co. Lit. 373. Moor, 467. Cro. Car. 13. Cro. Eliz. 595. Yelv. 72. 8 Co. 77. Sid. 166.

If the king make a leaſe reſerving rent, with a clauſe of re-entry for non-payment, the king (*a*) is not obliged to make any demand previous to his re-entry, but the tenant is obliged to pay the rent for the preſervation of his eſtate; becauſe it is beneath the royal dignity of the crown to attend a ſubject, to demand the rent; but the law for the ſupport of that dignity obliges every private perſon to attend the king with the ſervices due to him. 2 H. 7. 8. Bro. Prerog. pl. 101. (*a*) But this prerogative is not to be extended to the duchy lands. Moor, 249. 154. 161.

But, if the king, in caſes where he need not make a demand, aſſigns over the reverſion, the patentee cannot enter for non-payment without a previous demand; becauſe the privilege is inſeparably annexed to the perſon of the king for the ſupport of his royal dignity; and therefore ſhall not be extended to caſes where the king is no way concerned. 4 Co. 73. Moor, 404. Cro. Eliz. 462. Dyer, 87. And. 304.

So, if a prebendary make a leaſe rendering rent, and if the rent be arrear and be demanded, that it ſhall be lawful for the prebendary to re-enter; if the reverſion in this caſe come to the king, the king muſt demand the rent, though he ſhall be by his prerogative excuſed from an implied demand; for the implied demand is the act of the law, the other the expreſs agreement of the parties, which the king's prerogative ſhall not defeat; therefore in the caſe of the king, if he make a leaſe reſerving rent, with a proviſo that if the rent be in arrear for ſuch time (being lawfully demanded, or demanded in due form) that then the leaſe ſhall be void; it ſeems, that not only the patentee of the reverſion in this caſe, but alſo the king himſelf, whilſt he continues the reverſion in his own hands, is obliged to make an actual demand by reaſon of the expreſs agreement for that purpoſe. Moor, 210. Dyer, 87.

There can be no occupant of any of the king's poſſeſſions; and therefore if the king grants lands to *A.* during the life of *B.* and *A.* dies, living *ceſtui que vie*, the laws allows no man to gain the poſſeſſion which is now vacant by the death of *A.* but preſerves it for the king; for this reaſon, that he is preſumed to be taken up in the publick affairs of the kingdom, and therefore not at leiſure to attend his own private concerns: alſo, the king's grants proceeding from his own bounty and liberality, none ought to have any benefit from them but thoſe for whom he firſt deſigned them; and therefore when he made the grant to *A.* during the life of *B.*, though he intended *A.* ſhould have the benefit of it during the life of *B.*, yet if *A.* dies before *B.* none can make himſelf a title under Co. Lit. 41. 2 Roll. Abr. 150.

under the grant, becauſe it was made only to *A.*, nor ought any one by way of occupancy to take advantage of a grant made to *A.* for his particular ſervices; becauſe that were to extend the king's bounty further than he deſigned it, whereas ſuch a grant in the caſe of a common perſon ought to be taken moſt ſtrongly againſt the grantor, becauſe he parted with his land for the life of *B.* upon a valuable conſideration, and therefore is no ſufferer if he does not enjoy it during the time for which he granted it away. Alſo, no man can make himſelf a title to the king's poſſeſſions, without matter of record; and therefore none can claim any of them as occupant, becauſe that is an act in *pais*, and no matter of record.

Co. Lit. 201. b. Cro. Eliz. 462. Moor, 404. 4 Co. 73. Dyer, 87.

If the king makes a leaſe reſerving rent, the tenant muſt pay it without demand, either to his receiver for that purpoſe, or at the receipt of the Exchequer, as well as if by words of the leaſe the rent had been made payable at the Exchequer, or into the hands of his receiver; but, if the king grants the reverſion, the patentee muſt demand the rent upon the land, that being the place appointed by law for a common perſon to demand it on.

Roll. Rep. 169.

If the king make a feoffment on condition, that upon payment by the king of 100 *l.* ſuch a day, the feoffment ſhall be void; the feoffee muſt apply to the king at the day; for the king is not obliged to make a tender, as in the caſe of a common perſon.

Plow. 491.

The deed of a private perſon hath a relation only to the time of the delivery, and not to the time of the date; but the king's charter hath relation to the time of date; for being of record, it cannot be averred to have been executed on any time than that on which it bears date.

*Vide* Comp. Incumb. 223, 224. and ſeveral authorities there cited. (*a*) Latch, 254. 2 Roll. Abr. 354. Dyer, 392. Gouldſ. 163.

If the king preſents to a church, and his clerk is admitted and inſtituted, yet before induction the king by his prerogative may revoke ſuch preſentation; nay the preſentment of another is in law a repeal and revocation of ſuch preſentment, and that without any notice to the ordinary; but in the caſe of a common perſon, by preſentation and inſtitution he hath given up his power to the ordinary, and cannot afterwards vary, alter, or revoke his preſentation. But ſome (*a*) books hold, that after a preſentment only he may vary; and this ſeems to be the right diſtinction and better opinion at this day.

### 4. That his Rights ſhall be preferred to a Subject's where they happen to meet.

Co. Lit. 30. b. 4 Co. 55. 9 Co. 129. Hard. 24.—

It is an eſtabliſhed principle in law, that where the king's right and that of a ſubject meet at one and the ſame time, the king's ſhall be preferred.

In caſe of concurrent titles between the king and ſubject, the rule is *detur digniori.* 2 Vent. 268.

3 Leon. 251.

Hence it is ſaid, that if there be a lord meſne and tenant, and the tenant pay the rent at the day to the meſne, before noon; and after on the ſame day, the meſne die, his heir within age, the tenant ſhall pay it over again to the king.

E

If a woman marries and hath iſſue, and lands deſcend to the wife, and the huſband enters, and after the wife is found an idiot by office, the lands ſhall be ſeized for the king, according to this maxim, that when the title of the king and a common perſon begin at one inſtant, the title of the king ſhall be preferred. Co. Lit. 30. b.

So, if the woman had been the king's nief, and one had married her without the king's licence, &c., and lands had deſcended before or after iſſue, yet the king, upon office found, ſhall have them. Co. Lit. 30. b. 4 Co. 55.

Baron and feme joint purchaſers of a term for years, the huſband drowns himſelf, the leaſe is forfeited, and wife ſurviving ſhall not hold it againſt the king or his almoner; becauſe the title of the king and a common perſon coming together, the king's ſhall be preferred. Dyer, 108. Plow. 260. Dame Hale's caſe.

## 5. Of Acts of Parliament which extend to or bind not the King.

Herein a general rule hath been laid down and eſtabliſhed, *viz.* that where an act of parliament is made for the publick good, the advancement of religion and juſtice, and to prevent injury and wrong, the king ſhall be bound by ſuch act, though not particularly named therein. Plow. 136, 137. in Ld. Berkley's caſe. 11 Co. 68. b. 5 Co. 14. 7 Co. 32.

But, where a ſtatute is general, and thereby (*a*) any prerogative, right, title, or intereſt is deveſted or taken from the king, in ſuch caſe the king ſhall not be (*b*) bound; unleſs the ſtatute is made by expreſs words to extend to him. 11 Co. 68.

(*a*) And it ſeems that the uſual ſaving of the king's right, &c. is only *ex abundanti cautela*, and not of abſolute neceſſity. Show. P. C. 179.

(*b*) But may take advantage of an act of parliament, though not particularly named. 11 Co. 68. b. Leon. 150.

On this foundation and theſe diſtinctions it hath been held,

That the ſtatute of *Weſtm.* 2. (13 *Ed.* 1. *ſtat.* 1.) *de donis* extends to and binds the king; as, where lands were given to the king and the heirs of his body, it was adjudged, that the king's prerogative had not given him a greater eſtate than in the caſe of a common perſon; and that an alienation by him would be a tort and an injury to the donor, which the king cannot do. Plow. 238. &c. Lord Berkley's caſe, cited in 11 Co. 72. 5 Co. 14. Co. 44.

So, it hath been adjudged and alſo held in parliament, that the king is bound though not named, by the (*c*) 13 *Eliz.* *c.* 10. which reſtrains eccleſiaſtical perſons from making leaſes, &c., this being a general law, and for the publick good. 11 Co. 75. Caſe of Magdalen College. 5 Co. 15. b. Roll. Rep. 151.

(*c*) The ſtatute 1 Eliz. c. 19. which reſtrains biſhops from making eſtates, &c. hath a proviſo that it ſhall not extend to the king; which, my Lord Coke ſays, was of abſolute neceſſity; for that otherwiſe the king would be bound by it. 5 Co. 14. b.—It ſeems the law was held otherwiſe on the ſtat. 13 Eliz. c. 10. and therefore where a leaſe was made to the king by a dean and chapter, and the king had aſſigned it over, after that the law came to be held, that the king was bound, the aſſignee had his leaſe made good to him in Chancery againſt the ſtatute, becauſe he could not know the law in a matter ſo dubious. Rol. Abr. 378.

So, the king is bound, though not named, by the ſtatute 32 *H.* 8. *c.* 28. againſt diſcontinuances by huſbands of their wives eſtates, &c., for this being an injury to the wife, it ſhall extend to the king, whoſe moſt immediate concern is to relieve his ſubjects from any injury or wrong. 2 Inſt. 681. Show. Rep. 209.

So,

35 H. 6. 61. Plow. 236 b. 2 Inſt. 89.

So, the king, though not named, is bound by the ſtatute of *Merton*, 20 *H.* 3. *c.* 5. made againſt uſury in doubling the rent, in the caſe of an infant heir who has made default in payment.

Plow. 236. b. 2 Inſt. 99.

So, the king, though not named, is bound by the 10 *c.* of the ſtatute *Merton*, 20 *H.* 3. which ordains, that ſuit to the lord may be done by attorney, *&c.*

Co. Lit. 120.

The king is bound by the 31 *Eliz. c.* 6. againſt ſimony; being a law made for the advancement of religion.

11 Co. 74. b.

So, the king, though not named, is bound by the 27 *Eliz. c.* 4. againſt voluntary conveyances to defraud purchaſers; ſo that a voluntary conveyance to the king is as much void againſt a ſubſequent purchaſer for a valuable conſideration, as in the caſe of a common perſon.

2 Inſt. 169. 4 Mod. 207.

Bound by the ſtatute *Weſt.* 1. (3 *Ed.* 1.) *c.* 5. that none ſhall diſturb elections upon pain of great forfeitures.

2 Inſt. 142. Show. Rep. 209.

Bound by the ſtatute of *Marlbridge*, (52 *H.* 3.) *c.* 22. that none may diſtrain his freeholders without the king's writ.

4 Mod. 207. Show. Rep. 208. Croke's caſe—at the end of the caſe it is ſaid, that there were two inſtances in London where under colour of this prerogative the king's preſentee was preferred; but this is ſaid to have been done by Jefferies, and never conteſted.

By an act of parliament 22 *Car.* 2. *c.* 11. the pariſhes of St. *Michael, Wood-ſtreet*, and St. *Mary, Staining*, in *London*, were united and eſtabliſhed as one pariſh church; and it was provided, that the firſt preſentation ſhould be made by the patron of ſuch of the ſaid churches, the endowments whereof were of the greateſt value; the king was patron of St. *Mary, Staining* (of far leſs value), and a common perſon patron of St. *Michael, Wood-ſtreet*, who preſented Mr. *Crooke;* on a *caveat* entered againſt the inſtitution, it was determined by civilians, by the advice of lawyers at Doctors-Commons, that this ſtatute though in the affirmative, and without any negative words, extended to, and ſo far bound the king, as to deprive him of any preference he might have by his prerogative, as in caſes where his intereſt is intermixed with others; and that the act of parliament giving a new eſtate to the king, and preſcribing the manner of enjoyment, the method limited muſt take place of the king's prerogative.

Blow. 240. Hob. 146. 7 Co. 32. Moor, 540.

But, as acts of parliament are to be conſtrued according to the ſubject-matter, and not to be extended further than the intention of the legiſlature; hence in variety of caſes we find it determined, that general words in an act ſhall not ouſt the king of his prerogative.

Lit. § 140. Co. Lit. 98. Plow. 240. 11 Co. 68. b.

As, on the ſtatute *quia emptores terrarum*, which enacts, *that none ſhall alien lands in fee to hold of himſelf;* yet it is held, that the king may give lands in fee to hold in frankalmoigne or other ſervices.

Plow. 240. b. 244. a. 11 Co. 68. b.

So, the 12 *c. Mag. Cha.* which provides, *quod communia placita non ſequantur curiam noſtram ſed teneantur in aliquo certo loco*, does not bind the king; but that he may bring an action of debt or *quare impedit* in *B. R.*

Plow. 240. a.

So, of the ſtatute *Weſt.* 2. (13 *Ed.* 1. *ſtat.* 1.) *c.* 17. which provides, that where divers inheritances by knight's ſervice deſcend, *quod ille dominus de cætero habeat maritagium de quo anteceſſor ſuus prius fuerit feoffat.*

Not

Not bound by the ſtatute of *Marlbridge* (52 *H.* 3.), *c.* 9.; but all coparceners, in reſpect of the lands deſcended on them, muſt each of them do ſervice, as before the making of the ſtatute. Plow. 240. b.

Not bound by the ſtatutes of (*a*) limitation, nor by the ſtatute of *Weſtm.* 2. (13 *Ed.* 1. *ſtat.* 1.) *c.* 5. which makes a plenarty for ſix months a good plea. 11 Co. 68. Plow. 244. Comp. Inc. 108.

(*a*) *Vide* 3 Inſt. 188. [Though the crown is not bound by the ſtatute of limitations, yet a grant may be preſumed from great length of poſſeſſion. It was ſo done in the caſe of the Corporation of Hull v. Horner, Cowp. 102.: not that, in ſuch caſes, the court really think a grant has been made, becauſe it is not probable a grant ſhould have exiſted, without its being upon record; but they preſume the fact, for the purpoſe and from a principle of quieting the poſſeſſion. *Per* Lord Mansfield, Cowp. 215.]

Nor by the ſtatute 27 *E.* 1. (*ſtat.* 1. *c.* 4.) which gives the trial by *niſi prius* in the country. 11 Co. 68.

Neither the ſtatute merchant, thoſe concerning the ſtaple, the ſtatute of frauds, nor thoſe relating to bankrupts, extend to, or bind the king. Jon. 203. Cro. Car. 148. Salk. 162. pl. 1.

There are alſo ſtatutes, which, as my Lord *Hobart* ſays, were made to put things in an orderly form, and to eaſe a ſovereign of labour, but not to deprive him of power, which cannot be ſaid to bind the king. Hob. 126.

As the 27 *H.* 8. *c.* 27. which enacts that all grants concerning the court of augmentations ſhould be under the ſeal of that court; yet grants under the great ſeal have been held good. Dyer, 50. a.

So, the ſtatute 25 *H.* 8. *c.* 21. which directs the manner of granting diſpenſations, though it ſays that diſpenſations ſhall not otherwiſe be granted; yet the king's power is not thereby reſtrained, but that by virtue of his prerogative he may grant them as before. Hob. 146.

So, on the ſtatute 28 *H.* 8. *c.* 15. for the trial of piracy by commiſſion, it hath been held, that the trial may be, though the Chancellour does not nominate the commiſſioners, as that act appoints. Dyer, 225. Hob. 146.

So, on the ſtatute 9 *E.* 2. *ſtat.* 2. that the queen may make ſheriffs without the judges. Dyer, 303.

So, on 31 *H.* 6. *c.* 5. the office of alnage was granted by the queen, without the bill of the treaſurer; and held good. Hob. 146.

By a private act of parliament 1 *Jam.* 2. the pariſh of St. *James* was taken out of the pariſh of St. *Martin*, and made an independent pariſh; and it was provided by the ſtatute, that Dr. *Teniſon*, the then vicar of St. *Martin*'s, ſhould be the firſt rector of St. *James*'s pariſh; and that the patronage of the advowſon ſhould belong to the Biſhop of *London* and the Lord *Jermin, alternis vicibus*; the firſt rector, after vacation by Dr. *Teniſon*, to be preſented by the Biſhop of *London*, and the next by the Lord *Jermin* and his heirs, and ſo on. Dr. *Teniſon* was promoted to the biſhoprick of *Lincoln*, by which the church of St. *James* became void; and it was adjudged, that although it was by the ſtatute expreſsly appointed, that the Biſhop of *London* ſhould preſent upon the avoidance, yet the ſtatute deſigned only to direct the methods and turns between the patrons, and not to exclude the king of his prerogative; and although this was a church newly erected, yet the king having the prerogative to preſent to all churches where the incumbent is promoted, ſhall have it in this church when it is erected. Show. P. C. 164. 4 Mod. 200. 2 Salk. 540. pl. 2. Show. Rep. 413. 441. 493. 3 Lev. 377. 382. Ld. Raym. 23. S. C. Lev. Ent. 344. Comb. 205. 300, 301. Carth. 313. 2 Salk. 553. pl. 2. Holt, 585. pl. 1. between the Queen, and Biſhop of London, and Dr. Birch.

6. That no Laches can be imputed to him; and therein, of the Maxim, *Nullum Tempus occurrit Regi.*

Stamf. Prerog. 32, 33. Plow. 143. 7 Co. 28. Jon. 79. Hard. 24.

From the preſumption that the king is daily employed in the weighty and publick affairs of government, it hath become an eſtabliſhed rule at common law, that no laches ſhall be imputed to him, nor is he any way to ſuffer in his intereſts, which are certain and permanent; and this his privilege (*a*) *quod nullum tempus occurrit regi*, has been confirmed by the ſtatute *de prærogativa regis*.

(*a*) *Vigilantibus & non dormientibus jura ſubveniunt*, is a rule for the ſubject; but *nullum tempus occurrit regi*, is the king's plea; for there is no reaſon that he ſhould ſuffer by the negligence of his officers, or by their compacts or combinations with the adverſe party. Hob. 347.

Lit. § 178. Co. Lit. 118. a.

Hence it was held, that if the king's villein had purchaſed land, and aliened before entry by the king, yet, upon office found, the king might have entered, *quia nullum tempus occurrit regi*; though it was otherwiſe in the caſe of a common perſon.

Co. Lit. 294.

So, in a writ of right of advowſon brought by the king, the tenant ſhall not tender the *di mark*, becauſe *nullum tempus occurrit regi*; and therefore the king ſhall allege, that he or his progenitor was ſeiſed without ſhewing any time.

Co. Lit. 90. b.

So, an action of account lay at common law againſt the executors or adminiſtrators of the king's debtor or receiver; for being ſuppoſed buſied and employed in the weighty affairs of the kingdom, it was not thought reaſonable that he ſhould ſuffer in his treaſure by an omiſſion occaſioned perhaps by ſuch his attendance.

Co. Lit. 41. b.

For this reaſon it is that there can be no occupant againſt the king; ſo that if the king grants lands to *A.* for the life of *B.*, and *B.* dies, no man by his entry can gain himſelf a title againſt the king; though it was otherwiſe in the caſe of a common perſon.

Co. Lit. 57.

So, there can be no tenant at ſufferance againſt the king; but he who holdeth over is an intruder, becauſe no laches can be imputed to the king for not entering.

Bro. tit. Diſſeiſin (4). Hob. 322. Roll. Abr. 659.

Therefore, if the king be ſeiſed in fee of the manor of *B.*, and a ſtranger erect a ſhop in a vacant plot of it, and take the profit of it without paying any rent to the king; and after the king grant over the manor in fee, and the ſtranger continue in the ſhop and occupy it as before, this is no diſſeiſin; for the firſt entry of the ſtranger was no diſſeiſin, but an intruſion on the king's poſſeſſion; for that the king's title appearing on record, the entry in *pais*, which is not an act of equal notoriety, will not diveſt it out of him: if then the king is not diſſeiſed, his conveyance of the freehold is good, and the grantee is ſeiſed by virtue of it; and, conſequently, cannot be ſaid to be diſſeiſed by the ſtranger who has made no entry on him after the king's conveyance, but only continued the old intereſt which he had before the grant; and ſo remains an intruder ſtill, and liable to an action of treſpaſs or ejectment for it.

A per-

A perſon cannot be indicted on the ſtatutes againſt forcible entries for entering into the king's poſſeſſions, becauſe he cannot be diſſeiſed. Co. 69. 10 Co. 112. Dalt. Juſt. 303.

A deſcent caſt is no plea againſt the king, nor does it take away his right of entry. Plow. 243 a. 2 Leon. 31.

If the king's goods become wreck, the lord of the manor cannot take them, but the king may claim them after the year and the day; for this reaſon, that he is ſuppoſed employed in the publick affairs, and therefore no lapſe of time ſhall injure him. 2 Inſt. 168. Plow. 243.

For this reaſon the lord of the manor cannot take the king's beaſts, as ſtrays; as alſo that this privilege of waifs and ſtrays is derived from the crown, and cannot be ſuppoſed to extend farther than a liberty to take the goods and cattle of a common perſon. 49 E. 3. 4. Kitchen, 81.

If a grant be made to the king of the next avoidance of a living, and a ſtranger upon the death of the then incumbent preſent, and his preſentee continue in ſix months, and die, yet the king may preſent another, *quia nullum tempus occurrit regi*. So, if a grant had been made to the king of all ſuch preſentments as ſhould happen within twenty years, and in the twenty years there happen ten preſentments which are filled up by a ſtranger, yet the king ſhall preſent to them over again. Plow. 243 a.

If the king be patron of a church, and he omit to preſent within ſix months, the ordinary cannot preſent for the lapſe, but is only to ſequeſter the profits, and ſerve the cure till the king thinks proper to preſent; but if in this caſe the ordinary collate his clerk, and afterwards the king preſent, the clerk ſo collated cannot be turned out without a *quare impedit*. Bro. title Preſentment (24) Comp. Incumb. 118.

If the king preſents to a church, and his clerk is admitted and inſtituted, yet the king may before induction repeal and revoke his preſentation; and it is held in this caſe, that the preſenting another is a repeal in law, without any other notice to the ordinary (*a*). 7 E. 4. 32. Dyer, 290. 327. 360. [(*a*) But to free the ſecond preſentation of all ſuſpicion of being obtained by fraud in deceit of the king, it is proper that it ſhould make expreſs mention of the firſt preſentation. Gibſ. 795. Watſ. c. 20.]

So, where a title by lapſe comes to the king, if the king doth preſent, and his preſentee is inſtituted, yet the king may revoke his preſentation, and ſo null the inſtitution at any time before his clerk is inducted; or, if his clerk be inſtituted upon ſuch title, and die before his induction, the king may preſent another, his turn not being ſerved by the inſtitution only of his clerk. Leon. 156. Wright v. Biſhop of Norwich.

But, though the king may remove the patron's or ſtranger's clerk that comes in upon his lapſe, yet, if ſuch clerk happens to (*b*) die incumbent of the church before the king doth preſent, the king hath loſt the advantage of the lapſe, and ſhall not preſent afterwards, or remove the patron's ſecond preſentee, becauſe the king is to have but one turn, and that the next; and if the law ſhould be otherwiſe, the king, by ſuffering divers uſurpations upon his lapſe, might even diſinherit the very patron; and the rule *nullum tempus occurrit regi*, is not to take place where the king is limited to a time certain. 7 Co. 28. Owen, 2. And. 148. Cro. Eliz. 44. Cro. Jac. 53. 216. Hetley, 125. Bulſ. 28. Moor, 269. Fitzg. 30. (*b*) Or, if the church becomes void by reſignation or deprivation, unleſs ſuch reſignation were by fraud or covin. Cro. Jac. 216. Owen,

Owen, 89. 4 Leon. Caſe 351*. ——— * By ſtat. 9 G. 3. c. 16. (which is called the *Nullum tempus* act, and was brought into parliament by Sir Geo. Saville) the king ſhall not ſue, &c. any perſon, &c. for any lands, &c. (except liberties and franchiſes), or any title which has not firſt accrued within ſixty years before the commencement of ſuch ſuit, unleſs he has been anſwered the rents within that time, or they have been in charge, or ſtood *inſuper* of record, and the ſubject ſhall quietly enjoy againſt the king, and all claiming under him, by patent, &c. ——This extends not to eſtates in reverſion, or remainder, or limited eſtates. ——Theſe lands ſhall be held on the uſual tenures, &c. ——— Uſual fee-farm rents confirmed. ——— Putting in charge, ſtanding *inſuper*, &c. good only when on verdict, demurrer, or hearing, the lands, &c. have been given, adjudged, or decreed to the king. [And preſcription is now pleadable againſt the crown even in the caſe of franchiſes and offices; for by ſtat. 32 Geo. 3. c. 58. ſix years' poſſeſſion of a corporate office gives the corporator a preſcriptive title upon an information in the nature of a *quo warranto*, exhibited by the attorney-general or other officer on the behalf of the crown, by virtue of any royal prerogative, or otherwiſe. Neither is it competent to the crown to queſtion any derivative title, where the perſon from whom it is derived was in exerciſe *de facto* of the office or franchiſe, in virtue of which he communicated the title for a like period of ſix years.]

## 7. Of his Prerogative in his Suits and Proceedings in Courts of Juſtice.

Thel. Dig. l. 1. c. 3. 3 Inſt. 136. 1 Roll. Abr. 373.

[The king, though the chief and head of the kingdom, may redreſs any injuries he may receive from his ſubjects by ſuch uſual common law actions as are conſiſtent with the royal prerogative and dignity. He may too ſue in Chancery for a matter in equity.

2 Lev. 82.

A declaration for the king ought regularly to be in the name of his attorney-general; though where it was in the name of the king himſelf, *viz. coram domino rege venit dominus rex*, it was, upon demurrer for this cauſe, adjudged good.

3 Bl. Com. 258.

But the more effectual means of aſſerting the rights of the crown, and redreſſing its injuries, are thoſe which are obtained by the prerogative modes of proceſs. Such is that by inquiſition or inqueſt of office: which is an inquiry made by the king's officer, his ſheriff, coroner, or eſcheator, *virtute officii*, or by writ ſent to them for that purpoſe, or by commiſſioners ſpecially appointed, concerning any matter that entitles the king to the poſſeſſion of lands or tenements, goods or chattels. This is done by a jury of no determinate number; being either twelve, or leſs, or more.

Stamf. Pr. 55. b.

*Stamford* lays it down, that in all caſes where a ſubject ſhall not have poſſeſſion, in deed or in law, without entry, the king will not be entitled without office found, or other matter of record.

*Ibid.*

As, if the king's tenant aliens in mortmain, or without licence, the king's title muſt be found by office.

Sembl. Lev. 1 R. Cro. Car. 173. Sir W. Jon. 78. 217.

So, if the king claims upon a forfeiture, or (*b*) a condition broken.

(*b*) Sav. 70. 2 Ro. 215.

Stamf. *ubi ſupra.*

So, if the king claims the lands of an idiot, lunatick, *&c.*, the perſon ought to be found an idiot, *&c.* by office.

*Ibid.*

So, if he claims the year, day, and waſte, of a felon attainted, or the temporalties of a biſhop for a contempt.

Sav. 8.

So, if he claims a freehold or inheritance as forfeited for a contempt.

Attorney-General v. Wheeden, Park. 267.

So, if he claims as forfeited to the crown, *choſes en action*, which belonged to an alien enemy. And in ſuch caſe, a peace before the inquiſition taken, diſcharges the forfeiture.

Theſe

These inquests of office were devised by law, as an authentick means to give the king his right by solemn matter of record; without which he in general can neither take, nor part from any thing. For it is part of the liberties of *England*, and greatly for the safety of the subject; that the king may not enter upon, nor seize any man's possessions, upon bare surmises without the intervention of a jury. And although a defendant is now permitted to traverse these inquests (*a*), and therefore they are not conclusive evidence, yet, as the legislature has directed (*b*), that inquisitions shall be taken publickly and in an open place, and has empowered every one to give evidence openly before the inquest, the court will (*c*), in some cases, order reasonable notice to be given of the issuing of such commission. 3 Bl. Com. 259. (*a*) St. 2 & 3 E. 6. c. 8. (*b*) Stat. 34 E. 3. c. 13. 36 E. 3. c. 13. 23 H. 6. c. 16. 1 H. 8. c. 8. 3 H. 8. c. 2. (*c*) The King v. Daly, 1 Ves. 269.

Where an estate is given to an alien, or in trust for an alien, though such estate doth not actually vest in the king, until an office is found, yet he hath before office found such a right to it, as will entitle him to the assistance of a court of equity to enforce a discovery of the fact of alienage. Attorney-General v. Dupleſſis, Park. 144.

If the office be found against the king, a *melius inquirendum*, or farther inquiry under the former commission, may be awarded. But in good discretion no *melius inquirendum* shall be awarded in such case, without sight of some record, or other pregnant matter for the king, to shew the former was mistaken. And by pregnant matter for the king, is meant matter pregnant with evidence of the king's right. Stoughter's case, 8 Co. 168. Knight *ex parte* Dupleſſis, 2 Ves. 555. The *melius inquirendum* is grantable only on the part of the crown, and is given, because the crown cannot traverse, as the subject can. 3 Atk. 6.

But, if the *melius inquirendum* be found against the king, he is thereby precluded from having another *melius inquirendum*; for if this were allowed, it would lead to infinity, for by the same reason that he might have a second, he might have them without end. However, if the first writ of *melius inquirendum* were repugnant in itself, if it did not give authority to find such an office as was found, as, where the writ was to inquire, whether at the time of the death of a person who died in the reign of Queen *Elizabeth*, the manor of *O.* was holden of the lord the king that now is, another writ of *melius inquirendum* may be awarded. Stoughter's case, *ubi supra*.

If the king's title be found to lands and tenements, the king shall be in possession by the office only without seizure, if the possession be vacant, or if the title be found to a local office, or of which continual profit may be taken. Stamf. Pr. 53, 54. 9 Co. 95. b. 4 Co. 58. a.

But, if the king's title be found by office to an incorporeal inheritance, (as, an advowson, &c.) the king shall not be in possession before seizure; for if the king, after office, presents, the defendant in a *quare impedit* may traverse the king's title without traversing the office. 9 Co. 95. b.

And in all cases where a common person is put to his action, there, upon an office found, the king is put to his *scire facias*; for an office entitles the king to an action only, and not to an entry. But, where a common person may enter or seize, there, an office without a *scire facias* shall suffice for the king. 9 Co. 26. b. Stamf. Pr. 55. a.

Stamf. Pr. 54. b. If the king do not ſeize within a year and a day after office found, he ought to have a *ſcire facias* before ſeizure.

*Id.* 56. a. But no office is neceſſary, if the king's title appears by other matter of record.

*Id.* 54. a. 4 Co. 58. Sav. 7. 9 Co. 95. b. So, if a poſſeſſion in law be caſt upon the king, no office is neceſſary, but the king may ſeize without it. As, if the king has a title by deſcent in remainder or reverter; for the freehold is caſt upon him by law. So, if he is entitled by eſcheat; or is entitled to the temporalties of a biſhop in the time of vacation.

Sav. 8. 2 Ventr. 270. So, where the king ought to have chattels or profits of lands for a contempt, he may ſeize without office; as, upon an outlawry the goods of a prior alien. So, in the caſe of ſimony the king ſhall preſent without office. So, he ſhall nominate to an office void by *ſt.* 5 & 6 *Ed.* 6. *c.* 16.

And by *ſt.* 33 *H.* 8. *c.* 20. in caſe of attainder for high treaſon, the king ſhall have the forfeiture inſtantly, without any inquiſition of office.

2 Bl. Com. 261. Another prerogative proceſs is an information, filed in the Exchequer by the Attorney-General. This is a method of ſuit for recovering money or other chattels, or for obtaining ſatisfaction in damages for any perſonal wrong committed in the lands or other poſſeſſions of the crown. It differs from an information filed in the court of King's Bench, in that *this* is inſtituted to redreſs a private wrong, by which the property of the crown is affected, *that* is calculated to puniſh ſome publick wrong, or heinous miſdemeanour in the defendant.

The moſt uſual informations are thoſe of *intruſion* and *debt*: *intruſion*, for any treſpaſs committed on the lands of the crown, as, by entering thereon without title, holding over after a leaſe is determined, taking the profits, cutting down timber, or the like; and *debt*, upon any contract for monies due to the king, or for any forfeiture due to the crown upon the breach of a penal ſtatute.

There is alſo an information *in rem*, when any goods are ſuppoſed to become the property of the crown, and no man appears to claim them, or to diſpute the title of the king. As antiently in the caſe of treaſure-trove, wrecks, waifs, and eſtrays, ſeized by the king's officer for his uſe. Upon ſuch ſeizure an information was filed in the Exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects; and at the ſame time there iſſued a commiſſion of *appraiſement* to value the goods in the officer's hands: after the return of which, and a ſecond proclamation had, if no claimant appeared, the goods were ſuppoſed derelict, and condemned to the uſe of the crown. And when, in later times, forfeitures of the goods themſelves, as well as perſonal penalties on the parties, were inflicted by act of parliament for tranſgreſſions againſt the laws of the cuſtoms, and exciſe, the ſame proceſs was adopted in order to ſecure ſuch forfeited goods for the publick uſe, though the offender himſelf had eſcaped the hand of juſtice.

An

An information of *intruſion* is in the nature of a treſpaſs *quare clauſum fregit*. It may be general therefore, that the king was ſeiſed of certain lands, without deſcribing the particular ſpecies or quantity. So, on the other hand, it is ſufficient for the defendant to plead only ſo much as ſhews that ſhe has title to the poſſeſſion: as, where the defendant ſhewed, that ſhe had a jointure of a third part, without anſwering to the reſidue; for by that ſhe had the poſſeſſion of the whole in common with the king. Sav. 48. Semb. Mo. 370. 376.

At common law, upon an information for *intruſion*, the king by his prerogative might put the defendant upon ſhewing his title ſpecially. And, if he pleaded *not guilty*, he ſhould be immediately put out of his poſſeſſion: for that, regularly, the king's title appeareth of record, and therefore the defendant may take knowledge thereof, and the rather, for that in every information of *intruſion* it is ſpecified of whoſe poſſeſſions the lands, *&c.* were. Dy. 238. b. 4 Inſt. 116. *Not guilty* pleaded. Sav. 68.

If the defendant ſhews an inſufficient title in form, the attorney-general may demur: but if the attorney-general in ſuch caſe do not demur, but join iſſue on a fact alleged, which is found againſt him, he ſhall not afterwards take advantage of the defect. Dy. 238. b.

By *ſt.* 21 *Ja.* 1. *c.* 14. if the king, or thoſe claiming under him, or thoſe under whoſe title the king claims, have not been in poſſeſſion, or received the profits within twenty years, the defendant may plead the general iſſue, and ſhall not be ouſted of his poſſeſſion, till the title be found or adjudged for the king.

If the plea allege ſeveral facts, the king by his prerogative may traverſe them all, though a common perſon ought to traverſe but one. Sav. 19.

So, if the plea allege a title, which avoids the poſſeſſion in the king ſuppoſed by the information, the king needs not maintain the information, but may traverſe the title alleged by the plea. Sav. 61.

And it is ſufficient, if the king, by his replication, traverſes ſo much of the title as encounters the information, without anſwering the whole title alleged by the defendant: as, if to an information for intruſion in the moiety of a manor, the defendant ſays, *A.* was ſeiſed of the whole, and died ſeiſed, by which there was a deſcent to the defendant; it is ſufficient to traverſe, *abſque hoc*, that he died ſeiſed of ſuch moiety. *Ibid.*

After judgment in an information for *intruſion*, execution ſhall be ſometimes by injunction; or it may be by *amoveas manum*: and thereupon every party to the information, or claiming under him, ſhall be removed from the poſſeſſion. But a ſtranger to the information ſhall not be debarred of his entry; for no judgment of ſeiſin is given, nor does an *habere facias ſeiſinam* go.] Sav. 35. Hardr. 460. 462.

As the king is the fountain of juſtice, and all courts of juſtice derive their authority from him, hence he is ſuppoſed to be always preſent in court; and therefore it hath become an eſtabliſhed principle of law, that the king cannot be nonſuit in any action or information in which he is ſole plaintiff. Co. Lit. 139. Bro. Nonſuit (68). Sav. 56.

Co. Lit. 139. 2 Roll. Rep. 33 136.

But it ſeems that any informer *qui tam*, or plaintiff in a popular action, may be nonſuit, and thereby wholly determine the ſuit, as well in reſpect of the king as of himſelf*.

* But the king may afterwards proceed for his ſhare of the penalty, in the uſual way, as if no ſuch ſuit had been inſtituted, provided the proſecution is commenced in due time.

Co. Lit. 139. Sid. 420. Salk. 21.

Alſo the king's attorney-general may enter a *nolle proſequi*, which has the effect of a nonſuit to any information or action brought by the king only.

pl. 11. like point, where it is ſaid by the Ch. J. that the crown, notwithſtanding a *nolle proſequi*, may award new proceſs upon the ſame indictment.

Vent. 33. The King v. Benſon.

In an information for extortion, iſſue was joined, and the day the jury were returned, the king ſent a writing under his ſign manual to Sir *Thomas Fanſhaw* clerk of the crown, to enter a ceſſer of proſecution; and *Palmer*, attorney-general, affirmed, that the king may ſtay proceedings; yet notwithſtanding the court proceeded to ſwear the jury, and ſaid they were not to delay for the great or little ſeal; whereupon the attorney entered a *nolle proſequi*.

Ld. Raym. 721.

No proſecutor upon an (*a*) indictment can enter a *nolle proſequi*, without leave of the attorney-general.

(*a*) That entering *nolle proſequis* upon indictments, began in Charles 2d's time. 6 Mod. 263. *per* Holt, Ch. J.

4 Inſt. 17. Plow. 243. Roll. Rep. 290.

It is a rule of the common law, that the king by his prerogative may ſue in what court he pleaſes; and therefore may bring a writ of right or a *quare impedit* in the court of King's Bench.

[And in an information upon a ſtatute, the king's prerogative to lay it in any county cannot be taken away without expreſs negative words in the ſtatute. 4 Inſt. 172. Cro. Car. 525. 2 Str. 749. Parker, 182.]

Vent. 17. The King v. Webb.

In an action for embezzling the king's goods, which was laid in the declaration to be in *London*, it was moved for the king, that the county might be changed; and the court held, the king might chooſe his county, and might waive that which he had ſeemed to have elected before, as he may waive his demurrer and join iſſue.

Hil. 6 G. 2. in B. R. Rex v. Hallam, &c.

If a perſon be guilty of two capital offences, the king may elect which of them to try him on firſt; and accordingly, where two perſons murdered the poſt-boy in *Lincolnſhire*, and afterwards committed a robbery in *Wilts*, for which they were taken and in cuſtody in *Wilts*; the attorney-general moved for a *habeas corpus* to the ſheriff of *Wilts*, to deliver them to the ſheriff of *Lincoln*, and another to the ſheriff of *Lincoln* to receive them; which was granted; the court allowing the crown had ſuch election.

Lamb v. Gunman, Parker, 143.

[Where the king's revenue is concerned in the event of a cauſe, it ſhall be removed from any other court where the action is brought, into the office of pleas of the Exchequer.

Thus, in an action between the Duke of *Cleveland*'s bailiff and ſome other perſons of the town of *Rye*, upon a demand of priſage of wine, an iſſue was joined upon this queſtion, whether the town of *Rye* was entitled by charter to be exempted from this claim of priſage? The king had a reverſionary intereſt in this priſage, becauſe it was granted to the Duke of *Cleveland* in tail; and in reſpect of this intereſt it was holden, that the king had a right to deſire that the cauſe might be removed into the Exchequer; and the cauſe was accordingly removed.

Again,

Again, an action was brought againſt a Mr. *Pennington*, who was the collector at *Briſtol*, for money had and received by him, and it appeared that the action was brought for money received by him on account of the duties on glaſs, whereupon the court of Exchequer removed it, and ordered it to be tried in the Exchequer, and not in any other court; the queſtion being, whether Mr. *Pennington* was entitled to retain that money ſo received as duties on glaſs, or not? Jan. 29, 1754. Anſtr. 214.

So, an action brought by Mr. *Baring* againſt *Sutlin*, one of the principal officers in the port of *London*, in order to get back monies which had been charged to him for duties upon ſome goods which he thought he was not liable to pay, was removed into the court of Exchequer. An. 1773. *Ibid.*

So, in an earlier period, in the year 1702, two actions were removed. One was an action of treſpaſs, the other of trover: one was for entering a ſhip and ſeizing goods for non-payment of duties, and the other was trover for the ſhip itſelf. Both theſe actions were removed; and the minute only ſays, "there being "an information for the duties." Now an information for the duties is nothing more than the king's action of debt; and therefore there was nothing properly of prerogative in that, except merely the form of ſuing by information, inſtead of the common action of debt: but the ground of removal muſt have been, that a part of the queſtion in thoſe actions would be, whether the duties were payable or no. If the duties were payable, then it might follow, that the party might have a right to enter the ſhip and look for the goods, and might have a right to ſtop the ſhip and the goods till the duties were paid. If no duties were payable, this juſtification failed. *Ibid.* *Per* Eyre, C. B.

An action of treſpaſs for taking goods by colour of a warrant to levy a penalty of 100*l.* forfeited by the plaintiff, he having been convicted on an information before the commiſſioners of exciſe, for not making due entries of teas ſold by him, was removed into the court of Exchequer, for that the action propoſed to draw into queſtion elſewhere that debt or forfeiture, wherein the king had an intereſt, a moiety thereof, as ſoon as it was fixed and veſted by judgment, becoming a regular debt to the crown. Cawthorne v. Campbell, Anſtr. 205.

Again, an ejectment was brought in 1710, in the court of King's Bench; and it was, as to part of it at leaſt, for lands which were part of the queen's eſtate. There was an application to the court of Exchequer to ſtay the proceedings, and the parties were heard upon it. The attorney-general attended, and after the hearing, it was put off for a day or two; at length the entry is, that an injunction iſſued *pro dominâ reginâ*. So that the action was not removed, but, ſimply an injunction went to ſtay proceedings. And the reaſon was, if the action had been removed, the queſtion could not have been tried, even in the office of Pleas, becauſe the queen's title cannot be tried in an ejectment. The queen was in poſſeſſion; her hands muſt be removed by ſome other courſe of proceeding than an ejectment; and therefore it Anſtr. 215.

was

was fruitleſs to think of removing it, and it remained under an injunction. It may be ſaid, that it might be as well left to the Queen's Bench to determine that the queen's lands could not be recovered in ejectment. To be ſure they might, if the prerogative of the queen had not been, that the queen had a right to prevent that queſtion from being diſcuſſed there.

Vaugh. 65. R. 13, E. 4. 8. a. The king may amend his declaration in the ſame term, but not in another term.

2 Ro. 41. The king may waive his replication in another term, when the defendant is ready to rejoin.

Cro. Car. 347. Vaugh, 65. Hardr. 455. And in an information he may waive his demurrer to the defendant's plea, and reply to iſſue. pl. 322. a.

Cro. Car. 347. A defendant cannot waive his plea, and plead the general iſſue without the conſent of the attorney-general.

Stamf. 65. b. Vaugh. 65. Hardr. 459. pl. 322. a. But, after iſſue joined, the king may, in the ſame term, waive the iſſue and demur, or take another iſſue. 13 E. 4. 8. a.

Semb. Vaugh. 64. 1 Mod. 276. R. 13. E. 4. But, if the king joins iſſue upon his title he cannot afterwards waive it, to traverſe the title of the defendant. 8. a.

Vaugh. 62. Where the king's title appears to be no more than a bare ſuggeſtion, the king can, no more than a common perſon, (and for the ſame reaſons,) forſake his own title, and endeavour only the deſtroying of the defendant's title; for the weakening of the defendant's title without more, can no more make a good title to the king, than it can to a common perſon.

Rex v. Muſters, Parker, 50. Where a defendant pleads a title againſt the crown, and the attorney-general will not reply or demur in a reaſonable time, the court will order judgment to be entered for the defendant, unleſs the attorney-general, upon being attended, will either enter a *nolle proſequi*, or proceed.

Rex v. Hare, 1 Str. 266. If upon a *ſcire facias* out of the petty-bag office to repeal letters patent, one defendant pleads to iſſue, and as to the other demurrer is joined, the king may bring on either the trial or the demurrer firſt, as he pleaſes.

Sav. 2. In the Exchequer, no *niſi prius* ſhall be granted where the king is a party, unleſs the attorney-general conſents to it.

Cro. Car. 348. So, the trial ſhall be at *niſi prius*, and not in bank, if the king requires it, though it be upon an indictment removed by *certiorari*.

Cro. Car. 590. If a title appears upon record for the king, the court *ex officio* ſhall adjudge it for him.

Semé. Hardr. 170. If the attorney-general confeſſes the plea of the party, and thereupon he is diſcharged, where the plea is no bar in law, the king ſhall not be bound; for though a confeſſion by the attorney-general in a matter of fact binds the king, yet it is not ſo in a matter of law.

It

It ſeems queſtionable, whether, after a *diſtringas* and a jury returned upon it, the attorney-general can at his pleaſure ſtay trial. Lake's caſe, 4 Leon. 32.

He cannot waive the iſſue after verdict. Hardr. 455.

The king cannot be ſued by his ſubjects by writ, for he cannot iſſue a command to himſelf; though it is ſaid in ſome books (*a*), that before the time of *Edw.* I. the king might be ſued as a common perſon, the form being, "*Præcipe Henrico Regi Angliæ.*" Thel. Dig. l. 4. c. 1. (*a*) 22 E. 3. 3 b. pl. 25. 24 E. 3. 55. b. pl. 40. 43 E. 3. 22. *Sed vide* Stamf. Pr. Reg. 42.

Neither can any one vouch the king, for that is in nature of an action. So, if a fine is to be levied by the king of lands, it muſt be by render, and not by writ of covenant. H. 9 H. 6. 3 & 4 Thel. Dig. l. 4. c. 2. § 2. Cro. Car. 96-7.

The common law methods of obtaining redreſs or reſtitution from the crown of either real or perſonal property, are, 1. By *petition de droit*, or petition of right. 2. By *monſtrans de droit*, manifeſtation or plea of right; both of which may be preferred or proſecuted either in the Chancery or Exchequer. 3 Bl. Com. 256. Though Sir W. Blackſtone calls the *Monſtrans de droit* a common law remedy, yet Stamford's opinion is expreſsly, that the *monſtrans de droit* was given by 36 E. 3. and did not lie at common law, and in Anderſon's report of the Sadlers' caſe (1 And. 181.) it is affirmed by the court, that *the traverſe* and *monſtrans de droit* are both given by that ſtatute. And of the ſame opinion is the Lord Keeper Sommers in his argument in the Banker's caſe. 11 St. Tr. 154.—It is ſaid, that at this day a *monſtrans de droit* lies only in the Chancery or Exchequer, except in a ſpecial caſe, as in Lady Broughton's caſe, where the *monſtrans de droit* was brought in B. R. becauſe the record of the conviction and ſeizure were there. Skin. 610.—A ſuit by petition may be to the king in parliament, or, according to Comyns (Dig. tit. Prerogative, D. 80.), in any other court. If it be in parliament, it may be eſtabliſhed by act of parliament, or purſued as in other caſes. Stamf. Pr. 72. b.

There is alſo a remedy given by ſtatute 2 *E.* 6. *c.* 8, and that is by way of traverſe to the king's title.

At common law, when the king was ſeiſed of any eſtate of inheritance or freehold by any matter of record, were his title by matter of record judicial, as, attainder; miniſterial, as, by office; or by conveyance of record, as, by fine, deed enrolled, *&c.*; or by matter in fact, and found by office of record on oath, as by alienation in mortmain, purchaſe by alien born, *&c.*, he who had right was put to his petition of right in nature of a real action to be reſtored to his freehold and inheritance. 4 Co. 55. a.

And this method of proceeding by petition is proper, where the king ſeizes the goods or lands of a ſubject without due order of law, or enters into the lands of another without title or office found. Stamf. Pr. 72. a. b.

So, if he does not pay an annuity granted by him, or iſſuing out of lands in his hands; or does not pay a debt, wages, *&c.* Lord Sommers's Argument, 11 St. Tr. 154, 5.

So, if the king be entitled by a record not traverſable, as, by a recovery in the king's court, by aſſent, without title; or by an erroneous judgment; for error ſhall not be allowed without a petition. Stamf. Pr. 74. a.

And in all caſes where the entry would be tolled, if the land were in the hands of a common perſon; or, where the party controverts the king's title, the proceeding is by petition. Stamf. Pr. 74. b. *Per* Holt, 608.

And

Stamf. Pr. 74. a. Br. tit. Petition, pl. 35, 36. Lane, 58.

And where a traverſe or *monſtrans de droit* does not lie, ſuit ought to be to the king by petition: as, if the king be entitled by double matter of record. But, if *A.* be attainted in *B. R.* and it be found by inquiſition in the Exchequer, that he was ſeiſed of the manor of *D.* this will not be in judgment of law a double matter of record; ſo as to force the owner of the land to his petition, the record of the attainder not being in the ſame court with the inquiſition.

Sir W. Jon. 78.

Where an eſtate is forfeited by attainder, *&c.* none can ſue by petition before office found, for till office, the eſtate is not veſted in the king.

Finch's L. 256.

The party muſt be careful to ſtate truly in the petition the whole title of the king, elſe the petition will abate. For upon an iſſue in the petition found againſt the king, he ſhall be concluded for ever to claim by any of the points contained in the petition.

Lord Sommers's Arg. 11 St. Tr. 249.

The manner of anſwering petitions, it ſhould ſeem, was formerly very various: which variety did ſometimes ariſe from the concluſion of the party's petition, ſometimes from the nature of the thing; and ſometimes from favour to the party; and according as the indorſement was, the party was ſent into the Chancery, or the other courts. If the indorſement is general, *ſoit droit fait al partie*, which is now the uſual indorſement, the petition muſt be delivered to the chancellor of *England*, and then a commiſſion (*a*) iſſues to inquire of the truth of the ſuggeſtion; and that being found, ſo that there is a record for him, thus warranted, he is let in to interplead with the king: but, if the indorſement is ſpecial, then the proceeding is to be according to the indorſement in any other court. The caſe *Mich.* 10 *H.* 4. 4. is full as to this matter. The king recovers in a *quare impedit* by default againſt one who was never ſummoned, the party cannot have *a writ of deceit* without a petition. If then, ſays the book, he conclude his petition generally, *que le roy lui face droit*, and the anſwer be general, it muſt go into the Chancery, that the right may be inquired of by commiſſion; and upon the inqueſt found, an original writ muſt go directed to the juſtices to examine the *deceit*; otherwiſe the juſtices, before whom the ſuit was, cannot meddle: but, if he conclude his petition eſpecially, *that it may pleaſe his highneſs to command his juſtices to proceed to the examination*, and the indorſement be accordingly, *that* will give the juſtices a juriſdiction.

(*a*) This not neceſſary if the Attorney-General confeſſes the ſuggeſtion. Skin. 608.

Fitzh. tit. Traverſe, pl. 51. Br. tit. Petition, pl. 34.

But, where no office is found to entitle the king, the party may purſue a petition without an inquiſition for him.

Menvile's caſe. Moor, 639.

Stamf. Pr. 73. b.

After a commiſſion whereon a title is found for the party, before he can interplead with the king, there ought to be a writ to inquire of the king's title; and this, in all caſes, where land is in the king's hands, or granted to another: and in this laſt caſe, there ſhould be a *ſcire facias* alſo againſt the patentee.

Menvile's caſe, Moor, 639. The writs of

Where a petition diſaffirms the king's poſſeſſion, there ought to be four writs of ſearch directed to the treaſurer and chamberlains of the Exchequer: but, writs of ſearch are not neceſſary,

where the petition affirms the king's poſſeſſion: as, upon a petition of right of dower. ſearch iſſue upon the ſuggeſtion of the Attorney-General, that there are in the Treaſury ſeveral records, charters, deeds, muniments, &c. touching the king's right to the eſtate in queſtion. Raſt. Entr. 462. a.

Where the right of the party, as well as the right of the crown, appeared upon the ſame record, or the right of the party appeared by another record of as high a nature as that upon which the right of the crown appeared, the party was entitled by the common law to have a *monſtrans de droit*. Thus, if a conveyance be to the king, upon condition to be void, if a fine be levied, or a recognizance given, or other matter performed, which muſt be upon record; he who has made the conveyance, levied the fine, given the recognizance, &c. may have a *monſtrans de droit* by the common law; for the recognizance appears by a record as high as the conveyance. So he may, though the performance of the condition be not upon record, if it be afterwards found by office. 4 Co. 55. a. b.

So, if the title of the party be not found by the ſame or another record, whereupon he ſues to the king by petition, and an inquiſition is granted upon the petition finding his right, he afterwards may have a *monſtrans de droit* by the common law. 4 Co. 57. b.

But, if the title of the party did not appear by the ſame record, which found a title for the king, or by a record of as high a nature, he could not have a *monſtrans de droit* by the common law, but was forced to ſue by petition. And this, though it appeared by the return of the ſheriff, mayor, &c. to a *diem clauſit extremum*, or other writ; for the return, though filed of record, is not ſo high as an office found *per ſacramentum proborum hominum*. 4 Co. 55. b.

But by ſtat. 36 *E.* 3. *c.* 13. where lands are ſeiſed by inqueſt of office before the eſcheator, and any man will make claim to them, the eſcheator ſhall ſend the inqueſt, within a month, into the Chancery, and a writ ſhall be delivered to him to certify the cauſe of ſeiſure; and then the claimant ſhall be heard to traverſe the office, *and ſhew his right*. And therefore, where an office is found, which is traverſable by that ſtatute, the party may have a *monſtrans de droit*; and this, though he be not put out of poſſeſſion by the office, or, though the king be entitled by matter *in pais* found by record; as, by alienation in mortmain, &c. 4 Co. 59. a.

So, if the king be entitled by office, or matter of record, which is traverſable, but, being true, cannot be traverſed, the party may have a *monſtrans de droit*. Stamf. Pr. 71. a.

But, where the king was entitled by double matter of record, the party could not have a *monſtrans de droit* till it was given by the ſtatute of 2 & 3 *E.* 6. *c.* 8.

The *monſtrans de droit* recites the inquiſition found for the king, and then ſhews the right of the party, which it offers to verify, and concludes with praying judgment, and an *amoveas manum*, and reſtitution of the land and tenements, and of the profits from the time of taking the inquiſition. Co. Entr. 402.

If

Co. Entr. 404. 406. b. Finch's L. 460. 2 Inſt. 695. Finch's L. 459. The *amoveas manus* is the end of every ſuit, where a man comes to interplead with the king; for without that judgment, the land will ſtill remain in the king's poſſeſſion. Keilw. 158. a.

If the Attorney-General confeſſes the title of the party, or, if he replies, and afterwards confeſſes, or, if it be found for the party after verdict, or upon demurrer, the judgment is *quod manus domini regis amoveantur*, and that the party be reſtored to the poſſeſſion of the premiſes, with the appurtenances, together with the meſne profits from the time of the caption of the inquiſition not anſwered to the crown, *ſalvo jure domini regis;* which laſt clauſe is always added to judgments againſt the king, and is expreſsly required by *ſtat.* 2 & 3 *E.* 6. *c.* 8. And by this judgment the king is inſtantly out of poſſeſſion.

2 Salk. 448.

But the party cannot have judgment in a *monſtrans de droit*, though the king have no title, unleſs he can ſhew a title in himſelf.

*Ibid.* If the party ſuing the *monſtrans de droit* may be nonſuited, the whole of this proceeding is quite anomalous. For the party certainly appears upon the record in the character of a defendant: he ſhews his right in the form of a plea; the Attorney-General replies; and the other party when he takes the iſſue *ponit ſe ſuper patriam*, as on the other hand the Attorney-General in that caſe *petit quod inquiratur per patriam.* And Lord Sommers in his argument, 11 St. Tr. 154. ſays, "I take "it to be generally true, that in all caſes where the ſubject is in nature of a *plaintiff*, to recover any "thing from the king, his only remedy, at common law, is to ſue by *petition* to the perſon of the "king. I ſay, when the ſubject comes as a *plaintiff*. For, when upon a title found for the king by "*office*, the ſubject comes in to traverſe the king's title, or *to ſhew his own right*, he comes in in the "nature of *a defendant*; and is admitted to interplead in that caſe with the king in defence of his title, "which otherwiſe would be defeated by finding the *office*." And in another part he ſays explicitly—"In this ſort of proceeding (*viz.* a *monſtrans de droit*) the ſubject is in the nature of a *defendant*, and "comes in and pleads to a title found for the king." And note farther, that the caſe referred to from the Year-book (4 H 6. 11.) is of a *traverſe* to an inquiſition. Now it has been expreſsly determined in the King v. Roberts, 2 Str. 1208. that the traverſer of an inquiſition for the king is properly to be conſidered as a defendant, who oppoſes the title found for the crown, without ſetting up any title in himſelf, as he might do in a petition of right. And indeed it would be abſurd, ſay the court, to conſtrue the liberty of traverſing, to give a power of delaying the crown; which muſt be, if the party is conſidered as having the common right of *a plaintiff*. The court therefore held in that caſe, that the record was well made up and carried down for trial by the proſecutor of the commiſſion.

Co. Entr. 405.

The proceedings upon a *monſtrans de droit* are had in the Petty-bag office in the court of Chancery, and are not enrolled as in other courts, but remain upon files in that office.

4 Co. 56. a. Stamf. Pr. 60. b. 13 E. 4. 8. a.

At common law, where the king was entitled by office, though untruly found, the party could not have a traverſe to the office, nor could he avoid it without petition.

4 Co. 55. a. 56. a.

Nor, where the king was entitled by any matter of record, judicial or miniſterial, conveyance of record, or matter of fact found by office of record, notwithſtanding the office concerned only a chattel real.

4 Co. 56. b.

But, where the office did not give a ſeiſin or poſſeſſion to the king, but only entitled him to an action for the recovery of the land,

land, in such action the party might traverse the office by the common law. As, if an office finds, that the king's tenant has ceased for two years, or done waste, or made a feoffment by collusion, &c. whereby the king is entitled only to his action of *scire facias* against his tenant, in which the tenant may traverse the *cesser*, waste, collusion, &c.

So, by the common law, an office or inquisition for goods and chattels personal might be traversed. As, if *A.* be attainted of treason, or felony, or outlawed in debt, trespass, &c. and an inquisition find, that he had such goods at the time of the felony or outlawry, a stranger, who has the property, may traverse it. Stamf. Pr. 60. a. 13 E. 4. 8. a. 4 E. 4. 24. a.

So, offices of instruction only were traversable by the common law, as, all offices under the Exchequer seal. Sav. 130. There were two sorts of offices, one of *intituling*, and another of *instruction*. The office of *intituling* was always by inquisition found, by commission under the broad seal, for the king could not take but by matter of record: and this was a part of the liberty of England, that the king's officers might not enter upon other men's possessions, till the jury had found the king's title; therefore where the king's title appeared on record, his officers might enter without any office found; as, where the lands are held of the crown, and the tenant dies without heirs, the officers of the king may enter, because the tenure whereby the king's title appears, is upon record; so, by the common law, where lands belong to no body, the king's officers may enter, because by the law the land is in the crown; for the law entitles the king, where the property is in no man: but if any body else were in possession, the lands cannot be divested without matter of record. But notwithstanding where the king is entitled by matter of record there is no need of an office to entitle him; yet, there were always offices of *instruction* found, (that is to say,) the escheator was bound, *virtute officii*, to hold an inquest, *by way of instruction*, and to return the same into the Exchequer: and this is by 34 E. 3. c. 13. as likewise 10 H. 6. c. 7.; and by that last statute such offices are to be returned either into the Chancery or Exchequer, within one month after the taking of the same, under the penalty of 40 l.; and by 1 H. 8. c. 8. the escheators were to sit in open places, and the sheriffs were to return jurors, and the inquisition was to be taken by indenture, whereof one part was to remain with the foreman of the jury, and the other part was to be returned into the Chancery or Exchequer, within one month; and from the Chancery it was to be transcribed into the Exchequer. The reason why it was returned into Chancery, was, because that was a court that was always open, since the Chancellour was always an itinerant with the prince. The office of *instruction* might either be taken by the escheator, *virtute officii*, or it might be taken *by writ* from the court of Exchequer, and both were equally offices of *instruction*: but by 33 H. 8. c. 22. the escheator was not to sit *virtute officii*, where the lands were 5 *l. per annum* or above, on pain of 5 *l.*, which statute was made, to hinder escheators from seizing lands by virtue of their office, without a writ directed out of the Chancery or Exchequer: and it seems, that the office to *entitle* the crown must be by writ out of Chancery. But, if the freehold was cast upon the crown, though the escheator could not seize, *virtute officii*, after the statute; yet he might have a writ of seizure from the Exchequer, and thereby take an office of instruction; because such lands, being in the king without office, were within the survey of the court of Exchequer.—These offices of *instruction* settled the annual value of the lands, and by that value the escheators accounted; unless the court, upon putting them up to auction, found any person that would give more for the lands, and then they let them by lease under the Exchequer seal. Gilb. Exchq. 109.

By stat. 34 *E.* 3. *c.* 14. where lands or tenements were seised into the king's hands by office of the escheator, on account of alienation without licence, or the tenant *in capite* dying, and leaving his heir within age, it was to be returned into Chancery; and if the tenant would *traverse the office* so taken by the king's commands, and say, that the lands were not seizable, he was to be received so to do, and process was to be sent into the King's Bench to try it according to law.

But this act extended only to offices found *virtute brevis*, or *commissionis*; for the words are (taken by the king's command) so that an office taken *virtute officii*, was out of the act. 4 Co. 57. a.

It alſo extended only to the two caſes above-mentioned of alienation without licence and ward.

And farther, it extended only to a traverſe, and not to a *monſtrans de droit*, by which although on the traverſe, the iſſue was found for the party, yet the judges could not proceed to judgment without a writ *de procedendo ad judicium*.

To remedy theſe inconveniences the ſtatute of 36 *E.* 3. *c.* 13. was made, by which it is provided, that if land be ſeized by an office before the eſcheator, returned into Chancery, any one, who challenges the land ſeized, ſhall be heard without delay to traverſe the office, or otherwiſe to ſhew his right, and from thence ſent before the king to make a final diſcuſſion without attending other commandment.

4 Co. 57. b. Stamf. Pr. 61. a. This laſt ſtatute allows a traverſe to all offices found before the eſcheator, or before commiſſioners.

And by ſtat. 8 *H.* 6. *c.* 16. it is extended to all aggrieved by the inqueſt, though not put out of poſſeſſion by the eſcheator.

But, notwithſtanding theſe ſtatutes, perſons were ſtill liable to be precluded of their rights, by the untrue finding of offices. As, for inſtance, perſons holding terms for years, or by copy of court-roll, were often put out of their poſſeſſion by reaſon of inquiſitions, or offices found before eſcheators, commiſſioners, and others, entitling the king to the wardſhip or cuſtody of lands, or upon attainders for treaſon, felony, or otherwiſe, and this, becauſe ſuch terms for years, and intereſts in copyhold were not found: after which they had do remedy, during the king's poſſeſſion either by traverſe or *monſtrans de droit*, becauſe ſuch intereſts were only chattels in cuſtomary hold, and not freehold. In like manner perſons having any rent, common, office, fee, or other profit *apprendre*, if ſuch intereſt were not found in the office entitling the king, they had no remedy by traverſe, or other ſpeedy means, without great and exceſſive charges, during the king's right therein. To redreſs theſe hardſhips on the ſubject, it is declared by ſtat. 2 & 3 *E.* 6. *c.* 8. that all perſons in the above caſes ſhall enjoy their rights and intereſts, the ſame as if no office or inquiſition had been found, or as they might if their intereſt had been regularly found at the ſame time in ſuch inquiſition or office. Remedy was given where a perſon was found, untruly heir of the king's tenant, and the like. And where a perſon is untruly found lunatick, idiot, or dead, and in ſome other caſes, it is enacted, that the party grieved ſhall have a traverſe, and proceed to trial therein; and have like advantages as in other caſes of traverſe upon untrue inquiſitions and offices. The ſame of untrue finding, where a perſon is attainted of treaſon, felony, or *præmunire*, the party grieved may have a traverſe or *monſtrans de droit*, without being driven to a petition of right. And in all traverſes taken upon this act, it is directed, that the perſon purſuing his traverſe ſhall ſue out a writ of *ſcire facias*, one or more, as the caſe ſhall require, againſt ſuch perſon as ſhall have an intereſt either by the king or by his patentee,

tee, in like manner as upon traverſes and petitions in other caſes, with like pleas to the defendants in the *ſcire facias*.

If a term for years is found and ſold on an inquiſition on an outlawry, a mortgagee not in poſſeſſion ſhall be allowed to plead to the inquiſition. Rex v. Blunt, Bunb. 104.

Upon outlawry, inquiſition thereon returned, *levari* iſſued, and money levied, he who has a ſtatute-merchant, and is in poſſeſſion of the land, may, on motion, have time to plead to the outlawry and inquiſition; and, on giving ſecurity, have the money in the ſheriff's hands repaid to him. Rex v. Toller, *Id.* 123.

Where on an inquiſition a man was found poſſeſſed of a term *jure uxoris*, and after his death it was ſold on a *venditioni exponas*, the widow was permitted to plead to the inquiſition, though ſhe had defended an ejectment brought by the purchaſer, and filed a bill in Chancery. Watts v. Robinſon, *Id.* 220.

If a man traverſes an inquiſition, the uſual courſe of the court is to take ſecurity to the value of two years' profits of the land, becauſe in that time it is intended the right of the crown and party will be determined. *Per* Baron Montague, *Id.* 25.

To an inquiſition on an extent on an outlawry, the defendant as terretenant, may plead, that the party outlawed is dead, without ſetting forth a ſpecial title; for, upon affidavit of the fact, the attorney-general uſually allows the plea, there being after the party's death no title ſubſiſting in the crown. Rex v. Barnfield, *Id.* 102.

Where by office, or ſtatute without office, a particular eſtate is veſted in the king, he in reverſion or remainder dependant upon that eſtate may, upon the determination of it, enter upon the king without traverſe, or *amoveas manum*. Linch v. Coote, 2 Salk. 469.

So, if it be found by inquiſition that a perſon outlawed in a perſonal action was ſeiſed of lands, which *B.* claims, and the eſcheator take the profits by this falſe office; *B.* may diſturb him without a traverſe.] Stamf. Pr. 67.

## (F) Of the King's Grants and Letters Patent: And herein,

### 1. What Things the King may grant; and therein,

#### 1. Of Grants ariſing from his Prerogative of Power, and which are inſeparably annexed to the Crown.

FROM the great truſt and confidence repoſed in the king, and the high authority with which he is inveſted, the law hath inſeparably annexed to the crown a power of granting and diſpoſing of divers rights and privileges, which cannot be granted or eſtabliſhed by any leſs authority. Of theſe there are ſome that have no exiſtence till created, ſuch as franchiſes, liberties, fairs, markets, hundreds, Bro. Pat. 16. 2 Roll. Abr. 187. 9 Co. 25. 87. Co. Lit. 199. Godb. 254. Jenk. 79. 307.

hundreds, leets, parks, warrens, which the king (*a*) only by his prerogative can (*b*) eſtabliſh.

(*a*) And therefore a ſubject cannot build a caſtle or other place of defence without the king's licence. Co. Lit. 5. (*b*) May be created by ordinance, as my Lord Hobart expreſſes. Hob. 15.

Bro. Patent, 12. Noy, 176. Darcy v. Allen. So, the king may grant *pontage* or *murage* to be taken by thoſe who erect new bridges or walls; but the payment thereof ſhall continue no longer than the bridge remains uſeful, or the wall neceſſary for the defence of the ſubject.

13 H. 4. 14. Bro. Patent, 12. So, a grant of a ferry, and that every perſon going over ſhall pay a halfpenny, is good, being for the publick utility; and the payment is in conſideration of the particular benefit.

Bro. Patent, 100. Noy, 176. But the king cannot grant toll to be taken in the highways, which are to be free to all people; and therefore a toll-traverſe or toll-thorough cannot commence by grant at this day, but muſt be claimed by preſcription.

Moor, 476. *vide* title Fairs and Markets. (*c*) F. N. B. 220. And indeed in all grants of this kind, the good of the publick ſeems to be principally regarded, as appears by the writ of (*c*) *ad quod damnum*; and in this, that if the king creates or grants a fair or a market to a perſon, and afterwards grants another to another perſon to the prejudice of the firſt, the ſecond grant is void.

Bro. Patent, 33. All extraparochial tithes belong to the king by his prerogative, and may be granted by him.

7 Co. 17, 18. So, the king may grant a ſwan-mark or the game of wild ſwans in ſuch a river, and ſuch grant is good; but none can have a ſwan-mark unleſs he hath an eſtate of freehold of five marks *per ann.*

Plow. 339. So, all royal mines belong to the king, and he may grant them, but it muſt be by expreſs words.

Carter, 90. None but the king can erect a *beacon* or ſea-mark, unleſs he hath a licence or a grant for that purpoſe.

Carter, 92. Where the king hath a ſuit to a mill *ratione prærogativæ*, he may grant it.

4 Inſt. 87. Sid. 338. Co. Lit. 114. Lev. 219. All judicial offices which have been uſually granted by the crown, are of the *inſignia majeſtatis*, and ſo inſeparably annexed to the crown, that they cannot be granted by any leſs authority, nor in any other manner, nor with other powers than as warranted by the known and approved forms in ſuch caſes.

4 Inſt. 163. 245. Hence commiſſions of a new invention, though under pretence of publick good, have been condemned; as commiſſions to aſſay weights and meaſures.

2 Inſt. 54. So, commiſſions to ſeize the goods and impriſon the bodies of all perſons who ſhall be notoriouſly ſuſpected of felonies or treſpaſſes, without any indictment or other legal proceſs againſt them, have been held illegal and void.

4 Inſt. 161. So it has been held, that the king could not authoriſe perſons to take care of rivers and the fiſhery therein, according to the method preſcribed by the ſtatute *Weſt.* 2. (13 *Ed.* 1. *ſtat.* 1.) *c.* 47. before the making of that ſtatute.

So,

So, a grant by *Hen.* VI. to the corporation of dyers in *London* of a power to ſearch, *&c.*, and if they found any cloth dyed with logwood, that it ſhould be forfeit, was adjudged void; it being againſt law that any (*a*) forfeiture ſhould incur by letters patent. 2 Inſt. 47. (*a*) Sid. 441. Vent. 47.

The crown may grant cognizance of pleas to proceed *ſecundum legem terræ*, but not to proceed by other laws; for that would be to make new laws, which the crown, being but one branch of the legiſlative power, cannot do. Lit. Rep. 304. Hob. 48. 10 Mod. 125.

The king cannot grant to any to hold a court of equity, becauſe this is in derogation of the common law; and the Chancery in *Cheſter* and *Durham* are incidents to a county palatine which had *jura regalia*. Hob. 63. Noy, 147. 2 Roll. Abr. 192.

A grant to the town of *Berwick* that they ſhould be a county, but no grant of having a ſheriff, was adjudged to be void, becauſe there would be no officer to execute and do juſtice. Vent. 407.

There are likewiſe perſonal prerogatives which the king only can grant, and which are of ſo high a nature, as that they cannot be delegated to any other; ſuch as the power of making an alien, a denizen, the power of pardoning felonies, *&c.* Dyer, 300. Bro. Patent, 111. Skin. 606.

[A grant by the king within time of legal memory to a town of the right of ſending repreſentatives to parliament is good without firſt incorporating ſuch town. Thus, the city of *Weſtminſter*, which hath never been incorporated, firſt ſent members to parliament in the reign of *Edward* 6.] Harg. Co. Lit. 109. b. note 2.

## 2. Of Grants ariſing from his Intereſt.

It ſeems to be clearly agreed, that the king may alien, grant, or charge any branch of his revenue, in which he hath an eſtate of inheritance, as alſo his lands in fee-ſimple, though he is ſeiſed of them *jure coronæ*. And this power is ſaid to be founded on reaſons of ſtate, and ariſes from the nature of our conſtitution, by which the king is diſabled to levy money on the ſubject without an act of parliament; ſo that if this power were not inherent in the crown, the kingdom might ſuffer by a ſudden invaſion, *&c.* Alſo, as rewards and puniſhments are the ſupporters of all governments, it is but highly reaſonable that the crown ſhould have the power of rewarding thoſe who deſerve well. And this hath been the conſtant uſage of the kings of *England*, by granting out of the crown-revenue penſions and eſtates to thoſe whoſe ſervices have been meritorious, as alſo to ſuch of the nobility whoſe fortunes have come to decay. Plow. 236. in Ld. Berkley's caſe. Vaugh. 62. Co. Lit. 19. 7 Co. 12.

Lands in ancient demeſne, though they ſeemed moſt appropriate to the king's uſe of any of his revenues, (for the tenants had ſeveral privileges, all relating to the king, as not to be empleaded out of the manor, to be free of toll for all things concerning their ſuſtenance and huſbandry, not to be impannelled on any inqueſt,) were, notwithſtanding all this, always alienable. 5 Mod. 55. *per* Holt, Ch. J. *vide* tit. Ancient Demeſne.

The goods of felons, fugitives, perſons outlawed, *&c.* waifs, ſtrays, deodands, wreck, *&c.* are deemed the flowers of the crown, and diſtinguiſhed by that name; and theſe the king clearly 9 Co. 25. The Abbot of Strata Marcella's

case. Moor, 474. Palm. 78. And. 87. Mod. 232.

may grant; and between these and liberties and franchises, which have no existence till created, a distinction hath been established, *viz.* That if the first of these, and the possessions to which they are appendant or annexed, come to the crown, they sink in the crown, and the king is seised of them again *jure coronæ*; but, if the possessions, to which liberties or franchises, such as fairs, markets, &c. are appendant, come to the crown, yet these last are not extinct, but continue to exist according to their first establishment.

Cro. Eliz. 463. Heigham v. Best.

If the king grants to *J. S.* felons' goods, or waifs and strays within his manor, *J. S.* shall have them in the lands of the freeholders; for they are liberties due to the king, which he may grant, and are not charges to the subject; for the king hath this right in every man's land, and therefore may grant it to another.

Yelv. 19. Will. Rep. 690.

The forfeiture of goods and chattels in an outlawry in a personal action belongs to the king, which the king may, and usually does grant to the person who is at the expence of suing out the outlawry; yet this is but *ex gratia regis*, and not *debito justitiæ*.

Ld. Raym. 213, 214.

All fines for offences *de jure* belong to the king, because it is his correction, and the publick revenge is in his hands; but the king may grant them to others.

5 Mod. 46. Comb. 270. Skin. 601. pl. 11. The Banker's case. 11 St. Tr. 136.

It was agreed in the Banker's case, that King *Car.* II. having the revenue of excise vested in him, his heirs and successors, by act of parliament, might grant or charge the same or any part thereof; and that, accordingly, the letters patent and grant of 25,000*l. per ann.* out of the hereditary revenue of excise, for the payment of interest to Sir *Robert Vinor* and others, of whom the king had borrowed large sums of money, till such time as the principal debt should be discharged, were good and valid in law, and bound the king's successors; although it was objected, that this revenue was granted by act of parliament; that it arose out of the purses of the people, and that it was given in lieu of wards, liveries, purveyances, &c. which were inheritances unalienable. But to these it was answered and resolved, that being given in fee, though by act of parliament, it must have the same incidents as other inheritances in fee have, one of which is to be alienable at pleasure; and as to its being granted in lieu of inheritances which were unalienable, that was held not to be material, as those inheritances were extinct, and so could not affect inheritances of another nature newly given: besides, those inheritances of wards, liveries, &c. were in effect alienable, for they might have been released or discharged.

[It should seem, that before the Revolution there was properly no publick revenue, but that all the revenues both ordinary and extraordinary were the king's only, and wholly disposable at his pleasure. Upon the introduction of the funding system at the Revolution, appropriations became necessary, and therefore a certain portion only of the revenues hath been since that period subject to the immediate disposition of the crown, for the support of its honour and dignity. This, in the late reigns, consisted of an annuity granted by parliament, and the hereditary revenues of the crown, that is, the produce of certain branches of the excise, the post-

poſt-office, the duty on wine licences, the revenues of the remaining crown lands, the profits ariſing from courts of juſtice, and in King *William*'s reign, the 4 1-half *per cent.* duties ariſing from *Barbadoes* and the *Leeward Iſlands*. But his preſent Majeſty having, ſoon after his acceſſion, ſignified his conſent, that his own hereditary revenues might be ſo diſpoſed of as might beſt conduce to the utility and ſatisfaction of the publick; and having graciouſly accepted the limited ſum of 800,000 *l. per annum* for the ſupport of his civil liſt; the hereditary and other revenues were carried into and made a part of the aggregate fund; and the aggregate fund was charged with the payment of the whole annuity to the crown of 800,000 *l.* which being found inſufficient, was increaſed in 1777 to 900,000 *l. per annum.*

The power of the crown with reſpect to grants out of the civil liſt was till lately wholly unlimited, that part of it, called the penſion liſt, being totally diſcretionary in its amount. This occaſioned great diſorders in the adminiſtration of the civil liſt, and by exhauſting too great a part of the revenues, diſappointed the juſt claims of thoſe who had liens upon them, and reduced the crown to the painful neceſſity of making application to parliament to ſupply the deficiencies. His preſent Majeſty having therefore been graciouſly pleaſed to expreſs to his parliament his deſire to diſcharge the debt on his civil liſt, without any new burden upon the publick, and to introduce a better order and economy in the civil liſt eſtabliſhment, it was propoſed to reduce the penſion liſt, both in its groſs quantity, and in its larger individual proportions, to a certainty. It is therefore enacted by ſtat. 22 *G.* 3. *c.* 82. § 17. that "for the better regulation of the granting of penſions," (that is, of penſions chargeable upon the civil liſt, for this act affects only to regulate and reform the civil liſt eſtabliſhment,) "and the prevention of abuſe or exceſs therein, no penſion exceeding the ſum of three hundred pounds a-year ſhall be granted "to or for the uſe of any one perſon; and that the whole amount "of the penſions granted in any one year, ſhall not exeeed ſix "hundred pounds; a liſt of which, together with the names of "the perſons to whom the ſame are granted, ſhall be laid before "parliament in twenty days after the beginning of each ſeſſion, "until the whole penſion liſt ſhall be reduced to ninety thouſand "pounds; which ſum it ſhall not be lawful to exceed by more "than five thouſand pounds in the whole of all the grants: nor "ſhall any penſion, to be granted after the ſaid reduction, to or "for the uſe of any one perſon, exceed the ſum of one thouſand "two hundred pounds yearly, except to his Majeſty's Royal family, or on an addreſs of either houſe of parliament."

And by § 18. reciting that "it had been uſual that perſons "who have ſerved the crown in foreign courts, had, after the "expiration of their ſervice, at his Majeſty's pleaſure, received "ſuch proportion of their former appointments, as to his Majeſty "hath ſeemed expedient, it is enacted, That nothing in this act "contained relative to penſions ſhall be conſtrued to extend to

" ſuch allowance, either in preſent or in future, provided that " the ſaid perſons do not ſeverally enjoy ſome place or other pro- " fit from the crown, to the amount of the penſion uſually allowed " in ſuch caſes; provided that the liſt of the ſaid penſions " ſhall be laid, in the manner before mentioned, before parlia- " ment."

By § 19. reciting that " much confuſion and expence had ariſen " from having penſions paid at various places, and by various " perſons; and that a cuſtom had prevailed of granting penſions " on a private liſt during his Majeſty's pleaſure, upon a ſuppoſi- " tion that in ſome caſes it may not be expedient for the publick " good to divulge the names of the perſons in the ſaid liſt, or that " it may be diſagreeable to the perſons receiving ſuch payments " to have it known that their diſtreſſes are ſo relieved, or for ſav- " ing the expence of fees and taxes on ſmall penſions; by means " of which uſage, ſecret and dangerous corruption may hereafter " be practiſed:" Reciting further, that " it is no diſparagement " for any perſons to be relieved by the royal bounty in their diſ- " treſs, or for their deſert, but, on the contrary, it is honour- " able, on juſt cauſe, to be thought worthy of reward, it is en- " acted, That no penſion whatever, on the civil eſtabliſhment, " ſhall thereafter be paid but at the Exchequer, and in the ſame " manner as thoſe penſions which were then paid and entered at " the Exchequer, under the head, title, and deſcription of *Penſions*, " and with the name of the perſon to whom, or in truſt for whom, " the ſaid penſion is granted; and that thoſe which are transferred " thither by this act ſhall be ſubject to no taxes or fees whatever, ex- " cept the taxes and fees to which before this act they were ſub- " ject; any ſtatute, law, or uſage to the contrary notwithſtanding: " Nor ſhall any penſion hereafter to be granted be charged at the " Exchequer with further or other fees than were heretofore paid " on penſions to the paymaſter of the penſions." It is, however, by § 21. permitted to the high treaſurer, or firſt commiſſioner of the treaſury for the time being, to return into the Exchequer any penſion or annuity, without the name of the perſon to whom it is made payable, on his taking an oath, that according to the beſt of his knowledge, belief, and information, the penſion or annuity ſo returned without a name by him into the Exchequer, is not, directly or indirectly, for the benefit, uſe, or behoof of any member of the Houſe of Commons, or, ſo far as he is concerned, applicable, directly or indirectly, to the purpoſe of ſupporting or procuring an intereſt in any place returning members to parliament: upon taking which oath, it is enacted by § 22. that the penſion or annuity ſhall be paid at the Exchequer to the order of the high treaſurer, or firſt commiſſioner, whoſe receipt ſhall be accepted and taken as an acquittance for the ſame. But by § 23. if any ſuch ſecret penſion ſhall continue in the liſt for more than five years, the high treaſurer, or firſt commiſſioner of the treaſury, or one of the ſecretaries, or one of the chief clerks of the treaſury, for the time being, ſhall make oath before ſuch penſion ſhall

By ſt. 25 G. 3. c. 61. certain ſmall bounties of the crown therein mentioned payable to perſons in low and indigent circumſtances, are exempt from the operation of this clauſe, and the ſame are allowed to be paid as they formerly had been.

ſhall be paid at the Exchequer, that he believes that the perſon for whoſe uſe the ſaid penſion or annuity hath been granted is living.

In order to prevent, as much as may be, all abuſes in the diſpoſal of monies iſſued under the head of ſecret ſervice money, or money for ſpecial ſervice, the ſum to be iſſued or paid from the civil liſt revenues for the purpoſe of ſecret ſervice within this kingdom ſhall not exceed the ſum of ten thouſand pounds in any one year: And as to foreign ſecret ſervice money, it is enacted, that when it ſhall be deemed expedient by the Treaſury to iſſue, or in any manner to direct the payment of any money from the civil liſt revenues for that purpoſe, the ſame ſhall be iſſued and paid to one of his Majeſty's principal ſecretaries of ſtate, or to the firſt commiſſioner of the admiralty, who ſhall for his diſcharge at the Exchequer, within three years from the iſſuing of ſuch money, produce the receipt of his Majeſty's miniſter, commiſſioner, or conſul in foreign parts, or of any commander in chief, or other commander of his Majeſty's navy or land forces, to whom the ſaid money ſhall have been ſent or given, that the ſame hath been received for the purpoſe for which the ſame hath been iſſued; which receipt ſhall be filed in the Exchequer to charge the ſaid miniſter, commiſſioner, *&c.*, with the ſame; and the ſaid receipt, on proof of the hand-writing, ſhall be ſufficient to acquit and diſcharge the ſaid ſecretary, *&c.*, in their accounts at the Exchequer. And by § 26. any foreign miniſter, *&c.* charged at the Exchequer with the receipt of any ſecret ſervice money, ſhall ſtand acquitted thereof, if within one year after his arrival in *Great Britain*, he ſhall either return the ſaid money into the Exchequer, or make oath before the barons of the Exchequer, or one of them, that he has diſburſed the money intruſted to him for foreign ſecret ſervice, faithfully, according to the intent and purpoſe for which it was given, according to his beſt judgment for his Majeſty's ſervice. And by § 27. whenever it ſhall be neceſſary for the ſecretary or ſecretaries of ſtate, or firſt commiſſioner of the admiralty, to pay any money iſſued for foreign ſecret ſervice, or for ſecret ſervice in detecting, preventing, or defeating treaſonable or other dangerous conſpiracies againſt the ſtate in any place within this kingdom, then it ſhall be ſufficient to acquit and diſcharge ſuch ſecretary, *&c.* or ſuch ſecretary or ſecretaries, or the under-ſecretary of ſtate in the office to which ſuch ſecret ſervice money hath been paid, or for the firſt commiſſioner of the admiralty, or the ſecretary of the admiralty, to make oath, that the money paid to him for foreign ſecret ſervice, *or* for ſecret ſervice in detecting, preventing, or defeating treaſonable or other dangerous conſpiracies againſt the ſtate (*mutatis mutandis, as the caſe may be*), has been *bonâ fide* applied to the ſaid purpoſe or purpoſes, and to no other; and that it hath not appeared to him convenient that the ſame ſhould be paid abroad. By § 28. it is enacted, that no certain or ſtated ſum ſhall be given or allowed out of the civil liſt revenues, under the name of ſecret ſervice money, as had been theretofore the practice; but when any monies for ſecret ſervice ſhall be deemed neceſſary by the commiſſioners of the treaſury, the ſame ſhall be iſſued by their direction,

as the occaſion ſhall require, in the manner thereinbefore directed. And by § 29. whenever any money ſhall be iſſued for the purpoſe of any ſpecial ſervice, or ſhall be given without proviſion of annual or other ſtated payment, but in a groſs ſum or ſums, as to any ſecretary or ſecretaries of the treaſury, or others, to be paid over to or for the uſe of any perſon or perſons for ſpecial ſervice, or as of royal bounty, the ſaid money, together with the ſpecial ſervice or ſervices, or as of royal bounty, to which the ſame is applied, as alſo the name of the perſon or perſons to whom it is paid, ſhall be entered in a book to be kept for that purpoſe in the treaſury, in order to be produced to either houſe of parliament, if required. And for the better prevention of all practice by which ſuch grants as of bounty may be made a colour under which penſions may be ſubſtantially granted, it is enacted by § 30. that any money ſo given as of royal bounty, to any perſon more than once in three years, the ſame is and ſhall be reputed a penſion to all intents and purpoſes whatſoever.

The act next divides the payments of the civil liſt revenues into ſeveral diſtinct claſſes, and directs that no ſalary or penſion ſhall be paid but in the order there preſcribed. And it farther provides, that if any ſalary, fee, or penſion, or any part thereof, remain in arrear at the uſual time of payment, at the end of a period of two years, from want of caſh belonging to the civil liſt revenues to pay and diſcharge the ſame, ſuch arrear ſhall not be carried as a debt to the account of the year following, but ſhall be wholly lapſed and extinguiſhed, as if the ſame had not been payable.

The ſtatute of 1 *Ann. c.* 7. which provides for the civil liſt eſtabliſhment of that reign, reſtrains the power of the crown in the diſpoſal of its land revenue, and enacts that no grant ſhall be made by the crown of any manors, meſſuages, lands, tenements, rents, tithes, woods, or other hereditaments (advowſons of churches and vicarages only excepted), whether belonging to the crown in right of the crown of *England*, or as part of the principality of *Wales*, or of the duchy or county palatine of *Lancaſter*, or otherwiſe howſoever, for any longer term than one and thirty years or three lives, or ſome term determinable upon one, two, or three lives, and unleſs it be made to commence from the date or making thereof; and if to take effect in reverſion, it do not, together with the eſtate in poſſeſſion, exceed three lives or the term of one and thirty years in the whole; unleſs the tenant be puniſhable for waſte, and unleſs the ancient rent, or more, that hath been paid for the greater part of twenty years prior to the grant, be reſerved upon it; and if no rent hath been paid before the grant, then unleſs there be reſerved a reaſonable rent, not under the third part of the clear yearly value of the eſtates compriſed in the grant; and alſo ſuch rents be made payable to the queen, her heirs or ſucceſſors who ſhall make ſuch grant, and to her or their heirs or ſucceſſors, during the whole term of the continuance thereof. But, where the greateſt part of the yearly value of any tenements or hereditaments

ments belonging to the crown ſhall, at the time of making any leaſe or grant thereof, conſiſt of buildings thereon, which may want to be repaired or re-edified, in ſuch caſe, to encourage the re-building or reparation thereof, it is provided that the crown may grant ſuch tenements or hereditaments, for a term not exceeding fifty years or three lives, ſo as ſuch grant be made to commence from the date or making thereof, or if in reverſion, that it do not with the eſtate in poſſeſſion exceed fifty years or three lives from the date or making thereof, and that it be under the other reſtrictions required in the grants of one and thirty years. But this proviſo is repealed by ſtat. 34 *G.* 3. *c.* 75. except as to grants under the ſeals of the duchy and county palatine of *Lancaſter;* and it is enacted, that where any land or ground belonging to the crown ſhall be deemed proper by the treaſury for the erection of houſes or other buildings thereon, or for neceſſary gardens, yards, curtilages, and other appurtenances to be enjoyed therewith, and ſhall be by their order directed to be appropriated to that uſe, and where the leſſee ſhall agree and covenant to erect buildings thereon of greater yearly value than the land or ground ſo to be leaſed or granted, or where the greateſt part of the yearly value of any tenements or hereditaments belonging to the crown doth or ſhall, at the time of making any grant thereof, conſiſt of any buildings thereon, in any of thoſe caſes, the crown may grant the land or ground ſo directed to be ſet apart, or the tenements or hereditaments of the above deſcription, for any term not exceeding ninety-nine years, or three lives to be computed from the date of the grant, or if in reverſion, not exceeding, together with the eſtate in poſſeſſion, the like term of ninety-nine years, or three lives, to be computed in like manner from the date of the grant, ſo as when there ſhall happen to be any ſubſtantial building upon the ground to be demiſed, or that the buildings thereupon ſhall not require, or not be intended and agreed to be rebuilt, there be reſerved an annual rent not leſs than two-thirds of ſuch annual ſum as ſhall be deemed by the treaſury a reaſonable rent or conſideration for ſuch buildings and ground reſpectively, for the term intended to be granted, and ſo as there be paid to the uſe of the crown a fine to the amount of the remaining part of ſuch annual ſum, ſubject to a diſcount, which ſhall not be computed at a higher rate than the higheſt legal rate of intereſt at the time of making ſuch grant; and when there ſhall happen to be no ſubſtantial building on ſuch ground as the buildings thereon require, or ſhall be intended and agreed to be rebuilt, or other new buildings to be erected thereon, in that caſe there ſhall be reſerved ſuch annual rent as ſhall be deemed by the treaſury a reaſonable rent or conſideration for ſuch land and old buildings for the term intended to be granted, without taking any fine for the ſame; ſo as in every leaſe of land and buildings of this laſt deſcription, there be contained a covenant or condition on the part of the grantee, for the erecting of proper and ſubſtantial houſes and buildings thereon, within a reaſonable time, to be in each caſe limited for that purpoſe, and ſuch other covenants for keeping buildings in repair, and doing all ſuch other

acts

acts as the treasury shall think reasonable; and so as all such rents be reserved to be paid free of all taxes and assessments during the whole term, except such rent or such part thereof, during such part of the term as the treasury shall think fit to be allowed, not exceeding in any case the term of three years: and so as every such grantee or lessee sign, seal, and deliver a counterpart of his grant or lease, which counterpart shall not be subject to any stamp duty.

§ 4. And it is further enacted, that on every grant, lease, or other assurance by the crown under the great seal, or seal of the Exchequer, of any manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments, (advowsons of churches and vicarages, and such tenements and grounds, with buildings erected thereon, as are hereby authorised to be granted for any term not exceeding ninety-nine years or three lives, and whereon any fine or fines shall be payable as aforesaid only excepted,) whereby any estate or interest whatever at law or in equity shall pass from the crown, there be reserved such clear annual rent as by the treasury shall be deemed reasonable, without taking any fine for the same; which rent shall be made payable to the crown during the whole term of the continuance thereof; but no such grant shall be good unless the grantee execute a counterpart thereof, such counterpart however not to be subject to any stamp duty.

§ 5. With respect to the renewal of the crown leases, it is enacted, that no lease or grant of any manors, messuages, lands, tenements, tithes, woods, or other hereditaments belonging to the crown, within the ordering and survey of the Exchequer in *England*, shall be renewed, until within five years of the period of the expiration thereof, except such tenements and hereditaments as are authorised by this act to be granted for any term not exceeding ninety-nine years, nor shall any grant of any such tenements and hereditaments so authorised to be granted be renewed, until within twenty years of the period of the expiration thereof, nor any grant for lives, so long as there shall be more than one of such lives in being. However, where it shall appear to the satisfaction of the Treasury, that any person, has, at any time before the passing of this act, entered into any covenants or engagements to obtain renewals at earlier periods, in confidence that the same could be renewed according to the ordinary practice in such cases, in that case, a renewal may be made at a greater distance of time from the expiration of the lease, so as to enable such person to perform his engagements: In like manner, where any person shall be the lessee of any tithes of any lands, or any profits issuing out of any lands, and shall be the owner of, or interested in such lands, the Treasury may order a renewal of such lease at such times as shall appear to them convenient for the most beneficial enjoyment of such tithes or other profits, together with such lands: and where it shall appear to the satisfaction of the Treasury, that any lessee of lands belonging to the crown, has, before the passing of this act, demised, or agreed to demise the same, for the purpose of improving them by building, and has entered into any

covenants

covenants or engagements, in conſequence whereof ſuch perſon would, by reaſon of the improvements ſo made, be bound to pay, upon the renewal of any leaſe or grant of ſuch lands, more than he would be entitled to receive from the under-leſſees or leſſee thereof; in ſuch caſe, the Treaſury may make an abatement in the rent and fine to be reſerved and paid to the crown in conſequence of ſuch improvements, and ſuch leaſe or grant as ſhall be made (regard being had to ſuch circumſtances) ſhall be good and effectual. It is alſo provided, that where any waſtes belonging to §7. the crown ſhall be incloſed by authority of parliament, or where any lands or grounds belonging to and held under any leaſe or grant from the crown under the great ſeal, or ſeal of the Exchequer, ſhall be deemed by the Treaſury fit to be planted and appropriated to the growth of wood or timber, or any farm-houſe, or other ſubſtantial building, to be erected for the better management and improvement of any lands or grounds, or any pits, ſhafts, levels, watercourſes, engines, or other works, to be made for the better working of any mines, quarries, or collieries belonging to the crown, and holden as aforeſaid, and where the term or eſtate in poſſeſſion therein ſhall be deemed by the Treaſury to be inſufficient to repay the coſts and charges of ſuch works and improvements, with reaſonable profit and advantage to the parties making or cauſing the ſame to be made, or to their repreſentatives or aſſigns, in all ſuch caſes, it ſhall be lawful at any time hereafter to grant any further leaſe of any ſuch houſes or other buildings, land, or ground, for any term not exceeding the term hereby authoriſed to be granted; provided that there be reſerved and made payable to the crown the rents above required, and that covenants or conditions be inſerted therein on the part of the leſſees, for erecting ſuch new houſes or other buildings, and performing ſuch reſpective works and improvements, at the coſts and charges of ſuch leſſees, within a reaſonable time to be in each caſe limited and appointed for that purpoſe, where ſuch houſes or buildings, or works and improvements, ſhall not have been previouſly erected or made. But no grant ſhall be made of §8. any lands capable of ſurvey until a ſurvey ſhall be had, and eſtimate be made of the improved annual value of the eſtate propoſed to be granted by a ſurveyor to be appointed by the Treaſury or ſurveyor-general of the land revenue, which ſurveyor is to certify the ſame upon oath, and is alſo to ſtate for what term of years it ſhall appear to him moſt beneficial for the intereſt of the crown, to grant ſuch holding or ground, regard being had to the quality and condition of the building then ſtanding upon ſuch ground, and of the buildings propoſed to be erected thereon. But where §9. the tenements propoſed to be leaſed, are of a fixed and unimprovable value, or where they are incapable of valuation by means of a ſurvey or inſpection, or where they are of ſuch ſmall value, as not to be worth the expence of a ſurvey, a leaſe of them may be granted or renewed, under the direction of the Treaſury, without any previous ſurvey or eſtimate.

The

§ 21. The act further provides, that the ſurveyor-general ſhall every three years, within thirty days after the commencement of the ſeſſion of parliament, certify under his hand and ſeal to the king and both houſes of parliament, what leaſes or grants of any part of the land-revenue of the crown ſhall have been made within that time, for what terms, and alſo the annual value of the tenements and hereditaments compriſed in ſuch leaſes, as returned on oath by the ſurveyors employed to ſurvey the ſame, and the annual value by the laſt preceding ſurvey thereof, (where there ſhall happen to be a former ſurvey or valuation thereof in the cuſtody or power of the ſurveyor-general,) what rents ſhall have been reſerved upon, and what fines paid for every ſuch leaſe, and the conſiderations for making them; and alſo, ſo far as the ſame can be done, the rents and fines which were reſerved and paid upon or for the laſt preceding leaſe or grant of ſuch tenements or hereditaments.

Although the above ſtatute of 1 *Ann. c.* 7. § 7. reſtrains the crown from alienating the hereditary revenues and duties thereby
§ 8. granted for the ſupport of the civil liſt, yet it does not diſable it from making ſuch grants or leaſes of lands and hereditaments parcel of the duchy of *Cornwall* as it was authoriſed to make by ſtat. 12 *W.* 3. *c.* 13. or from granting away or reſtoring eſtates forfeited for treaſon or felony, ſeized upon outlawry, or taken in execution, or from making cuſtomary grants or admittances of copyhold eſtates. And the ſtatute of 1 *G.* 3. *c.* 1. which carries the hereditary duties to the aggregate fund, confirms and eſtabliſhes the above clauſes of the ſtatute of Queen *Anne*.

The act in Barbadoes was paſſed the 12th of Sept. 1663. *Vide* ſtat. 1 Ann. c. 7. Comm. Journ. 30th March 1702. See debates in the Houſe of Lords in March 1795 upon the penſions granted out of this fund to Lord Auckland and Mr. Burke — The right of the crown to levy theſe duties, by virtue of the prerogative only in the newly ceded iſlands

The duty of 4 1-half *per centum* ariſing from *Barbadoes* and the *Leeward Iſlands*, was a perpetual and irrevocable revenue granted to King *Charles* II. his heirs and ſucceſſors, originally by an act of the aſſembly of *Barbadoes*, and afterwards by ſimilar acts of the aſſemblies of the other *Britiſh Leeward Iſlands*, charged upon all dead commodities the growth of the iſlands, ſhipped to any part of the world. It appears to have been granted in exchange for an acknowledgment of forty pounds of cotton *per* head, and all other duties, rents, and arrears of rent due to the proprietor or grantee of the above iſlands, for quieting the poſſeſſions of the inhabitants of the iſlands, for a full confirmation of their eſtates and tenures, for holding their ſeveral plantations to them and their heirs for ever in free and common ſocage, and in conſideration of the great charges neceſſary for maintaining the honour and dignity of his Majeſty's authority there, the publick meetings of the ſeſſions, the often attendance of the council, and the reparations of the forts and other publick charges incumbent upon the government. Theſe duties were, during part of King *William*'s reign, appropriated with the other hereditary revenues of the crown for the ſupport of the civil liſt, but were diſappropriated in the commencement of the ſucceeding reign. This diſappropriation ſeems to have taken place in conſequence of an addreſs from the Houſe of Commons to the

queen, grounded upon a petition to that House from the merchants and planters of *Barbadoes*, praying that the duties may be applied to the local purposes of the islands, with which, as it may be supposed, the queen promised a compliance. But notwithstanding this resolution and address of the House of Commons, and consequent declaration from the throne, these duties have not in fact been, or been considered to be, appropriated merely to the service of the islands, but are holden to be an entirely open fund, applicable to any purposes, which the bounty of the crown may direct, or its necessities may require.

upon the peace of 1763, was very fully discussed in the case of Campbell and Hall, Cowp. 204. That case was as follows:--The island of Grenada surrendered by capitulation in 1762, and, with its dependencies, was finally ceded to Great Britain by the definitive treaty of peace at Paris on the 10th of February 1763. The chief stipulation material to the present purpose in favour of the inhabitants, as well by the treaty as by the articles of capitulation, was this—That, as they would become, by their surrender, subjects of Great Britain, they should enjoy their properties and privileges, and pay taxes, in like manner as the rest of his Majesty's subjects of the other British Leeward Islands. The island and its independencies being thus become a British colony, one of the first measures of government was to issue a proclamation under the great seal, bearing date the 7th day of October 1763, wherein, amongst other things, it is declared, "That the king, by letters "patent under the great seal, had given express power and direction to the governor, as soon as the state "and circumstances of the colony would admit thereof, with the advice and consent of the council, "and the representatives of the people, to make, constitute, and ordain laws, statutes, and ordinances, "for the good government thereof, as near as may be agreeably to the laws of England, and under such "regulations and restrictions as are used in the other British colonies." This proclamation was followed by another, dated the 26th of March 1764, inviting purchasers upon certain terms and conditions. The governor thus said to have been appointed, was General Melville, whose commission however did not bear date until the 9th of April 1764, and the assembly which he was directed to summon, met for the first time in 1765. But before that time, indeed before the departure of the governor from England, letters patent were issued under the Great Seal, bearing date the 20th of July 1764, which after reciting, that the above duty of 4 1-half *per centum* was payable in Barbadoes, and in all the British Leeward Islands; and the expediency and importance to the other islands that the like duty should take place in Grenada, orders and directs, by virtue of the prerogative royal, that from and after the 25th day of September then next, the duty of 4 1-half *per centum* in specie should be raised and paid to the king, his heirs and successors, upon all dead commodities, the growth and produce of Grenada, that should be shipped off from the same, in lieu of all customs and duties formerly paid to the French king. The question therefore submitted to the court was, Whether it was competent to the crown, under the above circumstances, to levy this duty merely by virtue of the prerogative royal? The determination of the court was against the crown, but it rested solely on the circumstance of the proclamations of October 1763, and March 1764, being of prior date to the letters patent, by which means the king had precluded himself from the exercise of legislative authority over Grenada, before the letters patent were issued. "Through inattention," said Lord Mansfield, "of the king's servants, in inverting the order in which "the instruments should have passed, and been notoriously published, the last act is contradictory to, and "a violation of the first, and is therefore void; and the duty can only now be levied, by an act of the "assembly of the island, or by an act of the parliament of Great Britain." But, although the question in this case was immediately determined upon the inversion of the order of the instruments, yet the noble and learned Judge, in delivering the judgment of the court, went very fully into the law upon the subject. His Lordship stated these six propositions as clear, and in which the counsel on both sides were perfectly agreed: 1st, A country conquered by the British arms becomes a dominion of the king in right of his crown; and therefore necessarily subject to the legislature, the parliament of Great Britain. 2d, The conquered inhabitants once received under the king's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens. 3d, The articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable, according to their true intent and meaning. 4th, The law and legislative government of every dominion equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the Plantations, has no privilege distinct from the natives. 5th, The laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to Pagans, mentioned in Calvin's case, shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian æra, and in all probability arose from the mad enthusiasm of the Crusades. 6th, If the king, that is, the king without the concurrence of parliament, has a power to alter the old and introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles; he cannot exempt an inhabitant from that particular dominion; as, for instance, from the laws of trade, or from the power of parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put. As to the question, Whether the king had *of himself* the power to substitute the present duties instead of the imposts formerly paid

paid to the French king, between the 10th February 1763, the day the treaty of peace was ſigned, and the 7th of October 1763, the day on which the firſt proclamation bears date, his Lordſhip ſaid, "It is "left by the conſtitution to the king's authority to grant or refuſe a capitulation: if he refuſes, and puts "the inhabitants to the ſword, or exterminates them, all the lands belong to him. If he receives "the inhabitants under his protection, and grants them their property, he has a power to fix ſuch "terms and conditions as he thinks proper. He is intruſted with making the treaty of peace: he may "yield up the conqueſt, or retain it upon what terms he pleaſes. Theſe powers no man ever diſputed, "neither has it hitherto been controverted, that the king may change part or the whole of the law or "political form of government of a conquered dominion." His Lordſhip then went into the hiſtory of the conqueſts made by the crown of England, and in the courſe of his inquiry took notice of the opinion delivered by Sir Philip Yorke and Sir Clement Wearge reſpecting Jamaica. In 1722, the aſſembly of that iſland being refractory, it was referred to thoſe two great law-officers to know, "what could be done if "the aſſembly ſhould obſtinately continue to withhold all the uſual ſupplies." They reported thus: "If Jamaica was ſtill to be conſidered as a *conquered iſland*, the *king* had a *right* to *levy taxes* upon the "inhabitants; but, if it was to be conſidered in the *ſame light* as the *other colonies*, no tax could be impoſed "on the inhabitants, but *by an aſſembly of the iſland*, or *by an act of parliament*."

The forfeited eſtates in *Scotland*, which were annexed to the crown by the ſtatute of 25 *Geo.* 2. *c.* 41. are diſannexed therefrom by the ſtatute of 24 *G.* 3. *ſeſſ.* 2. *c.* 57. for the purpoſe of enabling his Majeſty to grant them to the heirs of the former proprietors.]

### 3. How far the King muſt have an Intereſt, in order to enable him to grant.

8 Co. 55. b. 56. a.

There are three kinds of inheritances which the king may grant, though different as to the manner; which differences ariſe from the nature of his intereſt. 1*ſt*, All his lands, tenements, rents, commons, &c. he may grant in poſſeſſion, reverſion or remainder (*a*). 2*dly*, A corody in a religious houſe, or preſentation to a church, which he can only grant in poſſeſſion, or when the corody or the church become vacant; for of theſe he hath only the preſentation or recommendation, and therefore cannot grant them in reverſion. 3*dly*, Offices which he may grant, but cannot himſelf occupy.

[(*a*) Grants of the crown lands are now reſtrained by ſtat. 1 Ann. *c.* 7. *ſupra.*]

5 Co. 93. Berwick's caſe. Moor, 393. S. C.

If the king grants for three lives, *habendum a die confectionis literarum patentium*, this is void; becauſe an eſtate of freehold cannot commence *in futuro*, and letters patent under the great ſeal amount to a livery; and if the freehold ſhould paſs immediately from a day to come, then the king would have a particular intereſt in the mean time without any donor, which is againſt the rules of law.

4 Mod. 275. The King v. Kemp. 2 Salk. 465. pl. 2. Carth. 350. Comb. 334. S. C. Ld. Raym. 49. Skin. 446. pl. 4. Dyer, 108. 2 Roll. Abr. 198. Jenk. 246.

Upon a grant of the office of a ſearcher in the port of *Plymouth*, it was adjudged, that the king may grant an eſtate in an office to commence *in futuro*, or upon a contingency; for he hath no inheritance in the office or the execution of it, but in point of intereſt only to grant; and it was ſaid in this caſe, that there was a diverſity between offices in fee exiſting, and ſuch as were granted only for life; which being as a new thing created might, as a rent *de novo*, be granted to commence *in futuro*.

The king may grant that which is not actually in him at the time of the grant; as the marriage of (*b*) a ward, *quando acciderit*; although he had the ward in right of his prerogative.

(*b*) Wards, liveries, purveyances, &c. were always in effect alienable, as they might be releaſed or diſcharged. 5 Mod. 56. Skin. 605. *per* Holt, C. J. in his argument in the Banker's caſe.—But the

the king cannot grant land when it ſhall eſcheat. Raym. 241.——Whether he can grant land when it ſhall become derelict. Raym. 241. 2 Lev. 171.

The king cannot grant an annuity, for his perſon is not chargeable as the perſon of a ſubject; but, if he grant it out of his exciſe, or any branch of his revenue, it is good, for there is ſomewhat therewith chargeable. Salk. 58. pl. 1. *per Barones Scaccar.*

4. Grants tending to a Monopoly; and therein, of Things of a new Invention.

The king's grant of a monopoly, as of the ſole buying, ſelling, working, making, or uſing of any commodity, is not only void by the common law, but the perſons procuring ſuch grants are ſaid to be puniſhable by fine and impriſonment. *Vide* tit. Monopoly.

And indeed the freedom of trade and labour is of ſuch conſequence, that as no perſon can by his own act totally debar himſelf of this privilege, much leſs can he be reſtrained by the king's letters patent. 3 Mod. 128. Noy, 182.

But notwithſtanding this, it is agreed, that the king may for a reaſonable time grant to a perſon the ſole uſe of any art firſt invented by him; and this it ſeems the king might do at common law, and is therefore a matter excepted out of the ſtatute of monopolies, 21 *Jac.* 1. *c.* 3. by which it is provided, "That no declaration in the ſtatute ſhall extend to any letters patent and "grants of privilege for the term of fourteen years or under, "of the ſole working or making of any manner of new manu"factures within this realm, to the true and firſt inventor and "inventors of ſuch manufactures, which others at the time of "making ſuch letters patent and grants ſhall not uſe; ſo as alſo "they be not contrary to the law, nor miſchievous to the ſtate, "by raiſing prices of commodities at home, or hurt of trade, "or generally inconvenient; the ſaid fourteen years to be ac"counted from the date of the firſt letters patent or grants of "ſuch privilege; but that the ſame ſhall be of ſuch force as they "ſhould be if the ſaid act had never been made, and of none "other."

In the conſtruction of this branch of the above-mentioned ſtatute, the following points have been held:

That no new invention concerning the working any manufacture is within the meaning of this exception, unleſs it be ſubſtantially new, and not barely an additional improvement of an old one (*a*). 3 Inſt 184. [(*a*) But quære of this, for where the queſtion was,

Whether an addition to the old ſtocking-frame was the ſubject of a patent? Lord Mansfield ſaid, that if the general queſtion of law, viz. that there can be *no patent for an addition*, be with the defendant, that was open on the record, and he might move in arreſt of judgment; but that that objection would go to repeal almoſt every patent that was ever granted: there was a verdict for the plaintiff, and 500 *l.* damages; which was acquieſced in. Morris *v.* Branſom, Sitt. Weſt. E. 1776. Bull. N. P. 76. And ſince that caſe, it hath been the generally received opinion in Weſtminſter-Hall, that a patent for an *addition* is good. But then it muſt be for the *addition* only, and not for the old machine too. 2 H. Bl. 489. and Rex *v.* Elſee, Sitt. Weſt. Mich. 1785, *coram* Buller, J. Bull. N. P. 78. laſt edition.]

That no old manufacture in uſe before, can be prohibited in any grant of the ſole uſe of any ſuch new invention. 3 Inſt. 184.

That

10 Mod. 131. That if a patent be granted in caſe of a new invention, the king cannot grant a ſecond patent; for the charter is granted as an encouragement to invention and induſtry, and to ſecure the patentee in the profits for a reaſonable time; but when that is expired, the publick is to have the benefit of the diſcovery.

3 Inſt. 184. [(a) This notion is now exploded.] It is held by my Lord *Coke*, that a new invention to do as much work in a day by an engine as formerly uſed to employ many hands (a), is not within the ſaid exception; becauſe it is inconvenient in turning ſo many labouring men to idleneſs.

2 Salk. 447. [2 H. Bl. 491. S. C. cited by Eyre, C. J.] If the invention be new in *England*, though the thing was practiſed before beyond ſea, the patent is good; becauſe the act intended to encourage new devices uſeful to the kingdom; and it is not material whether the diſcovery be owing to ſtudy or travel.

3 Mod. 77. ſaid *arguendo*. If a man invent a new art, and another happen to learn it before the inventor can obtain a patent, a patent afterwards obtained, is void (b).

[(b) It will not be void, if the perſon who has learnt it, has not diſcloſed it.]

Skin. 204. [Where a patentee brings an action on his patent, if the novelty or effect of the invention be diſputed, he muſt ſhew in what his invention conſiſts, and that he produced the effect propoſed by the patent in the manner ſpecified. Slight evidence of this on his part is ſufficient, and it is then incumbent on the defendant to falſify the ſpecification. *Per* Buller, J. 1 Term Rep. 607.] If a perſon obtains a patent for a new invention, and another makes uſe of the invention without the licence or conſent of the patentee, an action lies againſt him.

2 H. Bl. 470. [It will not impeach the validity of a patent that another perſon firſt made the diſcovery which is the ſubject of it, if in truth the patentee were the firſt who made it publick, for it was the diſcloſure of new inventions which the ſtatute meant to encourage. It is therefore a proviſion, and indiſpenſible condition in all patents, that the patentee ſhall aſcertain the nature of his invention, and in what manner it is to be performed. The ſpecification

Rex v. Arkwright, Sitt. Weſt. Trin. 1785. Bull. N. P. 78. laſt edit. is the price which the patentee is to pay for his monopoly. It hath been laid down, therefore, that the patentee muſt diſcloſe the ſecret and ſpecify the invention in ſuch a way, that other artiſts of the ſame trade may be taught to do the thing for which the patent is granted, by following the directions of the ſpecification, without any new addition or invention of their own. He muſt deſcribe it ſo that the publick may, after the expiration of the term, have the uſe of the invention in as cheap and beneficial a way as the patentee himſelf uſes it, and therefore, if the ſpecification deſcribes many parts of an inſtrument or machine, and the patentee uſes only a few of them, or does not ſtate how they are to be put together and uſed, the patent is void. And if the ſpecification be in any part materially falſe or defective, if there be any ambiguity affectedly introduced into it, or any thing which tends to miſlead the publick, if the patentee ſay, that by one proceſs he can produce three things, and fail in any one; or the ſpecification direct the ſame thing to be produced ſeveral ways, or by ſeveral different ingredients, and any one of them fail, in theſe caſes the patent is againſt the law, and cannot be ſupported. In a caſe

caſe before Lord *Mansfield* for infringing a patent for ſteel truſſes, it appeared that the patentee, in tempering the ſteel, rubbed it with tallow, which was of ſome uſe in the operation; and becauſe this was omitted, the ſpecification was holden to be inſufficient, and the patent was avoided. So, in an action for infringing the plaintiff's patent for making patent yellow; three objections were made to the patent: 1*ſt*, That after directing that lead ſhould be calcined, it directed another ingredient, namely, *minium* to be taken, which would not anſwer the purpoſe, as it did not ſay whether it was to be calcined or fuſed, and by reference to the preceding words it would be to be calcined, which would not anſwer, as fuſion was neceſſary. 2*dly*, That it directed any kind of foſil-ſalt to be taken, whereas only one kind of foſil-ſalt, namely, *ſal gem*, would anſwer the purpoſe, becauſe it muſt be a marine ſalt. 3*dly*, That all the things together did not produce the effect; for the patent was to do three things, but this produced but one only. Theſe were allowed to be deciſive objections to the patent, and that it was void. Liardet v. Johnſon, Sitt. Weſt. Hil. 1778. Bull. N. P. 79. Turner v. Winter, 1 Term Rep. 602.

The above act of parliament having excepted only patents of the ſole working or making any manner of *new manufactures*, it hath been ſaid that the foundation of all patents muſt be the *manufacture* itſelf; that there can be no patent for a mere principle, nor for the mere application or mode of doing a thing, for a method only, without having carried it into effect, and produced ſome new ſubſtance. On the other hand it hath been ſaid, that though there can be no patent for a mere principle, yet for a principle ſo far embodied and connected with corporal ſubſtances, as to be in a condition to act, and to produce effects in any art, trade, myſtery, or manual occupation, there may be a patent; that a *method* may of itſelf be the ſubject of a patent: that Mr. *Hartley*'s patent was ſolely for a *method* of ſecuring buildings from fire: that it was not for making the plates of iron, for thoſe were in uſe before: that it was not for the effect produced, for that was merely negative; but it was for his *method* of diſpoſing the plates of iron ſo as to produce the propoſed effect: that new methods of manufacturing articles in common uſe, for which a variety of patents have been granted, where the ſole merit and the whole effect produced, are the ſaving of time and expence, and thereby lowering the price of the article, and introducing it into more general uſe, may be ſaid to be *manufactures* in one of the common acceptations of the word, as we ſpeak of the manufactory of glaſs, or any other thing of that kind: that the patents in theſe caſes cannot be for the effect produced, for it is either no ſubſtance at all, or, what is exactly the ſame thing, as to the queſtion upon a patent, no new ſubſtance, but an old one produced advantageouſly for the publick: that it cannot be for the mechaniſm, for there is no new mechaniſm employed: it muſt then be for the *method*; that is, in the words of Lord *Mansfield*, for *method* detached *from all phyſical exiſtence* whatever. Such were ſome of the topicks of argument diſcuſſed in the court of Common Pleas in the following caſe, upon which the judges of that court were equally divided.

Boulton and Watt v. Bull, 2 H. Bl. 463. In conſequence of the difference of opinion in the court of Common Pleas upon this caſe, it was afterwards moved to diſſolve the injunction which had been obtained, for the purpoſe of trying the validity of the patent in an action; but the Chancellour ſaid, that there muſt be another action, and that the injunction in the meantime muſt be continued, and that he could not impoſe any terms upon the patentees in bringing the action. 3 Vez. jun. 140. Accordingly, another action was brought in the court of Common Pleas, which came on to be tried at the ſittings in London Dec. 16th, 1796, before the Lord Chief Juſtice Eyre, when a verdict was found for the plaintiff with nominal damages.

A patent was granted to the plaintiff *Watt* for *a new invented method* of leſſening the conſumption of ſteam and fuel in fire-engines. The ſpecification ſtated, that the *method* conſiſted of certain *principles*, and deſcribed the mode of applying thoſe principles to the purpoſes of the invention. And an act of parliament, reciting the patent to have been for the making and vending of *certain engines* invented by *Watt*, extended to him for a longer term than fourteen years, the privilege of *making*, *conſtructing*, and ſelling the *ſaid engines*. The jury found that this invention was a new and uſeful invention, and that the privilege veſted in *Watt* and his aſſigns by the act of parliament was infringed by the defendant as charged in the declaration. They alſo found that the ſpecification was of itſelf ſufficient to enable a mechanick acquainted with the fire-engines previouſly in uſe, to conſtruct fire-engines producing the effect of leſſening the conſumption of fire and ſteam in fire-engines, upon the principle invented by the plaintiff *Watt*. The queſtions propoſed for the opinion of the court were, 1ſt, Whether the patent was good in law, and continued by the act of parliament? 2d, Whether the ſpecification was in point of law ſufficient to ſupport the patent?]

## 5. Grants of the ſole Liberty of Printing.

Carter, 89. Mod. 256. Skin. 233. pl. 3. 3 Mod. 77. Vern. 275.

The king's prerogative in granting letters patent for a privilege of printing, hath in many inſtances been diſputed, and his power herein greatly doubted, on this foundation and theſe reaſons, that grants of this kind which exclude all other perſons, and confine this liberty or privilege to the patentees, tend to a monopoly in enhancing the prices of books, reſtraining trade, diſcouraging induſtry, and in making the patentees careleſs and remiſs in their duty.

But notwithſtanding theſe reaſons, and the uncertainty that appears in ſome of the caſes in the books on this ſubject, it ſeems the better opinion, that the king hath a peculiar prerogative in printing, which hath been countenanced and allowed in all (*a*) ages, and ſeems eſtabliſhed on the fundamental maxims of government, as being a matter of a (*b*) publick nature, firſt (*c*) introduced by the kings of *England*; and in which an (*d*) unreſtrained liberty might be of dangerous conſequence to the publick.

(*a*) Carter, 90. it is ſaid, that fifty ſuch patents have been granted ſince E. 6.'s time.—— And that before ſuch grants, this buſineſs was managed by the king's ſervants. (*b*) In 3 Mod. 75. a difference is made between things of a publick nature, and thoſe only of publick uſe; and on this diſtinction the court inclined to think, that the letters patent granted for the ſole printing of blank warrants, bonds, and indentures, were not good, theſe being only of publick uſe, and not ſo in their nature. (*c*) The art of printing was firſt at Harlem, the news of it came to Hen. 6. who at the deſire of the Archbiſhop brought it over at his own charge, at the expence of 1500 marks; the perſon aſſigned for this ſervice was a merchant. Carter, 91.—— Said to be introduced by Hen. 6. Skin. 234.—— And that the king printed the Bible at his own charge, Vern. 275. (*d*) Printing is a conveyance by which men communicate their notions in the moſt publick manner, and with the moſt laſting impreſſion; and therefore if they are good, this is a means to ſpread them and to give them a more diffuſive influence; and if they are bad notions, this is likewiſe a method to ſpread the miſchief wider. Skin. 234.

Accordingly we find this prerogative admitted in the caſe of *Darcy* v. *Allen*, the great caſe of monopolies, and the reaſon thereof given by *Dodderidge*, who argued againſt monopolies, becauſe it is neceſſary for the peace and ſafety of the realm. Moor, 637. Noy, 173.

It ſeems agreed, that if a book has no certain author, the king has the property of the copy (*a*), and may grant it to whom he pleaſes; hence (*b*) almanacks are deemed prerogative copies. Mod. 256.

[(*a*) But, if there was no certain author, the property would not be the king's, but common. 4 Burr. 2402.] (*b*) So, of the tranſlation of the Bible, Year-books, Common Prayer, and Statute-book. Lucas, 105. 2 Chan. Ca. 76.

In the 15 year *Jac.* 1. a patent for printing law books was granted to one *Moor*, which came to Colonel *Atkins* on his marriage with *Moor*'s daughter. The Company of Stationers obtained copies of *Roll*'s Abridgment, which they printed; and this being complained of in Chancery by Colonel *Atkins*, an injunction was awarded, not only againſt thoſe of the company (*viz. Tyton* and *Roper*) who were principally concerned, but againſt every member thereof; and this matter coming afterwards before a committee of parliament, it was there likewiſe determined in favour of the patentee. And in this caſe it was ſaid, that the king hath a particular prerogative over law books, and that ſo he would have had, if the art of printing had never been known. Carter, 89. M. 18 Car. 2. 10 Mod. 106. S. C. cited to have been decreed in Chancery in favour of the patentees, and affirmed in the Houſe of Lords. [It was this Colonel Atkins, who upon this occaſion invented the fiction that printing was a flower of the crown acquired by H. 6. by purchaſe, the firſt printer in England having been brought to Oxford by Archbiſhop Bourchier, at that king's expence. 1 Bl. Rep. 113.]

But the caſe of the greateſt weight on this head, is that of *Roper* and *Streater*, which was this: *Roper* bought of the executors of Juſtice *Croke*, the third part of his reports, which he printed; Colonel *Streater* had a grant for years from the crown for printing all law books, and printed upon *Roper*; on which *Roper* brought an action on the ſtatute 13 & 14 *Car.* 2. *c.* 33. *Streater* pleaded the king's grant; and on demurrer it was adjudged in *B. R.* for the plaintiff againſt the validity of the patent on theſe reaſons: that this patent tended to a monopoly; that it was of a large extent; that printing was a handicraft trade, and no more to be reſtrained than other trades; that it was difficult to aſcertain what ſhould be called a law book; that the words in the patent, *touching or concerning the common or ſtatute law*, were looſe and uncertain; that if this were to be conſidered as an office, the grant for years could not be good, as it would go to executors and adminiſtrators; and that there was no adequate remedy in the way of redreſs in caſe of abuſes by unſkilfulneſs, ſelling dear, printing ill, &c. But this judgment was reverſed on a writ of error in parliament, for the following reaſons: that the invention of printing was new; that this privilege had been always allowed, which was a ſtrong argument in its favour, although it could not be ſaid to amount to a preſcription, as printing was introduced within time of memory; that it concerned the ſtate, and was matter of publick care; that it was in nature of a proclamation, which none but the king could make; that the king had the making of judges, ſerjeants, and officers of the law; that as to the uncertainty, theſe words in the patent were to be taken *ſecundum ſubjectam materiam*, Skin. 2. 4. S. C. cited and ſaid to have been ſo determined in B. R. M. 22 Car. 2. but reverſed in the Houſe of Lords. 2 Show. 260. S. C. cited as adjudged, M. 24 Car. 2. and there the judgment given in B. R. is called a ſudden judgment, and ſaid to be reverſed in parliament. 10 Mod. 105. S. C. cited, and there ſaid, that the validity of the patent is now eſtabliſhed by the judgment in parliament. Vern. 220.

S. C. cited, and ſaid it was not now to be ſhaken. (a) Though it cannot properly be called an office, yet it is a truſt, and a *ſci. fa.* will lie to repeal the grant. 3 Mod. 77.

*teriam*, and not to be extended to a book containing a quotation of law, but where the principal deſign was to treat on that ſubject; that as to its being an office, it was not ſo properly an office as an employment, which may well enough be managed by executors or adminiſtrators; and that, as to abuſes, theſe like all others were puniſhable at common law, or the patent itſelf might be repealed (a) by *ſci. fa.*

Mod. 256. 3 Keb. 792. S. C. 2 Show. 260. 3 Mod. 76. S. C. cited, and a like judgment ſaid to be given in the caſe of the Stationers' Company v. Wright, for printing pſalters and pſalms. Hil. 35 Car. 2. Skin. 234. 10 Mod. 106. like point, but no judgment.

In an action of debt by the Company of Stationers againſt *Seymour*, for printing *Gadbury*'s almanack, it was adjudged that the letters patent, granted that company for the ſole printing of almanacks, were good; and though the jury found, that the almanack ſo printed contained ſome additions; yet having likewiſe found, that the ſaid almanack had all the eſſential parts of the almanack that is printed before the Book of Common Prayer, the additions were looked upon as immaterial.

2 Show. 258. (b) An injunction was refuſed to ſtay the ſale of Engliſh Bibles, and to quiet the right of patentees, becauſe not a plain right; and therefore an iſſue directed. Vern. 120. ——So, where the Univerſity of Oxford claimed by patent a right of printing Bibles, though the Lord Keeper was of opinion, that the Univerſity patent extended to no more than were for their own uſe, or to ſome ſmall number to compenſate their charge; yet he refuſed to grant an injunction until the right was ſettled by a trial at law. Vern. 275. & *vide* 2 Chan. Ca. 76. 93. & Q. as to theſe caſes; for injunctions ſeem frequently to have been ſince granted in favour of patentees and owners of books, upon producing the patent in court under the great ſeal.

So, an injunction was granted againſt *Lee*, on the application of the Stationers Company, to reſtrain him from ſelling primmers, pſalters, almanacks, and ſinging pſalms imported from *Holland*; the ſole privilege of printing theſe belonging to that company; and that (b), without any trial directed as to the validity of the patent.

10 Mod. 105. 4 Burr. 2402. 2 Bl. Rep. 1004. In conſequence of this deciſion, an act was paſſed, which, after reciting, "that the "power of "granting a "liberty to "print "almanacks and other books was heretofore ſuppoſed to be an inherent right in the crown; and that the "crown had, by different charters under the great ſeal, granted to the Univerſities of Oxford and Cambridge, among other things, the privilege of printing almanacks; and that the Univerſities had demiſed to the Company of Stationers of the city of London, their privileges of vending almanacks and "calendars, and had received an annual ſum of one thouſand pounds and upwards, as a conſideration for "ſuch privilege: and that the ſum ſo received by them had been laid out and expended in promoting "different branches of literature and ſcience, to the great increaſe of religion and learning, and the gene"ral benefit and advantage of theſe realms: and that the privilege or right of printing almanacks had "been, by a late deciſion at law, found to have been a common right, over which the crown had no "control

[But, notwithſtanding the above deciſions, this prerogative right to the printing of almanacks was ſtrongly inclined againſt by the court of King's Bench in the caſe of the Stationers Company againſt *Partridge*. No judgment indeed was given in that caſe, but it ſtood over, that the company might ſee if they could make it like the caſe of the Common Prayer Book, whether they could ſhew that the right of the crown had any foundation in property; and it was never moved afterwards. However, in a later caſe of the Stationers' Company againſt *Carnan*, the queſtion hath been again brought forward, and the right of the crown to make ſuch excluſive grant to the company hath been expreſsly denied by the court of Common Pleas on a caſe ſent out of Chancery for their opinion.

"controul, and consequently the Universities no power to demise the same to any particular person "or body of men, whereby the payments so made to them by the Company of Stationers had ceased and "been discontinued;" enacts, that 500*l.* a year shall be paid to each of the Universities, out of the monies arising by the duties upon almanacks. Stat. 21 G. 3. c. 56. § 10.

In the case of *Baskett* v. University of *Cambridge*, the prerogative right of printing acts of parliament was sanctioned by a decision of the court of King's Bench. That case arose upon a bill filed by the plaintiffs for an injunction to restrain the defendants from printing or selling a book, entitled "An exact Abridgment of all "the Acts of Parliament relating to the Excise on Beer," &c. Both parties claimed under letters patent from the crown, the plaintiffs as the king's printers. The court were of opinion, that during the term granted by the letters patent to the plaintiffs, they were entitled to the right of printing acts of parliament, and abridgments of acts of parliament, exclusive of all other persons, not authorised to print the same by prior grants from the crown. But they thought that by the letters patent granted to the University they were INTRUSTED *with a concurrent authority* to print acts of parliament, and abridgments of acts of parliament, within the University, upon the terms in those letters patent. 1 Bl. Rep. 105. 2 Burr. 661.

And the following case establishes the exclusive right of the crown to print acts of parliament and books of divine service beyond all controversy. We are enabled to lay before our readers the judgment of the court as delivered by the Lord Chief Baron *Skinner*.

This is a case in which *Charles Eyre* and *William Strahan* are plaintiffs, and *Thomas Carnan* is the defendant. Eyre and Strahan v. Carnan, in the Exchequer, May 7th, 1781.

This bill was brought to restrain the defendant from printing and publishing a Form of Prayer, which had been ordered by his Majesty to be read in all churches; and for an account of the profits which have arisen from his sale of it.

The bill states, that the plaintiffs held the office of king's printer, which was granted the 19th of *December*, the 2d of King *George* the First, to *John Baskett* for 30 years in reversion after two terms which were then existing, the last of which expired the 21st of *January* 1770, when the grant to *Baskett* took effect in possession. The grant, which was read, imports to be a grant to *John Baskett* of the office of Printer to his Majesty, and his successors, of (among other things) all Bibles and Testaments in the *English* language; and all Books of Common Prayer and Administrations of the Sacraments, and other Rites and Ceremonies of the Church of *England*, in all volumes whatsoever heretofore printed by the king's printer, or to be printed by his command; and of all other books which he, his heirs or successors, should order to be used for the service of God in the Church of *England*.

The interest in this grant was assigned by *Baskett* to *John Eyre*, under whom the plaintiffs claim the benefit of it; the plaintiff *Eyre* in two-thirds, and the plaintiff *Strahan* in the other third.

The bill states, that in *December* 1779 a Form of Prayer was ordered by his Majesty to be used in all churches and chapels throughout *England* and *Wales* upon the 4th *Feb.* 1780; that it was printed by the plaintiffs, and a sufficient number thereof circulated

culated for ſale at ſixpence each, which was a reaſonable price, and at which they had been formerly ſold.

That the defendant *Carnan* had printed and ſold a great number of them; and upon this ground the plaintiffs pray an injunction and account. The defendant *Carnan*, in his anſwer, admitted the printing and ſelling, and he ſubmitted to an account if the plaintiffs had the excluſive right of printing ſuch Form of Prayer.

An injunction was granted upon filing the bill to ſtop the publication.

The queſtion now is, Whether the court ought to direct the account which is prayed by the bill, for as to the continuance of the injunction in ſuch a caſe, it is a mere matter of form?

Two objections are made by the defendant to this part of the relief: One is, that the price for which the plaintiffs have ſold it was not a reaſonable price; the ſecond, that the right is doubtful.

As to the price, though it is proved that it might be afforded at a cheaper rate, yet it is likewiſe in proof that the price which has been taken by the plaintiffs is the ſame which had been uſed to be taken for like Forms of Prayer ſo printed; and therefore we think this not a ſufficient ground for denying the account.

The next objection is to the plaintiffs' right. It has been ſaid that courts of equity never proceed in ſuch caſes to decree accounts but upon clear and undoubted rights.

That the preſent right, if it be one, has never received the ſanction of any legal determination. That though in the great queſtion concerning literary property the Judges conſidered and treated the excluſive right of the crown to print acts of ſtate and books of divine ſervice as an acknowledged right, yet they put it upon different grounds, ſome upon the grounds of prerogative, others upon the ground of property; and as it is now determined that property cannot be the ground of ſuch a right, the right itſelf conſequently becomes doubtful. In the argument of the queſtion reſpecting literary property in the Houſe of Lords, in the caſe of *Millar* and *Taylor*, it was aſſumed by all the Judges that the king's copy-right continued after publication, and from thence ſome of them drew arguments in ſupport of that right of an author after publication, inſiſting that property in the compoſition was the foundation of both; others denied that property, in the ſtrict legal ſenſe of the word, was the foundation of the right of the crown; but they all agreed that the crown had this right. The right therefore ſeemed to have been in effect recognized and eſtabliſhed in this memorable caſe by the unanimous opinion of the Judges, though they differed reſpecting the origin of it. This is certain reſpecting ſuch origin, that it has ever been a truſt repoſed in the king, as executive magiſtrate, and the ſupreme head of the church, to promulgate to the people all thoſe civil and religious ordinances which were to be the rule of their civil and religious obedience. There are traces of the ancient mode of promulgating the ordinances of the ſtate yet remaining to us, ſuited to the gloominess of the times when few who heard them could have read them; the king's officers tranſmitted authentick copies of

of them to the ſheriffs, who cauſed them to be publickly read in their county court. When the demand for authentick copies began to increaſe, and when the introduction of printing facilitated the multiplication of copies, the people were ſupplied with copies by the king's command by his patentee. This ſeemed a very obvious and reaſonable extent of that duty which lay upon the crown to furniſh the people with the authentick text of their ordinances. Our courts of juſtice ſeem to have ſo conſidered it when they eſtabliſhed it as a rule of evidence, that acts of parliament printed by the king's printer ſhould be deemed authentick, and read in evidence as ſuch. As to the promulgation of religious ordinances by the king's command, or by his patentee, it is not to be expected that inſtances ſhould be found of the execution of this truſt by the crown during the papal uſurpation of the ſupreme authority over all eccleſiaſtical matters in this kingdom. It appears, however, by a grant made in the 34th year of King *Henry* the Eighth, to *Richard Grafton* and *Edward Whitchurch*, of the ſole right of printing the Maſs book and certain other books of divine ſervice, that ſuch books had never at that time been printed in *England*, but had been brought into this kingdom from other countries, probably from *Rome*; though, as the grant recites, printing was at that time arrived at great perfection here. This grant, which bears date the 28th *January*, the 34th year of *Henry* the Eighth, is to be found in *Rymer*, vol. 14. p. 766. The period between the time of the re-eſtabliſhment of the ſupremacy of the crown and the completion of the Reformation under Queen *Elizabeth*, conſidering the fluctuating ſtate of religion, was not likely to afford, and in fact has not afforded, any inſtance of the ſuperintending care of the crown in printing books of divine ſervice, except that which I have alluded to, and which I have referred to chiefly to ſhew how the demand of the publick for ſuch books had been ſupplied before that time, namely, from foreign countries, and under the direction of a foreign power; but in the firſt year of Queen *Elizabeth*, the excluſive right of printing books of divine ſervice was inſerted in the ſame patent with the right of printing the acts of parliament, which had ſome time before been granted, and from that time they have been regularly granted together, and enjoyed by the king's patentee. Long uſage, referable to ſuch an origin, ought not to be ſhaken lightly, if there was no authority to ſupport it; but in the caſe of *Baſkett* againſt the Univerſity of *Cambridge*, the right of printing acts of parliament received the ſanction of the court of King's Bench; and in the caſe of *Millar* and *Taylor*, before alluded to, both the rights, as well that reſpecting acts of parliament as that reſpecting books of divine ſervice, were fully acknowledged. The privilege of the patentee has in fact been always executed with the excluſion of all other printers: it is therefore, in conſideration of law, a monopoly; but it is a monopoly ſupported by long uſage, and ſtanding upon very ſpecial grounds of neceſſity and publick utility; for it is of manifeſt publick utility to place in proper hands the right of ſuch publication, as well upon account of the

ſpecial care and ſuperintendence which a truſt of ſuch importance neceſſarily requires, as becauſe the excluſive right of doing or authoriſing any acts in which the publick is intereſted implies an obligation to exerciſe that right in ſuch manner as to anſwer the purpoſes for which it was given; and, conſequently, the right now in queſtion impoſes upon the crown an obligation to publiſh and diſperſe as many books of divine ſervice as the intereſt of religion and the demands of the publick require. It appears, then, that the right claimed by the plaintiffs, under the grant to *John Baſkett*, is founded in publick convenience, is ſupported by long uſage, and that it has been acknowledged by the unanimous opinion of all the Judges. Under ſuch circumſtances, we think it is not now to be conſidered as a doubtful right. If it is not doubtful, the plaintiffs are entitled to the account which is prayed; and which the court muſt accordingly decree. It is a matter of form to direct the continuance of the injunction; for in a caſe of this kind there is an end of all the effects of it; the defendant, therefore, muſt be decreed to account according to the prayer of the bill; and as the defendant has by thus printing the books of divine ſervice invaded the rights which the plaintiffs and the king's patentees have been long in the uninterrupted poſſeſſion of, the account muſt be with coſts.]

2 Inſt. 744. Here it may be proper to take notice of the acts of parliament relative to this matter, and the rather as they have been urged as arguments for the king's prerogative in theſe concerns. The firſt ſtatute is that of 25 *H.* 8. *c.* 15.*, which expreſsly provides in caſes of books, that the Lord Chancellour, Lord Treaſurer, or any of the Chief Juſtices, may ſet and limit the prices as well of books as of binding.

* Repealed by 12 G. 2. c. 36. ſ. 3.

In the ſtatute 21 *Jac.* 1. *c.* 3. (*ſ.* 10.) againſt illegal and miſchievous monopolies, it is particularly declared, that this ſtatute ſhould not extend to, or any ways impeach patents for ſole printing theretofore made or then after to be made.

Mod. 2 57. 2 Show. 260. The ſtatute 14 *Car.* 2. (now expired) recites, that printing is a matter of publick care, and every where countenances the ſole privilege of printing, and ſeems to be founded on the king's prerogative; but was a hard law, and injurious to the liberty of the ſubject, in reſtraining the number of preſſes, licenſing books, and impoſing penalties and forfeitures.

[By this ſtatute (which expired in 1692) it was enacted, that no private perſon whatſoever ſhould print or cauſe to be printed any book or pamphlet, unleſs the ſame ſhould be firſt entered in the book of the Regiſtrar of the Company of Stationers in London; except acts of parliament, proclamations, and ſuch other books and papers as ſhould be appointed to be printed by virtue of the king's ſign manual, or under the hand of one of the Secretaries of State; and unleſs the ſame ſhould be firſt licenſed by the ſeveral perſons therein directed; that is to ſay, all books concerning the common law were to be printed by the allowance of the Lord Chancellor, the Lords Chief Juſtices and Lord Chief Baron, or one of them; of hiſtory concerning the ſtate of this realm, or other books concerning any affairs of ſtate, by one of the Secretaries of State; of heraldry, by appointment of the Earl Marſhal, or, if there ſhould be no Earl Marſhal, then by two of the Kings of Arms; all other books, whether of divinity, phyſick, philoſophy, or other ſcience or art whatſoever, by the Archbiſhop of Canterbury, or Biſhop of London, or by their appointment reſpectively; or, in the univerſities, by the Chancellour, or Vice-Chancellour there, provided that the ſaid Chancellours or Vice-Chancellours ſhould not meddle either with books of common law, or matters of ſtate or government, nor any book the right of printing which ſolely and properly belonged to any particular perſon. And the printers were to ſet their names, and declare the name of the author if required. But there was a proviſo, that nothing therein ſhould extend to infringe any the juſt rights and privileges

privileges of either of the ſaid Univerſities, touching the licenſing or printing of books therein; nor ſhould extend to prejudice the juſt rights and privileges granted by the king, or any of his royal predeceſſors, to any perſon or perſons under the great ſeal or otherwiſe, but that they might exerciſe ſuch rights and privileges according to their reſpective grants.]

By the 8 *Ann.* c. 19. "The author of any book not yet printed, "and his aſſigns, ſhall have the ſole liberty of printing it for four-"teen years, to commence from the day of publiſhing thereof; "and (*a*) if any perſon within the ſaid time ſhall print, reprint, or "import any ſuch book without the conſent of the proprietor in "writing ſigned in the preſence of two credible witneſſes, or "ſhall knowingly publiſh it without ſuch conſent, the offender "ſhall forfeit the books and ſheets to the proprietor, who ſhall "forthwith damaſk and make them waſte paper, and ſhall forfeit "1 *d.* for every ſheet found in his cuſtody, either printed or "printing, one moiety to the crown, the other to him who will "ſue in any court at *Weſtminſter*."

(*a*) It ſeems alſo a good foundation for an action at common law, or for an application to a court of equity; but in order to entitle the party to the penalty in the ſtatute, the terms of the act as to regiſtering the book in the Stationers' Company, &c. muſt be complied with. [For the property does not veſt before the book is regiſtered. 2 Atk. 95. See alſo ſtat. 15 G. 3. c. 54. § 6.]

[And the act further directs, that, if at the end of that term, the author himſelf be ſtill living, the right ſhall then return to him for another term of the ſame duration.]

[It was determined by the court of King's Bench in the great caſe of *Millar* v. *Taylor*, *Yates*, J. *diſſent.* that an excluſive right in authors exiſted by the common law. But afterwards in the caſe of *Donaldſon* v. *Becket*, before the Houſe of Lords, which was finally determined 12th *February* 1774, it was holden, that no copy-right ſubſiſts in authors after the expiration of the ſeveral terms created by the above ſtatute of Queen *Anne*. In conſequence of this deciſion an act was paſſed in the following year for enabling the two Univerſities in *England*, the four Univerſities in *Scotland*, and the Colleges of *Eaton*, *Weſtminſter*, and *Wincheſter* to hold in perpetuity their copy-right in books given or bequeathed to them by authors, or their repreſentatives, upon truſt that the profits ariſing from the printing or re-printing of ſuch books, ſhall be applied as a fund for the advancement of learning, and other beneficial purpoſes of education.

4 Burr. 2303.

Stat. 15 G. 3. c. 54.

Although a plaintiff ſhould eſtabliſh his right only as to a *part* of a work, yet the court of Chancery will grant an injunction to reſtrain the publication of ſuch part. If an author has ſold *all his intereſt in the copy-right*, he has no reſulting right at the end of the firſt fourteen years, as againſt his own aſſignee, and will be injoined from re-publiſhing.

Carnan v. Bowles, 2 Br. Ch. Rep. 80. *Ibid.*

If there are ſeveral invaſions of a copy-right by different perſons, the proprietor cannot join them all in one bill, but muſt file ſeparate bills againſt each.

Dilly v. Doig, 2 Vez. jun. 486.

See farther on this point, tit. "Injunction," vol. 3. 651.]

2. Of

2. Of the Conſtruction of the King's Grants and Letters Patent, as to their being good or void; and herein, of the King's being deceived in his Grant.

Plow. 333. Co. 44. 6 Co. 55. 7 Co. 12. 8 Co. 56. (a) 2 Co. 24. 8 Co. 145. Hob. 224. Pollexf. 418. [Qu. Whether the king, proceeding by and with the advice of parliament, is in that ſituation, in reſpect of which he is under the ſpecial protection of the law, and can be conſidered to be deceived in his grant? 2 H. Bl. 500.]

As the king's grants proceed chiefly from his own bounty, and his letters patent are records of a high nature, they ought to contain the utmoſt truth and certainty, and have in all times been conſtrued moſt favourably for the king (a) contrary to the grants of common perſons; and accordingly in a great variety of caſes we find incertainty, miſrecitals, falſe ſuggeſtions, and all ſuch matters as ſhew that the king was deceived in his grant, held ſuch reaſons as have been ſufficient to vitiate the grants.

In a matter therefore in which ſuch great exactneſs has been required, it may be neceſſary in the firſt place to lay down the following general rules:

(b) 5 Mod. 297. 2 Salk. 560. Carth. 440. Skin. 651. pl. 1. Ld. Raym. 292. S. C.

Firſt, That in the conſtruction of letters patent every falſe recital in a part material will not vitiate the grant, if the king's intent ſufficiently appears; this was ſo held in the caſe of (b) *The King* and *Biſhop of Cheſter*, where the grant was made to a perſon as a knight, who in truth was no knight; and though the grant was held void for this reaſon in *B. R.* yet the judgment was reverſed in parliament.

(c) 4 Mod. 277. Carth. 350. Comb. 334. Salk. 465. pl. 2. Skin. 446. pl. 4. Ld. Raym. 50. S. C.

Secondly, That if the king is not deceived by the falſe ſuggeſtions of the party, but only miſtaken by his own ſurmiſes, this will not vitiate his grant; and ſo was the reſolution in the caſe of (c) *The King* v. *Kemp*.

(d) 6 Co. 55. Ld. Chandos's caſe. (e) It is ſaid the king may grant without any conſideration, Hob. 230.—— So, if the conſideration be not a full one, it is no objection; for kings are ſuppoſed to be bountiful. Verp. 279. ——If the king be deceived in a conſideration real executory, it will avoid the grant; but not in a conſideration perſonal executed. Freem. 332. For this difference, *vide* 5 Co. 93. Jenk. 304. 10 Co. 67. but in 5 Co. 94. Berwick's caſe, it is ſaid as a maxim, that if the conſideration which is for the benefit of the king, be it executory or executed

Thirdly, That though the king miſtakes either in matter of law or fact, yet if this is not any part of the conſideration of the grant, it will not vitiate it; and ſo is (d) Lord *Chandos*'s caſe, which was thus: *Henry* VII. granted to Lord *Chandos* a manor in tail, and the ſame king by other letters patent reciting the former grant, and that the ſaid Lord *Chandos* had ſurrendered the ſame to be cancelled, and that the ſame had been cancelled, by reaſon whereof the king was and is ſeiſed in fee, did grant the ſaid manor to huſband and wife, and to the heirs of the huſband, &c. Now, though by the ſurrender of the firſt letters patent, the eſtate-tail was not determined; and ſo the king not ſeiſed of the manor in fee as he recited he was in the ſecond grant; for he had only a reverſion in fee expectant upon the determination of the eſtate-tail; yet the clauſe, *viz. by virtue whereof we are ſeiſed in fee*, being what the king collected to be the conſequence of the ſurrender, and not at all owing to the miſinformation of the party, either as to the entail or ſurrender, the miſtake which he made being no part of the (e) conſideration, the grant was held good.

cated, or be it of record or not of record, if it be not true or not truly performed, or if any prejudice may arise to the king, by reaſon of the non-performance thereof, the letters patent are void, & *vide* Moor, 393. Hob. 221. 3 Leon. 248. Plow. 454. Skin. 663. Lane, 3. 76. Dyer, 252.

Fourthly, That the words *ex certâ ſcientiâ & mero motu*, in the king's charters and letters patent, do occaſion them to be taken in the moſt benign and liberal ſenſe, according to the intent of the king expreſſed in his grant. Bro. Patents pl. 80. Plow. 337. 6 Co. 56. 7 Co. 14. 3 Leon. 249.

——But, where the king in his grant recites a thing which is falſe, that ſhall not make the patent good, although the words be *ex certâ ſcientiâ & mero motu*. 10 Co. 112. 3 Leon. 249. Plow. 502. 3 Co. 4. Savil, 5. 37. Dyer, 300. 2 Salk. 561.

Fifthly, That though in ſome caſes, general words of a grant may be qualified by the recital, yet if the king's intent is plainly expreſſed in the granting part, it ſhall enure according to that, and is not to be reſtrained by the recital. So held in the caſe of the king and Biſhop of Cheſter, which is grounded on Legatt's caſe, 10 Co. 112.

In a *quare impedit*, it was found by a ſpecial verdict, that King *H.* VIII. was ſeiſed in fee of the manor of *Leyburn* in *Kent*, to which the advowſon of the church of *Leyburn* is appendant (which manor came to the king by the diſſolution of monaſteries, having been part of the poſſeſſions of the abbot of *Gray Church*), and that he granted the manor to the archbiſhop of *Canterbury* and his ſucceſſors, ſaving the advowſon; afterwards the archbiſhop regranted the manor and the advowſon to the king, his heirs, and ſucceſſors; after which the king grants the manor with the appurtenances, and this advowſon (naming it in particular) which lately did belong to the archbiſhop of *Canterbury* and to the abbot of *Gray Church*, together with all privileges, profits, commodities, &c., in as ample manner as they came to the king's hands by the grant of the archbiſhop, or by colour or pretence of any grant from the archbiſhop, or by ſurrender of the late abbot of *Gray Church*, or as amply as they are now or at any time were in our hands, to Sir *Edward North* and his heirs; and the queſtion was, Whether by this grant the advowſon did paſs? and adjudged that it did; for though here was a falſity or miſrecital, the advowſon never having been in the hands of the archbiſhop, yet that not being material, as the king could not be ſaid to be deceived, having granted the advowſon expreſsly by name, it was adjudged *ut ſupra*. Mod. 195. 2 Mod. 1. 2 Keb. 442. The King v. Sir Francis Clark.

In the argument of the above caſe, the following points were laid down as ſupported by the authorities in the margin:

1. Where a particular certainty proceeds, it ſhall not be deſtroyed by an incertainty or a miſtake coming after. Cro. Eliz. 34. 48. Yelv. 42. 3 Leon. 162. And. 148. 2 Godb. 423. Markham's caſe. 10 Co. Legatt's caſe.

2. That there is a difference when the king miſtakes his title to the prejudice of his tenure or profit, and when he is miſtaken only in ſome deſcription of his grant, which is but ſupplemental, and not material nor iſſuable. 21 E. 4. 49. 33 H. 7. 6. 36 H. 8. 37. 9 E. 4. 11, 12. Lane, 111. 2 Co. 54.

3. That diſtinct words of relation in the king's grant are good to paſs away any thing. Bulſ. 4. Dyer, 350. 9 Co. 24. 10 Co. 4. Whiſtler's caſe.

4. That

2 Inſt. 446-7. 6 Co. Sir John Molin's caſe. 10 Co. 65.

4. That when the king's grants are upon a valuable conſideration, they ſhall be conſtrued favourably for the patentee for the honour of the king.

Hob. 220. Needler v. Biſhop of Winchester.

One *Southwell* and his wife being ſeiſed of the parſonage of *Horſham* to them and the heirs of the huſband, by deed dated 10th *May*, granted the ſame to King *Henry* VIII. in conſideration whereof the ſame king, by his letters patent, dated the 21ſt *July* following, granted the vicarage of *Harley* to them and the heirs of the huſband; after which, and on the 26th *July* following, the deed 10th *May* was enrolled; and it was objected, that the king was deceived in the conſideration, as nothing paſſed by the deed before enrolment, and therefore the grant void; but notwithſtanding this it was held, that here was no deceit in effect, that though the deed could not be pleaded as ſuch before enrolled, yet it took its force and effect from the execution; and to that the enrolment ſhall have relation, ſo as to make it good *ab initio*.

Plow. 455. Sir Thomas Wroth's caſe.

If the king recites the conſideration to be the ſervices of the patentee, though none were done by him, or if he recites that a manor came to him by eſcheat, when in truth it was his inheritance; theſe will not vitiate the grant; *ſecùs*, if they are the ſurmiſes of the party.

Leon. 30. Sir Walter Hungerford's caſe. (*a*) 12 Co. 86. L. P. & *vide* title Election.

Queen *Eliz.* being ſeiſed of a great waſte in the pariſh of *Chipnam*, granted a moiety of a yard-land in the ſaid waſte to the mayor and burgeſſes of *Chipnam*, without any certainty, name or deſcription; and afterwards granted the ſaid waſte to *H.* And it was adjudged, that this firſt grant was void, not only againſt the queen, but againſt the ſecond patentee, for incertainty; and (*a*) that it could not, as in caſe of a common perſon, be made good by any election of the patentee.

2 Rol. Rep. 118. Dixon's caſe.

*Ed.* VI. granted *totam illam rectoriam de* Dale, *ac omnes decimas*, &c., *quæ quidem omnia & ſingula præmiſſa* are of the true yearly value of 32 *l.*, and at the time of this grant there was a farm in the pariſh of *Dale* in leaſe under a yearly rent; and though the words *quæ quidem omnia*, &c. refer only to tithes of that yearly value, and it might be the king intended to paſs no more, yet having granted *totam illam rectoriam* generally, it was adjudged, that the tithes of that farm ſhould paſs, though it made it more than 32 *l. per ann.*

8 Co. 167. Lane, 39. Cumberland's caſe. (*b*) Dav. 45. 7 Co. 14. 5 Mod. 301.

If the king grants *totum illud manerium ſuum, ſive totam illam rectoriam ſive advocationem*, &c. if he had a manor and no rectory, or an advowſon and no rectory, or a manor or a rectory impropriate, yet that which he had ſhall paſs, becauſe it was the effect of the grant; and in this caſe a rule was laid down, *viz.* that (*b*) if the king's grant may be taken to two intents, one of which may be good, and the other not, it ſhall be conſtrued to ſuch intent that the grant may take effect.

Cro. Eliz. 512, 513. Ld. Darcie's caſe.

If the king grants a manor with ſuch privileges and franchiſes as the dean and chapter of *St. Paul's* formerly enjoyed therein, it is a good grant becauſe of the certainty to which it relates.

So,

So, a grant of a manor, *habend.* to the grantee and his heirs *adeo plenè & integrè*, as it came to the hands of the king by the attainder of *J. S.* or as is contained in ſuch letters patent, or the like, is good according to the rule, *id certum eſt quod certum reddi poteſt.* 10 Co. 63. Whiſtler's caſe.

King *Ed.* VI. being ſeiſed of the manor of *Cleobery*, then late parcel of the poſſeſſions of the late Earl of *March*, whereof a great wood was parcel, grants this wood to the Lord *Paget* in fee; from the Lord *Paget* it came to the Lord *Seymour*, and by his attainder it returned to *Ed.* VI. again; from *Ed.* VI. the manor and wood came again to Queen *Mary*, and from her to Queen *Elizabeth*, who grants to the Earl of *Leiceſter* this manor, *nuper parcell. poſſeſſionum nuper comitis* Marchiæ, *et omnia al' ter' boſc' & hæreditamenta manerio præd' ſpectant', vel ut pars, parcell' ſive membrum inde antehac habita, cognita ſive reputata exiſten'*; and it was adjudged that theſe woods did paſs. Dyer, 362. Co. Ent. 383. The Queen v. Thornton.

Sir *Francis Forteſcue* being ſeiſed of a manor, grants the ſame to the Earl of *Denbigh* except ſuch lands as were then held for life by copy; afterwards the inheritance of this copyhold was granted to the Earl of *Denbigh*, and then the copyholder dies, and the Earl grants by copy again, and afterwards forfeited all to the king, who granted the manor and every part and parcel thereof, or that is reputed parcel thereof, to the Earl of *Clarendon*; and the queſtion was, Whether this copyhold, having been thus ſevered, paſſed by the words *reputed parcel*, or not? and adjudged that it did. Pollexf. 410. Freem. 207. Lee v. Browne.

If the king grants to *J. S.* lands and the mines therein contained, and royal mines are found in them, they ſhall not paſs; for the king's grant ſhall not be taken to (*a*) a double intent; and the moſt obvious intent is, that they ſhould only paſs the common mines that are grantable to a common perſon. Plow. 336. (*a*) Mines royal, amercements royal, eſcheats royal, ſhall not paſs by general words, of all mines, amercements, and eſcheats. Dav. 17. 57.

So, a grant of *bona felonum*, &c. will not paſs the goods of one who ſtands mute and will not plead. 8 H. 4. 2. pl. 2. Raym. 242. cited, & *vide* Rol. Rep. 309. 12 Co. 75. Jenk. 325. 2 Rol. Abr. 194. Owen, 155. Sand. 275. Vent. 32. Sid. 142. 2 Mod. 107.

[The king granted to a ranger of a foreſt all manner *of wood blown or thrown down by the wind, and all dead wood, and the boughs and branches of trees and wood in the foreſt, cut off or thrown down, and houſe-bote and fire-bote*, for himſelf and the foreſters and keepers. It was adjudged, that under theſe words, branches cut from trees felled for his Majeſty's uſe did not paſs.] Attorney-General v. Lord Stawell, Anſtr. 592.

By the ſtatute of 17 *E.* 2. *(ſtat.* 1.) *de Prærogativâ Regis*, the king's gift or grant of land, manors, *cum pertinentiis*, conveyeth not knight's fees, advowſons, or dowers, without expreſs words, though it be otherwiſe in caſe of a common perſon. 10 Co. 64.

But, if a manor with an advowſon appendant be in the hands of the king by eſcheat or by purchaſe, and he at this day give it as entirely as *J. S.* held it before it came into our hands by way of eſcheat, or as *J. S.* held who enfeoffed us, in ſuch caſe the advowſon 10 Co. 64. Plow. 251.

advowſon ſhall paſs without ſaying in the charter *cum feodis & advocationibus*; becauſe the law in ſuch caſe intends, that the king is appriſed of his right.

Latch. 248. (a) The king's grant of the vicarage of *D.* will not paſs the advowſon of the vicarage of which the king was ſeiſed. Cro. Eliz. 163.

So, if the king grants *eccleſiam*, the advowſon paſſes, the (a) intent, and not the preciſe words, being to be regarded in the king's grants.

9 Co. 42. 4 Mod. 279. cited. * In pleading it ought to be alleged in what counties the manors lie, as the plaintiff did in the Earl of Shrewſbury's caſe, and if the other party plead *non conceſſit*, upon trial of the iſſue, the circumſtances (mentioned by the court) may be given in evidence, to prove what manor was granted. *Vide* 9 Co. 47. a.

A grant of ſtewardſhip of ſeveral manors by name, without mentioning in what county, has been held good, though uncertain; notwithſtanding it was objected that the king may have divers manors of the ſame name, and no iſſue can be taken which manors the king intended to paſs *.

8 Co. 45. 4 Mod. 279. cited.

So, a grant to the Earl of *Rutland, a tempore plenæ ætatis*, when in truth he was of age long before, was adjudged a good patent, becauſe it was the intent of the king that it ſhould commence from that time; and if that could not be, then for the time to come.

Co. 46.

If the king, being tenant in tail or for life, grants *totum ſtatum ſuum*, nothing paſſes.

Dav. 43. 45. Rol. Abr. 845. Co. 43.

So, if the king, being ſeiſed in fee, grants the lands or a rent, and limits no particular eſtate in the gift, the grant is void, and the patentee has no freehold either for his own life or for the life of the king, nor even an eſtate at will; becauſe moſt grants proceeding from the application of the ſubject, they ought to know what they aſk; and if that do not appear, nothing ſhall paſs from the king by reaſon of the incertainty.

Co. Lit. 27. a. Jenk. 199. * *Contra* of armories or arms granted by the king to a man for reward of ſervice, as the ſame is deſcendible to the heirs male lineal or collateral. Co. Lit. 27. a.

So, if lands are given by the king's letters patent to a man and his heirs male, this is void, for there can be no ſuch tenure; and therefore the king is deceived in his grant *.

3 Lev. 134. Travel v. Garteret.

So, if the king poſſeſſed of a chattel intereſt grants it in fee, this is void.

### 3. Where the King's Grantee ſhall partake of his Prerogative.

Dyer, 1. pl. 7, 8. in marg. Keilw. 169. (b) 1 P. Wms. 252. 2 Vez. 181.

A *choſe in action* may be aſſigned to the king, as alſo granted or aſſigned by him; and in this latter caſe, the grantee may either ſue in his own or in the king's name. But it is (b) ſaid to be moſt uſual to ſue in the king's name, in order to take advantage of his prerogative.

Dyer, 30. Sav. 2. (c) Owen, 113. Cro. Jac. 82. like point.

*J. S.* attainted of treaſon, and being poſſeſſed of certain obligations which became forfeited, the king granted them to the wife (c) without any words enabling her to ſue for them in her own name; and ſhe having ſued in her own name, it was held, that ſhe well might; for the law allowing the grant good, gives by

by implication the grantee the neceſſary means of attaining the benefit of it.

So, where *J. S.* in an action on the caſe recovered 4000 *l.* damages, and afterwards became outlawed in a perſonal action; and the king having granted this 4000 *l.* it was held, that the grantee may levy this debt by action in his own name, or by extent in the king's name; though he has no words in his grant to ſue it in the king's name, as is uſual in ſuch caſe; but in this caſe an (*a*) aſſignment by the king's patentee was held void. Cro. Jac. 179. The King v. Twine. Sav. 133. (*a*) 2 Lev. 49, 50. Bro. Diſſeiſ. 65.

If the king enters without title, or ſeizes lands by a void or inſufficient office, he is no diſſeiſor: but (*b*), if the king by letters patent grants lands ſo ſeized, and the patentee enters, he is a diſſeiſor; becauſe he has time to inquire into the legality of his title, which the king is ſuppoſed to want leiſure for. (*b*) That the king's patentee ſhall not take advantage of the maxim *nullum tempus occurrit regi.* Poph. 26.

The king may diſtrain for his rent-ſervice in any lands of his tenant: ſo, if he hath a rent-charge iſſuing out of certain lands, he may diſtrain in any other lands of the party; but his grantee cannot do ſo. Bro. Prerog. 68.

Originally all wrecks were in the crown, and the king has a right to a way over any man's ground for his wreck; and the ſame privilege goes to the grantee thereof. 6 Mod. 149.

---

# Privilege.

PRIVILEGE is an exemption from ſome duty, burden, or attendance, with which certain perſons are indulged, from a ſuppoſition of law, that the ſtations they fill, or the offices they are engaged in, are ſuch as require all their time and care; and that therefore without this indulgence it would be impracticable to execute ſuch offices to that advantage which the publick good requires.

Under this deſcription we ſhall conſider,

(A) The Duties and Offices from which certain Perſons by reaſon of their Privilege are exempt.

(B) The particular Privileges in Suits allowed Officers and Attendants in the Courts of Juſtice: And herein,

1. Who are the Officers entitled to Privilege.

2. Of

2. Of the Privilege and Protection allowed thoſe whoſe Attendance is neceſſarily required.
3. In what Caſes this Privilege is to be allowed.
4. Of claiming and allowing Privilege; and therein, that it muſt be ſet forth and pleaded.
5. How privileged Perſons are to ſue and be ſued.
6. Whether there can be Privilege againſt Privilege.

## (C) Privilege of Peers and Members of Parliament.

1. Who are the Perſons entitled to this Privilege.
2. How far this Privilege extends to their Servants and Attendants.
3. In what Caſes this Privilege is to be allowed.
4. Of the Commencement and Continuance of this Privilege.
5. How Privilege is to be claimed and taken Advantage of.
6. What ſhall be deemed a Breach of Privilege.
7. Of the Proceedings in Courts by and againſt Perſons entitled to Privilege of Parliament.

## (A) The Duties and Offices from which certain Perſons by reaſon of their Privilege are exempt.

2 Inſt. 531. 704. Skin. 21.

THE king's ſervants are privileged in ſome caſes in reſpect of their neceſſary attendance.

pl. 21. 2 Chan. Rep. 196. 2 Show. 84. pl. 72.——Privileged from arreſts. Raym. 152. [It is an eſtabliſhed rule of law, that the king cannot grant an exemption from any duties but thoſe he has a title to impoſe; and which are *perſonal* to him, and diſtinct from the general intereſt of the realm. 2 Roll. Abr. 198. K. pl. 1. 202. T. pl. 2. Therefore where a ſtatute enacted, that the lord-lieutenants of the ſeveral counties ſhould "charge any perſon with horſe and arms for the county where his eſtate "ſhould lie," towards the maintenance of the militia, it was holden, that a charter granted to the College of Phyſicians, exempting the members "from bearing or providing arms to ſerve in the "militia in London and Weſtminſter, or the ſuburbs or within ſeven miles thereof," did not exonerate one of the members from the charge, though his eſtate lay within ſeven miles of London. Sir Hans Sloane v. Lord William Paulet, 8 Mod. 12. But it ſhould ſeem, that it is competent to the crown to grant an exemption from being preſſed; becauſe in the crown alone lies the power of iſſuing preſs-warrants. Cowp. 520-1.]

(a) 1 Sid. 287. 2 Keb. 50. 54. S.C. Swallow's caſe.

One (a) *Swallow*, being the king's minter or moneyer, was elected an alderman of *London*, but refuſing to take the oath of an alderman was fined, and committed for the fine by the judgment of the court in *London*, which appeared on the return to a *habeas corpus*. He alleged in *B. R.* that he was an officer of the mint, and that, by an ancient charter of privilege granted ſuch officers, he ought to be exempt; and offered to plead this matter to the return of the *habeas corpus*, as a matter conſiſtent with him to do: but this the court refuſed to admit, as he might have pleaded it in the court below: however, he was directed to ſet it forth in a ſuggeſtion in the crown-office, which he did, and obtained a writ of privilege, which at another day he brought into court. The recorder objected to its being allowed againſt the ancient privilege of the city, confirmed by acts of parliament; but the

the court held it a reaſonable privilege, the office being ancient, and the attendance neceſſary elſewhere. They ſaid, that if there were not perſons ſufficient beſides to ſerve, this might have been ſhewn, and it would be a good reaſon to ſuſpend his privilege; and though aldermen were not mentioned in the charter, yet, as ſuperior and inferior officers were mentioned, as, mayor, ſheriff, eſcheator, collector of tenths, &c., they ſaid the middle were included; and accordingly he was diſcharged.

But, where ſome perſons belonging to the cuſtom-houſe, *London*, were indicted for not keeping watch and ward, though they pleaded a ſpecial privilege granted them by the king to exempt them from this duty; yet, as they did not aver that there were ſufficient perſons beſides, the plea was over-ruled. Sid. 272. Keb. 933. The King v. Clark.

The king by his charter may exempt ſome perſons from ſerving on juries if there be enough beſides. But ſuch charter of exemption does not extend to the court of King's Bench, unleſs particularly named; nor to any caſe where the king is concerned, unleſs it has theſe words, *licet tangat nos*. And the ſheriff muſt not return ſuch privilege, but the perſons who would have the benefit of it muſt claim it. Sid. 243. Lev. 159. Raym. 113. Keb. 840.

A juror ſurmiſed at the bar, that he was tenant in ancient demeſne, and had his charter in his hand, and prayed to be exempted from ſerving on the jury; but the court did not regard it, but cauſed him to be ſworn. It was ſaid (*a*), he might have his remedy againſt the ſheriff; or, if he had made default and loſt iſſues, he might ſhew his charter in the Exchequer upon the amercement eſtreated, and there he ſhould be diſcharged. Leon. 207. Mills v. Snowballs. *Vide* title Ancient Demeſne. (*a*) Q. & *vide* Co. Lit. 130. Sid. 243.

Where a peer is party, either plaintiff or defendant, two or more knights * muſt be returned on the jury; and it was ſaid, that in *Cumberland* there was but one freeholder who was a knight, beſides Sir *Richard Stote*, a ſerjeant at law; and the court were of opinion, that rather than there ſhould be a failure of juſtice, a ſerjeant at law ought to be returned a juryman; for that his privilege would not extend to a caſe of neceſſity. 2 Mod. 182. Mod. 226. Dyer, 107. pl. 27. * See 24 G. 2. c. 18. ſ. 4. No challenge to the array, for want of a knight.

If a ſworn (*b*) attorney or other officer of any of the courts of *Weſtminſter-hall* be choſen conſtable, he may have a writ of privilege for his diſcharge. And it is held, that ſuch officers ſhall have this privilege, not only where there is no ſpecial cuſtom concerning the election of conſtables, but alſo where they are choſen by a particular cuſtom in reſpect of their eſtates or otherwiſe; for that no ſuch cuſtom ſhall be ſuppoſed to be more ancient than the uſage of thoſe courts, and therefore ſhall give way to them. March, 30. Noy, 112. Cro. Car. 389. 2 Keb. 477. (*b*) This privilege is thought to extend to barriſters at law, 2 Hawk. P. C. c. 10. § 39.

So, an attorney, being choſen church-warden of a pariſh, may have a writ of privilege: ſo, a writ of privilege was ſigned by all the court of *C. B.* for *G.* a clerk under the *cuſtos brevium*, to free him from being a ſoldier. And it is therein recited, that it is the privilege of the court, that neither the attornies nor clerks of it 2 Rol. Abr. 272. Palm. 392. Lev. 265. Vent. 16. 29. Raym. 180.

Cro. Car. 11. 389. 585. and Co. Ent. 436. should be elected to any office without their consent, but ought to attend the service of the court. the like writ of privilege.

Trin. 27 Car. in B. R. Gale's case. 3 Keb. 512. S. C.

*Gale*, an attorney of *B. R.*, was elected one of the twenty-four burgesses in the town of ———, and because he refused to serve was fined ten pounds: then he procured a writ of privilege, which he shewed; after which debt was brought for the ten pounds in *B. R.*, and it was prayed after imparlance to stay the action against *Gale*, because that after imparlance he could not plead his privilege to the action; and *Stone*'s case was cited, who was elected reeve to collect the rents of the lord at *Harrow the Hill*, and was discharged by his writ of privilege. The court held, that the privilege of an attorney was a good discharge in this case: they likewise held, that the writ of privilege had a retrospect to the whole, and that being discharged from the office, he was discharged from the fine also.

Sid. 272. 355. 431. Mod. 22. Lev. 233. Keb. 439. 933. 2 Keb. 309. 578.

It seems to be the better opinion, that if a captain of the king's guards, a gentleman of quality, or practising (*a*) physician, be chosen constable in a parish, where there are persons sufficient to serve, and in which there is no special custom directing such election, that every such person may be relieved or discharged by the court of King's Bench, which hath a supreme and mandatory power in cases of this nature: but, in case of a special custom in respect of estate or otherwise, it hath been holden, that such persons are not to be excused; and the rather, because they may execute the office by deputy.

(*a*) Members of the College of Physicians in London exempted by the statute 32 H. 8. c. 40. [But the equity of this act, it should seem, does not extend to other physicians not mentioned in it. 2 Hawk. P. C. c. 10. § 44.]

2 Keb. 578.

By the statute 5 *H.* 8. *c.* 6. surgeons are exempt from serving parish offices.

By the 6 *W.* 3. *c.* 4. "All persons using the art of an apothecary, who shall be brought up and serve in the said art as apprentices seven years, shall be exempted from the offices of constable, scavenger, overseer of the poor, and all other parish, ward, and leet offices, and from serving on juries."

Cro. Car. 585. Jon. 462. Alderman Abdy's case.

If an alderman of *London* has a house in the manor of *R.* in the county of *Essex*, (in which manor the lord has by prescription a leet,) and he as an inhabitant is chosen constable there, yet he is not compellable to serve; for that as an alderman he is bound to be present in the city for the good government thereof *.—And a writ was awarded to the lord of the manor to discharge him.

* At the summer assizes at Croydon, 1777, Lord Mansfield refused to fine Mr. Plumbe, returned as a special juryman in a cause before his Lordship, because at that time he was one of the sheriffs of London.

2 Jon. 46. Price's case.

One *Price*, being high constable for the hundred of *Wanstead*, was elected overseer of the poor in the parish of *St. Peter the Poor* in *London*; and upon producing the certificate of the justices of the peace of the county, and their certifying that his service in the office of constable was of great use and importance to

to his Majeſty, he was by the court of *B. R.* diſcharged from the office of overſeer till ſuch time as his office of conſtable expired.

But, where *A.* was indicted for not taking on him the office of high conſtable, and the queſtion on a ſpecial verdict was, Whether a tenant in ancient demeſne may be made conſtable of an hundred which reaches further than the demeſnes? it was adjudged, that he might. Vent. 344. 2 Show. 75, pl. 59. The King v. Betteſworth.

Doctor *Lee*, archdeacon of *Rocheſter*, having lands within the level, was made an expenditor by the commiſſioners of *ſewers*; whereupon he prayed his writ of privilege, which was granted; for the regiſter is, *vir militans deo non implicetur ſecularibus negotiis;* and the ancient law is *quod clerici non ponantur in officia*—Clergymen are not to ſerve in the wars. Vent. 105. Lev. 303, Dr. Lee's caſe, and Mod. 282. S. C. where it is ſaid, the reaſon was, becauſe the land was in leaſe, and the tenant, if any, ought to do the office. [The like point was determined in the vicar of Dartford's caſe, 2 Str. 1107. more fully reported in Andr. 353. under the name of Chambers' caſe. The court in delivering their judgment in this laſt caſe ſaid, that upon the authority of Dr. Lee's caſe, and 6 Mod. 140. (*infra*), they were clearly of opinion, Mr. Chambers, the vicar, was not compellable to exerciſe the office: the firſt caſe being directly in point, and ſtanding upon both the reaſons given in the books; and the other being contrary to the diſtinction taken between an office at common law, and under act of parliament. And Lee, C. J. added, that the uſage which had been offered of ſeveral clergymen having actually ſerved the office ſince Dr. Lee's caſe, had no influence on the preſent queſtion; for the exemption being claimed as a privilege, any perſon entitled to it may certainly waive it, if he pleaſes.]

A writ of privilege was moved for to have a clergyman, who appeared to have no cure of ſouls, privileged from the office of overſeer of the poor, which three judges thought reaſonable; but *Holt*, Ch. J. ſeemed againſt it, who thought that their privilege of exemption was only extendible to their ſpiritual revenues; and if in any caſe they were perſonal, it was only from common law offices, eſpecially if they were without cure, as in the preſent caſe; and in deference to his opinion it was directed to be moved for again. 6 Mod. 140. [By 1 W. & M. c. 18. §11. *diſſenting miniſters*, and by 31 G. 3. c. 32. *Roman catholick prieſts*, are, under certain conditions, exempted from ſerving all county, ward, and *pariſh* offices, and therefore a *clergyman of the church of England* may be ſuppoſed to be exempted; for it cannot be imagined, that the legiſlature meant to confer greater privileges upon *ſectaries*, than the *regular clergy* were underſtood to poſſeſs: but there does not appear to be any adjudged caſe preciſely to this point. See note to laſt edition of 6 Mod. *ſupra*.]

In the caſe of *Evedon* an attorney of *B. R.*, it was determined that he was not obliged to ſerve in the train-bands, or to find a deputy for that purpoſe, although the array and muſter of theſe is directed by ſeveral acts of parliament which contain general words; for his privilege ſhall exempt him from offices, as well thoſe created by ſtatute as thoſe at common law, if there be not an expreſs clauſe for taking away his privilege. M. 9 G. 2. in *B. R.* Evindon's caſe. 2 Str. 1143. [Heaton's caſe, Barnes, 1143. S. P. But, ſince the 2 G. 3. c. 20. § 42. the militia acts having allowed a commutation of ſervice into a payment of 10*l.* it hath been holden, that an attorney is not entitled to his writ of privilege to exempt him from ſerving in the militia, it being no longer deemed to be *a perſonal* ſervice, upon which ground alone he could be entitled to it. Gerard's caſe, 2 Bl. Rep. 1123.—By 26 G. 3. c. 170. § 27. "No peer of the realm, nor "any perſon who ſhall ſerve as a commiſſioned officer in any regiment, troop, or company in his Ma"jeſty's other forces, or in any one of his Majeſty's caſtles or forts, nor any non-commiſſioned officer "or private man, ſerving in any of his Majeſty's other forces, nor any commiſſioned officer ſerving, or "who hath ſerved four years in the militia, nor any perſon being a member of either of the univerſities, "nor any clergyman, nor any teacher of any ſeparate congregation, nor any conſtable or other peace-officer, "nor any articled clerk, apprentice, ſeaman, or ſeafaring man, nor any perſon muſtered, trained, and doing "duty, or employed in any of his Majeſty's docks or dockyards for the ſervice thereof, or employed and "muſtered in his Majeſty's ſervice in the Tower of London, Woolwich Warren, the ſeveral gun-wharfs at "Portſmouth,

" Portſmouth, or at the ſeveral powder-mills, powder magazines, or other ſtorehouſes belonging to his Ma-
" jeſty under the direction of the Board of Ordnance, nor any perſon being free of the Company of
" Watermen of the river Thames, nor any poor man who has more than one child born in wedlock,
" ſhall be liable to ſerve perſonally, or provide a ſubſtitute to ſerve in the militia; and no perſon hav-
" ing ſerved perſonally, or by ſubſtitute, according to the directions of this, or any former act, ſhall be
" obliged to ſerve again, until by rotation it ſhall come to his turn: but no perſon who has ſerved
" only as a ſubſtitute ſhall by ſuch ſervice be exempted from ſerving again, if he ſhall be choſen by
" ballot."]

Mayor of Norwich v. Berry, 4 Burr. 2113. 1 Bl. Rep. 636. S. C.

[An attorney, it hath been holden, is exempted by the privilege of the court to which he belongs, from ſerving the office of ſheriff in a corporation; though he be a member of the corporation, and reſident in the corporate town, before and when he is admitted an attorney.

Delamotte's caſe, 2 Str. 698.

*A.* who was a juſtice of peace, and reſided at *Blackheath* in *Kent*, and in *London*, being appointed conſtable in *London*, moved for a writ of privilege. But the court denied it, ſaying they had nothing to do with it, but the proper method was under the ſtatute of *Car.* 2. to apply to the ſeſſions.

*Per* Lord Mansfield, 4 Burr. 2114.

Barriſters are conſidered as exempt from ſerving the office of ſheriff.

It is permitted by 1 *W. & M. c.* 18. and 31 *G.* 3. *c.* 20. to diſſenters and *Roman* catholicks to ſerve the office of conſtable by deputy.

Anſtr. 216.

The officers of the exciſe and cuſtoms claim, and have been allowed in ſeveral inſtances, their writ of privilege from the court of Exchequer, as officers of the court, to be diſcharged from offices. One of theſe writs of privilege, that are now in uſe, was ſettled by Lord Chief Baron *Comyns* himſelf.

Harriſon's caſe, Bunb. 24.

So, the foreign appoſer was allowed his writ of privilege to exempt him from ſerving the office of conſtable.

Biſhop v. Lloyd, Bunb. 255.

One *Martin*, who was deputy to the uſher of the cuſtoms, being choſen head-borough for *Weſtham* in the county of *Eſſex*, moved for a writ of privilege to diſcharge him from that office, which was granted. Upon the authority of this precedent it was moved for a writ of privilege for the chief accountant to the commiſſioners for victualling the navy, who was choſen churchwarden of the pariſh of *Saint Botolph, Aldgate*, his attendance upon the king's buſineſs and the revenue of the crown being, it was urged, equally concerned as in the other caſe. But the court thought this caſe not like the other caſe, for it did not appear here, that there was a clauſe of exemption in the patent conſtituting the commiſſioners of victualling, as in the other caſe there was for *all* officers, &c. and the true reaſon they went upon in the other caſe was, for that *all* officers in the cuſtoms are bound to an attendance in the court of Exchequer, which, in this caſe, the party applying for this writ of privilege is not.]

## (B) The particular Privileges in Suits allowed Officers and Attendants in the Courts of Justice: And herein,

### 1. Who are the Officers thus entitled to Privilege.

THE officers, ministers, and clerks of the courts in *Westminster-hall* are allowed particular privileges in respect of their necessary attendance on those courts: they are regularly to sue and be sued in the courts they respectively belong to, and cannot, except in certain cases, be empleaded elsewhere; which privilege arises from a supposition of law, that the business of the court or their clients' causes would suffer by their being drawn into any other than that in which their personal attendance is required. 2 Inst. 551. 4 Inst. 71. Vaugh. 154. Dyer, 377. a. pl. 30.

*Anderson*, Ch. J. of the *C. B.*, brought trespass by bill for breaking his house in the city of *Worcester*, against a citizen of the said city; the mayor and commonalty came and shewed a charter granted by *E.* VI. and demanded conusance of pleas; but it was refused, because the privilege of that court, of which the plaintiff was a chief member, is more ancient than the patent; for the justices, clerks, and attornies of this court ought to be here attending to do their business, and shall not be empleaded or compelled to emplead others elsewhere; and this privilege was given this court upon the original erection of it. 3 Leon. 149. Lord Anderson's case.

An attorney, so long as he remains on record, shall have his privilege; and therefore where it was moved, that *J. S.* should put in special bail, being an attorney at large, and having (*a*) discontinued his practice, the court said, that attornies at large have the same privilege with the clerks of the court, and are to appear *de die in diem*; and they were not satisfied that he had discontinued his practice. Bro. title Attorney, 67, title Bill, 24. Vent. 1. Sir John How v. Walley.

(*a*) That if an attorney absents himself for a year, by the new rules he loses his privilege. 2 Lill. Reg. 371. *per* Glyn, Ch. J. See acc. 4 Burr. 2114.

But, where *J. S.* was arrested in *B. R.*, and after the arrest he procured himself to be made an attorney of *C. B.*, and prayed his privilege; it was disallowed, because it accrued *pendente lite*. 2 Rol. Rep. 115.

In debt against the warden of the *Fleet*, by bill of privilege, he refused to appear; the court doubted how they could compel him, as they could not forejudge him the court, he having an inheritance in his office; but it being surmised that he made a lease of his office, it was held, that he should not have his privilege, for that the lessee, and not he, was the officer during the lease. 2 Leon. 173. Gittinson v. Tyrrel.

So, if the marshal of *B. R.* grants his place for life, the grantor has no privilege during that time *. Vent. 65.

* *Qu.* if he can now grant it? *Vide* the stat. 27 Geo. 2. c. 17. whereby the power of appointing the Marshal is revested in the Crown.

Palm. 403. A clerk of *B. R.* was ſued in an inferior court for a debt under five pounds, and had a writ of privilege allowed; for the ſtat. 21 *Jac.* 1. *c.* 23. never intended to take away the privilege of attornies.

Hard. 365. (*a*) Where an officer In the court of (*a*) Exchequer there are three ſorts of privilege: 1*ſt*, As debtor. 2*dly*, As accountant. 3*dly*, As officer.

or Miniſter of the Exchequer is one of the parties in a perſonal action, he ſhall be ſued in that court, becauſe his abſence might hinder the king's affairs: ſo, a priſoner of this court, or any accountant that is entered into his account, ſhall have the like privilege; and a farmer or one indebted to the king, for the king's more ſpeedy ſatisfaction of his debt or duty, may ſue his debtor by a *quo minus* in the Exchequer. 2 Inſt. 531. [That *officers of the revenue*, as ſuch, are privileged to be ſued in the Exchequer in all caſes, is a doctrine and opinion which has been ſuppoſed to obtain in the Exchequer. However, the general privilege to be ſued in all perſonal actions in that court hath been doubted by very great authority; for it ſeems that the court has always confined the privilege of removing the action, to thoſe caſes in which the action hath been brought for ſomething which hath been done by them in the execution of their office. Lord C. Baron Eyre's argument in Cawthorne v. Campbell, Anſtr. 276. And this doubt of the learned Judge is ſupported by the caſe of Barkley v. Walters, Bunb. 306. where a cuſtom-houſe officer had ſeized two cables, one of which only was forfeited; and an action being commenced againſt him in the court of King's Bench, the court of Exchequer refuſed to remove it, becauſe it did not appear, but that the action was brought in B. R. for the other cable only.]

Noy, 40. Walrend v. Winroll. *J. S.* was ſued in an action of battery in *London*, which he removed into *B. R.*, and afterwards prayed his privilege in the court of Exchequer; and upon the puiſne baron's coming into court, and bringing the red-book of the Exchequer, which ſhewed that he was an eſcheator, and ſo an accountant to the king, the privilege was allowed.

2 Leon. 21. Lightfoot v. Butler. If one holds of the queen as of her manor, he ſhall not have the privilege of the Exchequer for that cauſe; but (*b*), if the king grants tithes, and thereupon reſerves a rent *nomine decimæ*, and a tenure of him, there he ſhall have privilege.

(*b*) In 2 Leon. 146. it is ſaid, that the tenant of the king in chief, or he who pays firſt fruits, or he who holds of the queen in fee-farm, ſhall not have privilege. Q. & *vide* 3 Leon. 258. —— That commencing a ſuit in the Exchequer on a *quo minus* as debtor to the king, is not ſuch a privilege as will ouſt an inferior juriſdiction; for it is now grown the common method of ſuing in thoſe courts. Hard. 316. 2 Vent. 362.

2 Show. 299. pl. 301. Lampen v. Sir Edward Deering & *al'*. On a *latitat*'s being ſued out againſt the commiſſioners of the treaſury, the puiſne baron of the Exchequer came into the court of *B. R.*, and brought into court the red-book of the Exchequer, which is deemed a record in that court; and thereby it appeared, that the treaſurer had privilege of being ſued only in that court; and the patent being produced in court which conſtituted the defendants, &c., and granted them the office of treaſurer of *England*, their privilege was allowed them without putting them to bring a writ of privilege, the court grounding themſelves on the (*c*) record before them.

(*c*) Difference between officers that are of record and not. Hard. 164.

Hard. 316. *vide* Moor, 753. 2 Inſt. 23. 551. Bro. Privilege, 16. It hath been held, that the treaſurer of the navy is *eo ipſo* an accountant; and that an accountant's privilege will hold againſt a ſpecial privilege in another court, as officer of the court or otherwiſe; though it be not alleged that ſuch an accountant is (*d*) entered upon his account; for that every accountant may be attached by the court to make up his accounts, and muſt attend for that purpoſe *de die in diem*.

(*d*) But, if an accountant has finiſhed his account and reduces it to a debt, he ſhall have no privilege but as a general debtor. Hard. 365.

In

In debt in *B. R.* againſt *J. S.*, he pleaded to the juriſdiction, that none of the privy-chamber ought to be ſued in any other court, without the ſpecial licence of the lord chamberlain of the houſehold, and that he was one of the privy-chamber; on demurrer to this plea, the court over-ruled it with great reſentment, and awarded a *reſpondeas ouſter*. Raym. 34. Keb. 137. Barrington v. Venables.

It was agreed in Serjeant (*a*) *Scrogg*'s caſe, that the privilege of the court of *C. B.* which ſerjeants claimed, extended only to inferior courts, not to the courts in *Weſtminſter-hall*; and that a ſerjeant may be ſued in any of theſe, becauſe he is not confined to that court alone, but may practiſe in any other court: but it is otherwiſe as to attornies or filazers, who cannot practiſe in their own name in any other court but ſuch as they reſpectively belong to. A ſerjeant at law therefore is to be ſued by original, and not by bill of privilege. (*a*) 2 Lev. 129. 3 Keb. 424. 2 Mod. 296. S. C. —So of the ſervant of a ſerjeant at law. Cro. Car. 84.

So, in an action by bill brought in *C. B.* againſt a ſerjeant at law, for work done, he pleaded that he ought to have been ſued by original, and not by bill. [Upon arguing the demurrer, a caſe was quoted, *Baker* againſt *Swindale*, in the court of *C. P. Mich.* 10 *G. Roll.* 360. It was an action brought againſt a prothonotary's clerk by original, to which he pleaded, that he ought to be ſued by bill; whereupon the plaintiff demurred, and the court gave judgment that the defendant ſhould anſwer over. *Per cur.* This caſe is in point; ſerjeants, prothonotaries' clerks, and all others not obliged to attendance in court, are upon the ſame foot. Judgment *quod billa caſſetur*. Trin. 7 G. 2. Serjeant Gindler's caſe. Barnes, 371.

The defendant pleaded in abatement, that he was one of the clerks of Sir *J. Cooke*, prothonotary in *C. B.* Upon a rule to ſhew cauſe why it ſhould not be ſet aſide, the affidavit annexed to the plea was produced, wherein the defendant ſwore, that he ſerved his clerkſhip with a Common Pleas attorney, and that he had for many years acted as an attorney or ſolicitor; and followed no other employment. After conſideration the court ſet aſide the plea, being all of opinion, that ſuch clerks had no privilege at all, they not being ſworn as attornies are, nor ever acting as clerks in the prothonotary's office; and that it was not ſufficient for the prothonotary to enter their names in his book. As to ſuch clerks as were actually employed under him, for ſo long as they continued in that employment, they would be privileged, but no longer; as in the caſe of a judge's clerk; and an old rule 8 *Car.* was cited, where they were reſtrained from practiſing as attornies.] Payne v. Fry, 1 Str. 546. The old way of pleading that a man is a clerk of one of the prothonotaries, was, that he was employed in engroſſing records, *aſſidens in curiâ*, and the like. Raſt. 473. b. 34 H. 6. 15. And in the court of K. B. of late years an affidavit has been required to that effect. Cooke v. Latimer; Reade v. Chambers, Forteſc. 342. and in the caſe of one Worthington, 1 Ld. Raym. 359. Clift. 572.

*J. S.* being arreſted by a writ out of *C. B.* brought his writ of privilege as clerk of the Crown-office; but it appearing that he was only a clerk to Mr. *Ward* (clerk of that office) and not an immediate clerk of the office, a *ſuperſedeas* to the writ of privilege 2 Show. 287. pl. 284. Ward v. Lawrence.

was granted on motion; the court having agreed, that he had no more privilege than an (*a*) attorney's clerk.

(*a*) That an attorney's clerk has no privilege. Comb. 12. adjudged.——But the clerk to the clerk of the Pells in the Exchequer is entitled to the privilege of that court. Comb. 482.

Stil. 460. Mod. 64. 2 Show. 242. pl. 239.

A ſerjeant at law, (*b*) barriſter, attorney, or (*c*) other privileged perſon, whoſe attendance is neceſſary in *Weſtminſter-hall*, may (*d*) lay his action in *Middleſex*, though the cauſe of action accrued in another county; and the court on the uſual affidavit will not change the *venue*.

(*b*) Though he hath diſcontinued his practice for ſome time. 2 Show. 176. pl. 172. [*Vide ſupr. contr.* But he does not loſe his privilege by reſiding in the country. 2 Bl. Rep. 1065.] (*c*) This privilege extends to judges clerks, and alſo to the clerk of aſſize. Salk. 670. pl. 9. 671. 2 Ld. Raym. 1253. (*d*) It is the common right of any gentleman at the bar to have a trial at bar; and it has never been denied in the caſe of an officer of the court. 6 Mod. 123. *per cur.*

Carth. 126. Ld. Raym. 338. Show. 148.

But it hath been held, that if a privileged perſon be ſued, and the action brought againſt him in the right county, his privilege will not entitle him to have it tried in *Middleſex*.

Biſſe v. Harcourt.——But in Salk. 668. in Wilcocks's caſe, Trin. 2 Ann. the venue is ſaid to have been changed where an attorney was defendant. [And the like was done in the caſe of Wigley v. Morgan, 2 Str. 1049. Ca. temp. Hardw. 285. Andr. 384. However, this caſe hath been ſince overruled, and the law is now ſettled agreeably to the doctrine in the text. Pope v. Redſearne, 4 Burr. 2027. Yeardly v. Rowe, 3 Term Rep. 573.]

2 Vent. 77. 2 Salk. 668. pl. 1.

If an attorney lays his action in *London*, the court will change the *venue* on the uſual affidavit; for by not laying it in *Middleſex*, he ſeems regardleſs of his privilege, and is to be conſidered as a perſon at large.

[So, an attorney ſuing by original, waives his privilege. Hetherington v. Lowth, 2 Str. 837.]

2 Ld. Raym. 1556. Fitzg. 40. S. C. Burroughs v. Willis. 2 Stra. 822. Barnard. K. B. 14.

On a motion to diſcharge a rule which had been obtained for changing the *venue*, it appeared, that the plaintiff was a barriſter and Maſter in Chancery; and the court held, that he had a privilege by reaſon of his attendance, to lay his action in *Middleſex*, and therefore diſcharged the rule.

## 2. Of the Privilege and Protection allowed thoſe whoſe Attendance is neceſſarily required.

Brownl. 15. Raym. 101. 2 Mod. 181. 2 Rol. Abr. 272. Goldſ. 33.

The law not only allows privileges to the officers of the court, but alſo protects all thoſe whoſe attendance is neceſſary in courts; ſo that if a ſuitor is arreſted either in the face of the court, or out of the court, as he is coming to attend and follow his ſuit, or upon his return, it appears upon complaint made thereof, that the fact was ſo, the court will not only diſcharge the party from the arreſt, but will puniſh the officers or bailiffs, as alſo the (*e*) plaintiff who procured the arreſt, as for a contempt to the court.

(*e*) If he knew that the party was proſecuting or defending any ſuit; becauſe an affront to the court, as well as an injury to the party arreſted. 2 Lil. Reg. 369.

Serjeant

Serjeant *Scroggs*, entering his coach at the door of *Weſtminſter-hall*, was arreſted upon a *latitat* out of *B. R.*, and complaint being made thereof in *C. B.*, it was agreed, that not only ſerjeants at law, but all other perſons whatſoever, are freed from arreſts ſo long as they are in view of any of the courts at *Weſtminſter*, or if near the courts, though out of the view, leſt any diſturbance may be occaſioned to the courts or any violence uſed, which in ſuch caſes is very penal. In this caſe the ſerjeant was diſcharged of the arreſt by rule of court, and the Judges ſaid, that if the plaintiff ſhould bring an action againſt the ſheriff for an eſcape, they would commit him. The bailiffs who made the arreſt were committed to the *Fleet*, but the next day, upon their ſubmiſſion and acknowledgment, were diſcharged, paying their fees. M. 26 Car. 2. in C. B.

So, where one *Long* an attorney of *C. B.* was arreſted in *Palace-yard*, not far from the Hall-gate, ſitting the court, he together with the officer was brought into court, and the officer committed to the *Fleet*; and becauſe the plaintiff was an attorney of *B. R.* who informed the court of *C. B.* that his cauſe of action was 200*l.*, the court ordered that another of the ſheriff's bailiffs ſhould take charge of the priſoner, and that the prothonotary ſhould go with him to the court of *B. R.*, and that court being informed how the caſe was, diſcharged the defendant on common bail. The writ upon which he was arreſted was an attachment of privilege, which the court ſuppoſed to be deſigned to ouſt him of his privilege; for there was another writ againſt him at the ſheriff's office, at the ſuit of another perſon. 2 Mod. 181. Long's caſe.

If proceſs hath iſſued againſt a huſband, and in coming to defend it, he and his wife are both arreſted, the wife ſhall have privilege as well as the huſband; for they are conſidered as one perſon in law, and the wife cannot anſwer without her huſband. Dyer, 377. a. pl. 30. Bro. Priv. 17. *& vide* Noy, 68.

If the court give either plaintiff or defendant leave to inquire after evidence in any cauſe depending in that court, and he be arreſted, he ſhall have privilege; but it is otherwiſe, if he go without the permiſſion of the court. So, if one on the day he has been attending his cauſe be arreſted at ten o'clock at night, by one noway engaged in the cauſe, he ſhall not have privilege (*a*). 2 Rol. Abr. 272.

[(*a*) But *quære* of this, for the returning has never been very nicely ſcanned, ſo as to require a man to go the direct road. *Bro. Privilege* 4. allows that the protection is not forfeited by the plea of *extra viam*, becauſe it may be, the party went to buy a horſe, victuals, or other neceſſaries for his journey. Neither is the law ſo ſtrict in point of time as to require the party to ſet out immediately after the trial is over, as in the caſe of Hatch v. Bliſſet, *infra*, and Gilb. Rep. 308. The defendant, an old woman, had a trial at Wincheſter aſſizes, which was over on Friday at four in the afternoon: ſhe ſtaid there till after dinner on Saturday, and in the evening at ſeven was arreſted going home to Portſmouth, which is twenty miles: and the court held, that ſhe ought to be diſcharged, that her protection was not expired, and a little deviation or loitering would not alter it. And in a later caſe, where the defendant was attending his cauſe at the ſittings, and though it was put off early in the day, ſtaid in court till five in the afternoon, and then went with his attorney and witneſſes to dine at a tavern, where he was arreſted during dinner; the court held, that ſuch a neceſſary refreſhment as this ought not to be looked upon as a deviation, ſo as to cancel the defendant's privilege *redeundo*. Lightfoot v. Cameron, 2 Bl. Rep. 1113.]

*A.* has a ſuit againſt *B.* in *C. B.*, and afterwards *B.* is arreſted in an inferior court, when he was not coming to or returning from the defence of his ſuit, he ſhall not have privilege. Jenk. 173.

A perſon

Comb. 29. The King v. Fielding.

A perſon coming to give ſecurity of the peace, it was held he was privileged; if he had come to have ſworn the peace, the arreſt would have been allowed.

2 Salk. 544. pl. 6. *Sed vide infra.*

So, where one came to confeſs an indictment, the court held he had no privilege *eundo & redeundo*, becauſe there was no proceſs againſt him.

Vent. 11. Mod. 66.

The courts not only protect the parties themſelves, but all witneſſes are protected *eundo & redeundo*; for ſince they are obliged to appear by the proceſs of the court, they will not ſuffer any one to be moleſted whilſt he is paying obedience to their writ.

Meekins v. Smith. 1 H. Bl. 636.

[And it hath lately been laid down by the court of *C. P.* as a general rule, that all perſons who have relation to a ſuit which calls for their attendance, whether they are compelled to attend by proceſs or not, are entitled to privilege from arreſt *eundo & redeundo*, provided they come *bonâ fide*. And in this deſcription bail and barriſters upon the circuit are included.]

20 H. 6. 4. Bro. Priv. 55. 2 Rol. Abr. 273.

Alſo, the courts not only protect the perſons of their attendants, but likewiſe all thoſe things that are neceſſary for their journey or the defence of their ſuit; but not merchandizes or goods for ſale or traffick.

Kinder v. Williams. 4 Term Rep. 377. But ſee *Ex parte* Kerney, 1 Atk. 55.

[The court of *B. R.* hath refuſed to diſcharge a perſon in cuſtody by proceſs of the ſheriff's court in a cauſe afterwards removed into *B. R.* becauſe he was arreſted whilſt attending commiſſioners of bankrupt to prove a debt.]

*Ex parte* Dick, and *Ex parte* Stow, 2 Bl. Rep. 1142.

### 3. In what Caſes this Privilege is to be allowed.

Sand. 67.

The privilege allowed officers of the court, is to be underſtood as extending only to ſuch caſes where the party who ſues them has ſufficient remedy in their own courts: therefore, if a writ of entry or other real action be brought againſt an attorney of *B. R.* he cannot plead his privilege; becauſe, if this ſhould be allowed, the plaintiff would have a right without remedy: for the King's Bench hath not cognizance of real actions.

Sand. 67.

So, if an attorney of *C. B.* be ſued in an appeal, he ſhall not have his privilege; for his own court hath not cognizance of this action.

Sid. 362. Sand. 67. 2 Keb. 346. Turbill's caſe, & *vide* 2 Leon. 156.

So, if money be attached in an attorney's hands by foreign attachment in the ſheriff's court in *London*, he ſhall not have his privilege; becauſe in this caſe the plaintiff would be remedileſs; for the foreign attachment is by the particular cuſtom of *London*, and does not lie at common law.

4 Leon. 81. 2 Rol. Abr. 274. Lit. Rep, 97.

In indictments, informations, or ſuits, in which the king alone is concerned, the officer ſhall not have privilege; for it would be unreaſonable that the court ſhould allow protection to thoſe who offend againſt the publick peace of the community and the king's intereſt.

3 Lev. 398. Comb. 319. Lutw. 193. Skin. 549. pl. 10.

But it ſeems the better opinion, that in an action *qui tam*, as on the *ſtat.* 23 *H.* 6. *c.* 7. againſt an attorney, for continuing ſheriff longer than a year, the defendant ought to have his privilege; for

for though it be brought in the king's name, and the king is to have part of the money, yet it is to be conſidered as the mere ſuit of the party, in which the party may be nonſuit. Beſides, the party may have a *tales*, without the warrant of the Attorney-General. Salk. 30. Ld. Raym. 27. 2 Salk. 543. pl. 1. 1 Bl. Rep. 373. Cowp. 367.

Alſo, the privilege the courts allow their officers, is reſtrained to thoſe ſuits only which they bring in their own right, or are brought againſt them in their own right; for if they ſue or are ſued as executors or adminiſtrators, they then repreſent common perſons, and are not entitled to privilege. Hob. 177. Dyer, 24. pl. 150. 2 Sid. 157. Latch, 199. Godb. 10. Brown and Goldſb. 47. Sav. 20.

As, where a clerk of the King's Remembrancer in the Exchequer married a woman who was executrix to *J. S.*, and having brought an action of debt by privilege, for a debt due to the teſtator, it was held, that he was not entitled to privilege.

So, in an action againſt an attorney, who was executor to *J. S.* who pleaded his privilege, it was over-ruled, though it was urged, that there was a difference where the attorney was plaintiff, and where defendant; but the court held it the ſame in both caſes. Salk. 2. pl. 4. Ld. Raym. 533. Newton v. Rowland.

Alſo, if a privileged perſon brings a joint action, this deſtroys his privilege; becauſe thoſe with whom he joins are not officers of the court, nor entitled to the attachment which the court grants to its own officers. 2 Rol. Abr. 274.

So, if an action be brought againſt a privileged perſon and others, he ſhall be ouſted of his privilege; for if otherwiſe, he would deſtroy the plaintiff's action, as he would be obliged to ſue the others by original writ, and him by petition. But ſome opinions are, that this muſt be underſtood where the action is joint in its nature, and cannot be ſevered; and that if the action can be ſevered without doing any injury to the plaintiff, the officer ſhall have his privilege. 14 H. 4. 21. 20 H. 6. 32. Dyer, 377. 2 Rol. Abr. 274, 275. Godb. 10. Noy, 68. 2 Sid. 157. Vent. 298. 2 Lev. 129. 2 Mod. 296. Vern. 246.

But this matter came fully to be conſidered in a late caſe where treſpaſs was brought in *B. R.* againſt an attorney and another perſon, the attorney pleaded his privilege as an attorney of *C. B.*, and concluded *quod non intendit quod cur. cognoſcere velit*, &c.; and on demurrer, though it was admitted that the nature of the action was ſeveral, yet the court on conſideration of the above cited caſes held, that the rule was general, and that the plaintiff was not bound to bring ſeparate actions; and thereupon awarded a *reſpondeas ouſter*. Hil. 8 G. 2. in B. R. Pratt v. Salt.

4. Of claiming and allowing Privilege; and therein, that it muſt be ſet forth and pleaded.

Privilege is to be claimed and allowed of in courts in ſuch (*a*) manner as the law directs, and in moſt caſes it is a matter to be taken *b*) ſtrictly. Dalſ. 16. Vaugh. 154. 2 Bulſ. 36.

(*a*) Not to be allowed on motion. Stil. 373. *vide* 2 Chan. Ca. 69. ——An attorney muſt plead his privilege, and cannot be diſcharged on motion. Salk. 544. pl. 3. [1 Wilſ. 306. 2 Str. 864. 2 Ld. Raym. 1367. Barnard. B. R. 300. But where an attorney is arreſted by *latitat* in his own court, it is a motion

tion of courſe to diſcharge him on filing common bail. Wheeler's caſe, 1 Wilſ. 298. Imp. K. B. 474. ed. 1791. In the caſe of Croſsley v. Shawe, 2 Bl. Rep. 1085. the court of C. P. held, that an attorney arreſted by *capias* upon a ſpecial original out of that court was not entitled to his diſcharge upon ſerving the ſheriff with a writ of privilege, but muſt plead his privilege. If indeed the arreſt were upon proceſs out of an inferior court, his writ ought to be allowed *inſtanter*. Rawlins v. Parry, Sir Geo. Cooke's notes, p. 2.] (*b*) 2 Sid. 164.

8 Co. 141. 2 Brownl. 101. ——A writ of privilege diſallowed by an inferior court, held error. Cro. Eliz. 152.

If an inferior court will proceed after a writ of privilege is delivered, it is a nullity; and the courts at *Weſtminſter* will diſcharge the party.

Hil. 26 C. 2. in C. B. Barns v. Fletcher.

One *Fletcher* was ſued in the Marſhal's Court, and he procured a writ of privilege as attorney of *C. B.* upon which the plaintiff in the Marſhal's Court ſurmiſed, that he was forejudged before, and produced the record of his forejudger; upon which the Marſhal's Court proceeded; and upon complaint thereof in *C. B.* the court held, that the writ of privilege ought not to have been queſtioned there, but ought to have been allowed; and that if it was not duly obtained, it was a matter examinable here; therefore all the proceedings in the Marſhal's Court were ſet aſide, and the plaintiff ordered to pay all coſts of the proceedings ſince the writ of privilege, otherwiſe an attachment to iſſue.

6 Mod. 305. Phips v. Jackſon.

A clerk to one of the Barons of the Exchequer being ſued in *B. R.* pleaded, that *tempore quo memoria non extat* all the clerks of the king's court of Exchequer were privileged from being ſued elſewhere than in that court; and that the defendant was clerk to *R. P. un' Baron' de Scaccario noſtro prædict':* upon demurrer, the court ſaid, there were two ways of pleading privilege; one was, to go to iſſue, and at the trial, if the party be an officer of record, to ſhew it by producing the record; if he be not an officer of record, but is attendant on one of the Barons, that muſt be tried by a jury; becauſe the court of Exchequer, as a court, cannot take notice of it any more than the court of King's Bench: the other way is, if he be an officer on record, to produce a writ of privilege at the time of the plea pleaded, and then no iſſue can be joined upon it; and here the cuſtom is ill pleaded, for *tempore quo non extat memoria* is nonſenſe, it ſhould be *cujus cont' memoria*, &c.; and becauſe that he did not aver to one of the Barons of the King's Exchequer, but *de Scaccario noſtro*, a *reſpondeas ouſter* was awarded.

Carth. 362. Skin. 582. pl. 2. Stephens v. Squire. (*a*) Hard. 364. 7 Mod. 97. But the privilege of an attorney or officer on record is not traverſable, nor triable *per pais*. Salk. 30. 2 Salk. 543. pl. 1. Ld. Raym. 27. 2 Sid. 164. 2 Lutw. 1466. Vent. 264. 3 Keb. 352. Skin. 582. pl. 2. [2 Bl. Rep. 1088.]

In an action againſt *A.*, he pleaded his privilege thus. And the ſaid *A.*, in his proper perſon, ſays, that he is, and at the time of exhibiting the bill was, one of the clerks of *T. W.* one of the prothonotaries of the court of *C. B.* at *Weſtm.* in the county of *Middleſex*, and attending his office every day, and concluded with an averment generally, without annexing any writ of privilege to his plea; and this on demurrer was held ill, becauſe the defendant did not ſay *venit* as well as *dicit;* and for that he did not lay any *venue*, ſo as the fact of his being a prothonotary's clerk might be tried; for it is a matter iſſuable, for their clerks are not (*a*) enrolled.

To an action brought in *B. R.*, the defendant pleaded his privilege of an attorney of *C. B.*, without producing any writ of privilege, and without saying *prout patet per recordum*; and two exceptions were taken: 1*ſt*, The want of averment, *prout*, &c. 2*dly*, That there was no place laid where the defendant was an attorney. And *per Holt*, Ch. J. there are two ways of pleading this matter ſo as it cannot be denied, *viz.* with a *profert* of a writ of privilege, or of an exemplification of the record of his admiſſion; or it may be pleaded as it is here: and as to the averment by the record, it is never pleaded as a matter of record, which is always pleaded with time, *viz.* of ſuch term, *&c.*; but never any plea was ſeen that the defendant of ſuch term was admitted attorney, *&c.* As to the ſecond exception he ſaid, that it was not neceſſary to lay a *venue*; for that this being a matter concerning the perſon of the defendant, it ſhould be tried where the writ was brought. 2 Salk. 545. pl. 8. 2 Ld. Raym. 1172. Scawen v. Garret.

An attorney of *C. B.* being ſued in *B. R.*, pleaded his privilege; to which it was demurred ſpecially, for not concluding his plea with a *profert* of a writ of privilege teſtifying his being an attorney, *&c.* And *per Holt*, Ch. J. the difference is, if privilege of an attorney be pleaded with a writ, the defendant cannot be denied to be an attorney; if without, he may; and then a *certiorari* ſhall be awarded to certify whether he be or not. 2 Salk. 545. pl. 7. Dillon v. Harper, 2 Ld. Raym. 898. S. C. *vide* 7 Mod. 106. Clifton v. Swezeland, like caſe.

An attorney of *C. B.* pleaded to the juriſdiction of the court of *B. R.* And *per curiam*, he ſhall not be (*a*) ſworn to his plea, nor need the writ of privilege be ſet forth at large; and if matter of fact be pleaded in abatement, and found againſt the defendant, judgment (*b*) final ſhall be given. 6 Mod. 114.

(*a*) An attorney of *C. B.* pleaded his privilege in *B. R.* and annexed a writ of privilege to his plea, teſted after the action brought, but made no affidavit of the truth of his plea; and on a motion of Mr. *Parker*, the plea was ſet aſide for want of the oath; and becauſe it did not appear by the writ, that the defendant was an attorney at the time of bringing the action. M. 6 G. 2. Wicks v. Dagley. 2 Barnard. K. B. 216. S. C. [Whether it is neceſſary to annex an affidavit to the plea ſeems to be a matter of ſome doubt. See 2 Bl. Rep. 1088. It muſt appear by the plea, that the defendant was an attorney at the time of bringing the action. A mere clerical miſtake in the ſtatement of this fact, was holden to be fatal. 2 Str. 864.] The defendant pleaded his privilege that he was an acting clerk to Sir George Cooke, and annexed an affidavit to his plea, that he ſolicited cauſes in the court of C. B., but becauſe he did not ſwear that he entered cauſes in that office, or that he did buſineſs as an entering clerk, the plea was ſet aſide. Hil. 2 G. 2. in B. R. Edmund and Thomas. Barnard. K. B. 141. S. C. may be pleaded without a venue. 2 Ld. Raym. 1173. (*c*) That it is peremptory. Bro. Perempt. pl. 48.

In *aſſumpſit* by *A.* againſt *B.* for 1000 yards of black cloth, for which the defendant promiſed to pay, *&c.*; the defendant pleaded his privilege as an auditor of the Exchequer, in theſe words, that the Barons of the Exchequer, their clerks, or other officers of that court, have not been empleaded elſewhere; to which plea there was a demurrer: 1*ſt*, Becauſe it was pleaded in the (*c*) negative. 2*dly*, Becauſe it was general, *that the Barons and their clerks*; which doth not ſhew but that one of their clerks might be ſued elſewhere. 3*dly*, That the concluſion was, he hopeth, *&c.*; and for theſe reaſons the plea was thought ill: it was likewiſe ſaid, that he ought to have concluded *hoc paratus eſt verificare*, unleſs the puiſne brings into court the (*d*) red book of the Exchequer. 2 Sid. 164. Hard. 164. Forſter v. Barrington. (*c*) *Vide* 2 Ld. Raym. 869. Lutw. 1466.

(*d*) The privilege of an officer of the Exchequer may be pleaded, or by ſhewing the red book of the Exchequer allowed. 1 Keb. 256. 2 Keb. 103. 2 Lutw. 46.——An accountant of the king's Exchequer allowed his privilege in B. R. on a Baron's coming into court and ſhewing his book of accounts, and this without any plea or prayer of the party. 2 Bulſ. 36.——Where one entitled

to

to the privilege of the court of Exchequer is ſued in C. B. the court ſends a *ſuperſedeas*; but if it be in B. R. no *ſuperſedeas* is ſent, for that would be to ſuperſede the king; but the practice is, to ſend up the red-book by the Puiſne Baron. 2 Salk. 546. *per* Walter, Ch. Baron. [The practice here ſtated is gone into deſuetude, and the method now uſed of aſſerting the privilege is by an order from the court of Exchequer to remove the action, whether commenced in the King's Bench, Common Pleas, or any other court, into the office of pleas of the court of Exchequer, and that it ſhall be there in the ſame forwardneſs as in the court out of which the action is removed: but this order does not operate as a *certiorari* to remove the proceedings, but as a perſonal order on the party to ſtay his proceedings there, with liberty to commence his action in the office of pleas, and of courſe calls upon the defendant in the action to appear, to accept a declaration, and to put the plaintiff in the ſame ſtate of forwardneſs in the office of pleas as he was in the other court. So that the order is ſimply an injunction to ſtay proceedings in the other court, qualified and ſoftened by a liberty given to ſue here; and is to be enforced, as all injunctions are, by attachment. Lord C. B. Eyre's argument in Cawthorne v. Campbell, Anſtr. 207-8.]

Ld. Raym. 336. Salk. 194. pl. 3. Thomee v. Lloyd. Ld. Raym. 336. Comb. 482. 12 Mod. 195. 6 Mod. 88.

In *aſſumpſit*, the defendant *venit & dicit*, that he is an officer of the Exchequer, and pleads privilege; and on demurrer two exceptions were taken: 1*ſt*, Becauſe he pleads his privilege by writ, but not under the ſeal of the court. 2*dly*, That it is not ſaid, that the court ought not to have conuſance in the beginning of the plea. *Per Holt*, Ch. J.—If a man pleads privilege, and at the time of pleading he produces a writ teſtifying that he is an officer, the plaintiff cannot deny the privilege: but, if he pleads it without a writ, the plaintiff may deny it, but the plea is good without ſhewing the writ. As to the ſecond exception he held, that the concluſion made the plea; for if a man begins in bar and concludes in abatement, it is a plea in abatement.

Sid. 74.

The clerks of the papers and ſecondary of the King's Bench, when they claim privilege, declare themſelves to be clerks to the maſter.

Sid. 65.

Privilege in the Common Pleas muſt be certified by the prothonotaries, and not by the ſecondaries.

2 Bulſ. 207. 2 Rol. Abr. 275. Salk. 1. pl. 3. Ld. Raym. 90. 5 Mod. 310. 3 Lev. 343. Carth. 377. Ld. Raym. 93. 136.

It hath been a matter of great doubt how far an attorney of *C. B.* or other privileged perſon, being *in cuſtodiâ mareſcalli*, ſhall be ouſted of his privilege; for on the one hand being in actual cuſtody, he is to anſwer to the plaintiff's demand lodged againſt him, and not to the proceſs that brought him in; and on the other hand, it hath been thought hard, that his being there by coercion and on a fictitious treſpaſs ſhould ouſt him of his real privilege: the determinations herein have been, 1*ſt*, That though *A.* be in *cuſtodiâ mareſcalli* at the ſuit of *B.*, yet when *B.* declares againſt him he may plead his privilege, becauſe he comes there by coercion, and had no opportunity before to take advantage of it. 2*dly*, If *A.* files bail at the ſuit of *B.* and in the ſame term a declaration is delivered againſt *A.* at the ſuit of *C.*, *A.* may plead his privilege againſt *C.* as well as againſt *B.*; for it were abſurd that *C.*, who tops his ſuit upon the action of *B.*, ſhould have more liberty or advantage againſt *A.* than *B.* himſelf had. 3*dly*, But if it be in a ſubſequent term, or if by any thing *A.* waive his privilege in the firſt action, he then becomes obnoxious to the ſuits of every one; and as to *C.* he is truly *in cuſtodiâ mareſcalli*; for being once ouſted of his privilege, he can no longer attend as an officer in the other courts, but is fixed in the King's Bench; and therefore cannot by the ſuppoſition of the neceſſity of his attendance ouſt the party of his action.

So,

So, if an attorney of *C. B.* is brought into the court of *B. R.* at the ſuit of an attorney there, which is an eſtoppel to the defendant's privilege, the defendant ſhall be ouſted of his privilege in all other actions commenced againſt him in *B. R.* in the ſame term; becauſe the juriſdiction of this court was attached upon him by the firſt action. Carth. 377.

As to the time of pleading privilege, it has been laid down in a variety of caſes as a ſure rule, that after imparlance the defendant cannot plead his privilege, becauſe by imparling he affirms the juriſdiction of the court, which by this plea he would ouſt. But herein theſe diſtinctions have been taken, and the law by the modern authorities ſeems now eſtabliſhed, that after a general imparlance, the defendant cannot plead privilege, becauſe he muſt then plead in chief; ſo after a ſpecial imparlance in this manner, *Salvis omnibus allegationibus & exceptionibus omnimodis tam ad breve quam ad narrationem*; for by this ſpecial imparlance he has confined himſelf to take advantage of defects in the writ and count only; but in caſe of a general ſpecial imparlance obtained from the court, *viz. Salvis ſibi omnibus & omnimodis advantagiis & exceptionibus*, he may after plead his privilege; for this is not to ouſt the court of its juriſdiction, but is a privilege which each court allows to the officers of the other, to be ſued in their own court only. 22 H. 6. 7. 2 Rol. Abr. 275, 276. Dyer, 33. Godb. 286. Stil. 295. Lev 54. Keb. 195. 221. 256. 2 Show 145. pl. 124. Hard. 365. Sid. 318. 2 Keb. 103. 121. 163. Show. 49. Lutw. 46. Salk. 1. pl. 3. Comb. 68.

A witneſs was arreſted in his return from *Wincheſter* aſſizes, and in the term following was diſcharged by motion on common bail by the court from which the record iſſued, and that without having the privilege of the court of *niſi prius* certified. Had the arreſt been at the aſſizes, the judges there might have diſcharged him; for privileges given by law are to be proſecuted in ſuch a manner as the party may moſt eaſily get the benefit of them. Trin. 13 Ann. in B. R. Hatch v. Bliſſet. Gilb. caſ. 308. 2 Stra. 986.

5. How privileged Perſons are to ſue and be ſued.

When an attorney or other officer entitled to privilege, is plaintiff, he regularly ſues (*a*) by writ of privilege, and is ſued by bill; which proceſſes iſſue out of the court in which the action is commenced, and have no foundation in Chancery. 4 Inſt. 71. 99. 112. (*a*) In the Exchequer, where the plaintiff is privileged, the ſuit is *quo minus*; where the defendant is privileged, the ſuit is by bill. 2 Salk. 546.

But an attorney is not obliged to ſue by writ of privilege, but may ſue by original; but if he elects the former, he muſt name himſelf attorney, *&c.* for when any particular character or relation gives any perſon rights and privileges, it muſt be ſet forth. Vent. 199. 28 E. 3. 4. Cro. Eliz. 731.

And therefore it hath been held, that if an attorney ſues by original, he muſt declare as others do; and that if he does otherwiſe, it will be fatal on a ſpecial demurrer, though aided after verdict, and alſo good on a general demurrer. 2 Lev. 40. Vent. 198. 2 Keb. 860. 879. 3 Keb. 15.

Attornies are entitled to proceſs of attachment, and are not to be arreſted or held to ſpecial bail, let the cauſe of action be what it will; for being officers of the court they are obliged to a conſtant attendance, and are preſumed to be always amenable. Mod. 10.

A filazer

2 Salk. 544. pl. 4. Brown's caſe.

A filazer of *B. R.* was arreſted by writ, but diſcharged on common bail; for he ought to be ſued by bill, as being preſent in court.

Salk. 544.

A bill cannot be filed againſt a perſon privileged, in vacation (*a*); for then he is not preſent in court, and as to the vacation, it begins the laſt day of the term, as ſoon as the court riſes.

[(*a*) But now it may be filed in vacation as well as in term time, Dougl. 300.; though if it be filed in vacation, otherwiſe than to avoid the ſtatute of limitations, the plaintiff will not be allowed his coſts, if the action ſhould be ſettled before the enſuing term.]

2 Salk. 544. pl. 5.

The bill muſt be filed though the attorney agrees to appear and diſpenſe with it; but it may in ſuch caſe be filed afterwards.

6 Mod. 16.

In an attachment of privilege by the marſhal, he ſhall have no attorney, becauſe preſent in court.

Sid. 134. The King v. Paget.

An information was exhibited againſt the *cuſtos brevium* of *B. R.* for abuſes and miſdemeanors in his office, who refuſed to appear in (*b*) perſon, but would have appeared by attorney; and the opinion of the court was, that he could not appear by attorney, being an officer of the court, and preſumed to be always preſent; and therefore it was agreed, that no proceſs ſhould be iſſued againſt him; but that upon reading the information, if he did not appear, judgment ſhould be given againſt him.

(*b*) An attorney may plead his privilege by an attorney, without any inconvenience, for he may be ſick, or have buſineſs in another court, and the precedents are both ways, Stil. 413.

Cro. Car. 580. Raymond v. Burbedge.

In an action brought by an attorney by bill of privilege, the judgment was *quod nil capiat per breve*, inſtead of *nil capiat per billam;* which was held manifeſt error, unleſs it could be amended as the miſtake of the clerk.

Leon. 329. Crew v. Bailie, *vide* title Outlawry.

In a bill of privilege by or againſt an attorney, no *capias* lies, but an attachment of privilege; and conſequently on ſuch proceeding there can be no outlawry.

Dyer, 288. a. pl. 53. Cro. Car. 91, 92. 3 Lev. 37.

In an attachment of privilege by or againſt an attorney, it hath been held, that pledges to proſecute muſt be entered on the imparlance roll; and that this is not barely form, but matter of (*c*) ſubſtance.

(*c*) Seems now aided by the 4 & 5 Ann. c. 16.

2 Mod. 297. 3 Lev. 398. 3 Salk. 283. pl. 8. Ld. Raym. 399.

The judges, prothonotaries, attornies, *&c.* of the court of *C. B.* whoſe attendance is wholly required in court, are not ſuable by original, but by bill only; but ſerjeants at law, judges' ſervants, and other clerks, though they may be entitled to the privilege of being ſued in that court, yet muſt they be ſued by original, and not by bill.

Trin. 5 G. 2. in B. R. Duett v. Hayward.

In *aſſumpſit* by bill againſt the defendant as *un' clericorum domini regis coram ipſo rege*, the defendant pleaded that he was a filazer, *abſque hoc*, that he was a clerk; and on demurrer, the plea was ſet aſide as frivolous and impertinent, for that filazers are clerks.

6. Whether

## 6. Whether there can be Privilege againſt Privilege.

It ſeems a general rule, that there can be no privilege againſt privilege; ſo that if an officer of one court ſues an officer of another, the defendant ſhall not plead his privilege; for the attendance of the plaintiff is as neceſſary in his court as the defendant's is in his; and therefore the cauſe is legally attached in the court where the plaintiff is an officer. Bro. Privilege, pl. 40. Godb. 81. Jenk. 131. 2 Brownl. 267. Moor, 753. 2 Rol. Abr. 274. Jenk. 173. 2 Keb. 346. [Barnes, 44. 2 Bl. Rep. 1325. If one attorney ſue another attorney by attachment of privilege, and hold him to bail, the defendant may either plead his privilege in abatement, or move the court to ſtay the proceedings, but in neither caſe will he be entitled to coſts. Barber v. Palmer, 6 Term Rep. 524.]

As, where *J. S.* attorney of *B. R.* brought treſpaſs againſt the warden of the Fleet who came into the court of *C. B.* and prayed the advice of the court, whether he being an officer of the court ſhould be obliged to anſwer; and on conſideration of the equality of privilege, the court determined, that he who commences the ſuit is entitled to privilege; and therefore adviſed the warden to anſwer. 2 Leon. 41. Povey's caſe.

So, where one of the clerks in Chancery was empleaded in *C. B.* by bill of privilege by an attorney of the ſaid court, and prayed his privilege; it was denied him, becauſe the plaintiff was privileged in that court as well as the defendant in Chancery, and was firſt intereſted in his privilege by bringing his writ. 4 Leon. 193. Ben Johnſon's caſe.

So, where the plaintiff brought his bill in the Exchequer, to be relieved againſt a bond, put in ſuit againſt the defendant in the Petty-bag Office, which is a court of common law, to which the defendant pleaded his privilege as an officer of the court of Chancery; the court agreed, that when both parties are privileged perſons, his privilege ſhall take place who firſt ſues; ſo that here the ſuit in equity to be relieved againſt the penalty of the bond, being firſt attached here, gained a preference in the plaintiff in his ſuit, which is a diſtinct ſuit from that of the defendant at common law; and therefore the plea was over-ruled, and an injunction awarded till anſwer. In this caſe it was ſaid, that if both are privileged, but the attendance of the one is more requiſite than that of the other, his privilege ſhall be allowed who has moſt cauſe of privilege. Hard. 117. Baker v. Lenthal.

Where an action is brought by the king, the defendant ſhall not have privilege. Ld. Raym. 27.

An attorney of *C. B.* ſued a member of the Univerſity of *Oxford*, who prayed his privilege, which is, not to be ſued in another place; and though it was inſiſted, that this privilege was given them by act of parliament, yet, in regard the words were general, the court held, that there was no neceſſity to conſtrue them ſo as to extend to privileges before *in eſſe*; and that therefore this ſpecial privilege was not taken away by the ſtatute. Ld. Raym. 342. Joliffe v. Langſton.

## (C) Privilege of Peers and Members of Parliament: And herein,

### 1. Who are entitled to this Privilege.

4 Inſt. 24. Stil. 118. 222. 253. 454. Dyer, 314. Mod 66. Bro. Exg. 3. Moor, 767. Scobel's Memorials, 88.

ALL peers, without any diſtinction as to degree or rank, are entitled to privilege; for they are equally obliged to (*a*) attend the ſervice of the publick, and (*b*) are always ſuppoſed amenable, and to have ſufficient property to anſwer in ſuits and actions brought againſt them, and on theſe grounds are not to be arreſted or moleſted in their perſons. This privilege extended formerly to abbots, as it does to biſhops, members of the Convocation, and members of the Houſe of Commons at this day.

103. Sir Simon Dew's Journals, 414. Pick. 59. Finch, 355. 2 Ld. Raym. 1247. 3 Sell. Wilk. edit. p. 1478. (*a*) Dyer, 60. a. in margine. Noy, 102. Moor, 778. pl. 1080. Stand. P. C. 38. Hawk. P. C. c. 22. § 2. That the king's grant or charter of exemption cannot diſcharge a nobleman from his attendance in parliament, 4 Inſt. 49. (*b*) The law intends them to be aſſiſting the king with their counſel for the commonwealth, and to keep the realm in ſafety by their proweſs and valour. 9 Rep. 49. a. *id.* 68. Jenk. Cent. 107. pl. 6. Hob. 61. 10 Rep. 76. b. 12 Co. 96.

(*c*) Ld. Coke ſays of this law, *ab omnibus querenda eſt, a multis ignorata, a paucis cognita*, 4 Inſt. 15. (*d*) 13 Co. 63. 4 Inſt. 23. 50. 363.

The privilege of parliament, according to the (*c*) law of parliament, is of a very extenſive nature. But all that is here intended to be treated of is only the taking notice of and pointing out ſuch caſes and reſolutions relative hereto, as are to be found in the books of law; not to determine concerning this privilege as ſettled by the rules and orders of each Houſe, of which they themſelves are the (*d*) ſole judges, though the king's courts (*e*) incidently take notice thereof, and are bound to determine in matters of privilege when ſo directed by act of parliament.

Prinn's Animad. on 4 Inſt. 12. Cro. Car. 181. 604. 2 Ld. Raym. 1111. (*e*) *Vide* Mod. 68. Have determined in relation to their journals. Hob. 111. See the arguments in the caſe of Aſtley v. White, Salk. 19. pl. 10. 6 Mod. 45. 2 Ld. Raym. 938. Barnardiſton v. Soame. 2 Lev. 114. 3 Keb. 365. 369. Onſlow's caſe. 2 Vent. 37. The Queen v. Paty. 2 Ld. Raym. 1105.

Co. Lit. 156. 2 Inſt. 48. 3 Inſt. 30. pl. 19.

This privilege extends only to the peers of *Great Britain*; ſo that a nobleman of any other country, or a lord of *Ireland*, hath not any other privileges in this kingdom than a common perſon. Alſo, the ſon and heir apparent of a nobleman is not entitled to the privilege of being tried by his peers, which is confined to ſuch perſon as is a lord of parliament at the time. But it ſeems, that an infant peer is privileged from arreſts, his perſon being held ſacred.

(*f*) 9 Co. 117. ſtat. 5 Ann. c. 8. P. W. 583. [Since this ſtatute, the perſon of a Scotch peer has been

The peers of *Scotland* had no privileges in this kingdom (*f*) before the Union; but now, by the twenty-third article of the Union, the ſixteen elected peers ſhall have all the privileges of the peers of parliament of *Great Britain*; alſo, all the reſt of the peers of *Scotland* ſhall have all the privileges of the peerage of *England*, except only that of ſitting and voting in parliament.

holden to be privileged from arreſts, 2 Str. 999. Fort. 163. 165. But the above article of the ſtatute of Union, upon which this privilege is claimed by a peer of Scotland, not one of the ſixteen, ſays, that the peers of Scotland ſhall have the privileges of the peers of Great Britain, except the right and privilege of ſitting in the Houſe of Lords, *and the privileges depending thereon*. Now, as every privilege claimed by a peer ſolely depends upon, and is in conſequence of his ſitting in parliament, that is, being an actual lord of parliament, it ſeems, that the allowing all the Scotch peers the privilege from arreſts is not within the words of the act of Union, the only act under which the Scotch peers to this day can claim any privilege here at all. 2 Cr. Pr. 127.]

A peer is

A peereſs by (*a*) birth is entitled to privilege: ſo, of a peereſs by marriage, and that as well during the coverture as after: but, as a peereſs by marriage (*b*) loſes her dignity by marrying a commoner, after ſuch marriage ſhe is not entitled to any privilege. 2 Inſt. 50. Stil. 222. 234. 252. 2 Chan. Ca. 224. Forteſc. Rep. 162. Vent. 298. Styl. 222. Eq. Caſ. Ab. 349. (A). Co. Lit. 16. b. 6 Rep. 53. b. Dyer, 79. pl. 51. 2 Hawk. P. C. c. 44. § 11. Order of Houſe of Peers, 21 Feb. 1692. ——(*a*) But doubted whether a peereſs by parent only for life, is entitled to this privilege. Styl. 234. 252. held that ſhe is not entitled. Style, 254. but adjourned. ——(*b*) Co. Lit. 16. 6 Co. 53. Dyer, 79.

It was holden by my Lord Ch. J. *Holt*, in the caſe of (*c*) Lord *Banbury*, that where a perſon is called by writ to the Houſe of Peers, he is no peer till he ſits in parliament, the writ giving him no nobility or honour; but that it was the ſitting in the Houſe of Lords, and aſſociating himſelf with them that ennobled his blood; and that therefore, if the king or he dies before a parliament meets, the writ is determined, and the party remains a commoner; but he held it otherwiſe in a creation by letters patent, by which the party is immediately noble without any other act or ceremony; and though the parliament never meets, or the king dies, the nobility remains to him and his poſterity, according to the limitations in the patent. (*c*) *Vide* this caſe *infra*.

2. How far this Privilege extends to their Servants and Attendants.

A (*d*) member of parliament ſhall have privilege of parliament, not only for his (*e*) ſervants, but for his horſes, &c. or other goods diſtrainable. 4 Pryn Reg. Writs, 624. D'Ew's Journ. 123. 4 Inſt. 24. (*d*) Noblemen's ſervants are privileged from arreſts in time of parliament. 2 Show. 84. Order of Houſe of Lords, 28 May 1628. Sir W. Jo. 155. Style, 139. 167. Sir Simon D'Ewes's Journals, 315. 323. 530. 532, 533 607, 608. 617. (*e*) Said to extend only to ſervants, and not to their tenants. Mod. 13. And in March, 92. it is ſaid to have been ordered by the Lords in Parliament, 1 Car. 1. That only menial ſervants, or thoſe who attended on the perſon of a knight or burgeſs of parliament, ſhould be free from arreſt.

*J. S.* brought debt for rent againſt *H.* who pleaded that he was tenant and ſervant to Lord *Moon*, and prayed his writ of privilege might be allowed: the plaintiff demurred: it was argued, that the matter of the plea was againſt the common and ſtatute law; but *per Roll*, Ch. J. You ought not to argue generally againſt the privilege of parliament; every court hath its privilege; I conceive a writ of privilege belongs to a parliament-man, ſo far as to protect his lands and (*f*) eſtate; and you have admitted his privilege by your demurrer. Stile, 139. Smith v. Hale. & *vide* Latch, 150. and the S. C. Stile, 167. 223. (*f*) 1 Jo 155.

The warden of the *Fleet* inſiſted upon a writ of privilege, alleging that he was obliged to attend the Houſe of Lords; but it appearing that he was ſued upon an eſcape, and the court conſidering that great inconvenience would enſue, and being of opinion that it was in their diſcretion whether they would grant ſuch writ or no upon a motion, they ſaid he might plead it if he would, but they would not award ſuch a writ, or, if his privilege was infringed, he might complain to the Houſe of Lords. 2 Vent. 154.

Mod. 146. cited to have been adjudged between Rivers v Couſin. Hil. 24 E. 4. ret. 4. 7. 10. in Scacc. Paſch. 30 Car. 2. in C. B. Lea v. Wheatley.

In debt, the defendant pleads he was a ſervant to a member of parliament, and *ideo capi ſeu arreſtari non debet;* the plaintiff prays judgment; and *quia videtur quod tale habetur privilegium quod magnates*, &c. *& eorum familiares capi ſeu arreſtari non debent; ſed nullum habetur privilegium quod non debent implacitari, ideo reſpondeat ouſter.*

Defendant after a general imparlance pleaded, that he was a ſervant to a peer, *viz.* the Earl of *Pembroke;* and by *North*, Ch. J. it is not receivable, for it is the privilege of the maſter and not the ſervant's; but the defendant ought to ſue his writ of privilege, for perhaps his maſter will not protect him; and if he will not, he is then left to anſwer; like to the caſe of a counſellour, where it is the privilege of the client that he ſhall not be compelled to diſcover the ſecrets of the client; but, if the client be willing, the court will compel the counſel to diſcover what he knows; which Serjeant *Maynard* ſaid was his father's caſe before the Lord *Cecil*, in the court of Wards. *North* ſaid, as it was a matter of great conſequence, he would adviſe with the Lord Chancellour and the reſt of the Judges, what uſed to be done in ſuch caſes: afterwards it was moved again, and *North* ſaid it was moved in the Houſe of Lords, and that they had left it to the Judges to do according to law; and therefore the plea was rejected.

2 Stra. 1065.

By an order 24 *Jan.* 1606, in the Houſe of Lords, it was reſolved, that no common attorney or ſolicitor, though employed by any peer, ſhould have the privilege of that Houſe.

By an order 24 *May* 1724, this privilege was reſtrained to menial ſervants and others neceſſarily employed about eſtates of peers.

By an order 22 *Jan.* 1715, it was reſolved, that every peer ſhould upon his honour certify to the Houſe, that the perſons protected were within the privilege of the Houſe; and ſhould by letter acquaint the party arreſting ſuch privileged perſon with the ſame.

M. 10 G. 2. in B. R. Wickham v. Hobart.

An attorney was taken in execution upon a *ca. ſa.* about two years ago, but upon a letter under the hand and ſeal of the Lord *Say and Seal*, the ſheriff diſcharged him as ſteward to his lordſhip.

2 Stra. 1065. Ca. temp Hardw. 348. S. C.

A rule was obtained at the ſide-bar for the return of the writ; and now on motion in court to diſcharge this rule, it was urged in behalf of the ſheriff, that this privilege belonged only to the peer, and not to the party, and was not returnable to the proceſs; and that therefore the court ought not to inſiſt upon a return, as the ſheriff could not juſtify the detention of the defendant, but under peril of bringing himſelf and the plaintiff under the cenſure of the Houſe of Peers: but on conſideration of the above-mentioned orders, and on conſidering the nature of this caſe, that the plaintiff was within the ordinary juſtice of the court entitled to a return of his writ; that without ſuch return he might be debarred from any further execution; but principally from the great inconveniency that might ariſe by allowing attornies, who are officers to the courts in which they reſpectively practiſe, and therefore amena-

ble

able to thoſe courts, this kind of privilege; the court gave the plaintiff liberty to proceed againſt the ſheriff, but gave him time till next term to make his return.

[But now the ſtatute of 10 *G.* 3. *c.* 50. takes away from ſervants all privilege whatever, perſonal, as well as privilege from ſuits.] On the meeting of the new parliament in November 1774, a doubt was conceived, whether, as this act had thus taken away all privilege from the ſervants of members, ſome alteration ought not to be made in the form of the prayer of the Speaker of the Houſe of Commons to the throne; and the then Speaker, Sir Fletcher Norton, at firſt, it ſeems, intended to make an alteration, by claiming all the uſual privileges, "except where the ſame had been "varied or taken away by act of parliament." But upon conferring with the Lord Chancellour, Lord Apſley, his Lordſhip ſaid, "that as no alteration had been made formerly, on the paſſing of the act in "King William's time, relating to the privilege of parliament; and as, whatever the Commons "claimed, neither the allowance of the king, nor the claim itſelf, could be ſuppoſed to include privi-"leges not warranted by law; he was of opinion, that it would be the ſafer way, in order to prevent "any difficulties that might ariſe from an alteration, to adhere to the uſual form; and that he was "ready to give the king's anſwer in the accuſtomed manner." Sir Fletcher Norton acquieſced in this; and made the claim in the ancient form of words, without any alteration, and received the uſual anſwer, and the ſame form has been continued ever ſince.

### 3. In what Caſes this Privilege is to be allowed.

In all cauſes this privilege is regularly to be allowed; ſo that a peer of the realm, or a member of the Houſe of Commons, is not to be arreſted or moleſted in his perſon or (*a*) eſtate. Bro. Exigent. that a capias does not lie againſt a lord of parliament, nor againſt an abbot or biſhop; but, if reſcous be returned upon a lord of parliament, a *capias* lies for the contempt. Moor, 767. Finch of Law, 355. (*a*) The goods of a privileged perſon taken in execution during the privilege of parliament ought to be redelivered and freed as well as the perſon. Jon. 155.

But privilege of parliament doth not extend to (*b*) high treaſon, felony, breach of the peace, or ſurety of the peace. 4 Inſt. 25. Prinn's Survey of Parliament Writs. [On the 4th of June 1614, the Lord Chancellour Elleſmere, in a caſe then before the Houſe of Lords, declares, "That no privilege of parliament doth protect any man, in caſe of "breach of the peace." So, on the 7th of February and 8th of June 1757, on a complaint againſt Earl Ferrers, the Lords reſolve, "That no peer or lord of parliament hath privilege of peerage or of parlia-"ment againſt being compelled, by proceſs of the courts in Weſtminſter-hall to pay obedience to a "writ of *habeas corpus* directed to him." In the year 1795, the Earl of Abingdon was committed by the court of King's Bench to the priſon of that court as part of the puniſhment inflicted upon him, being convicted of publiſhing a libel.] (*b*) In treaſon or felony, or miſpriſion of treaſon or felony, they can only be tried by their peers; but for all other offences, as *præmunire*, riot, ſeducing a young lady from her parents in order to debauch her, &c. they are to be tried by the country. 2 Hawk. P. C. c. 44. § 13. ——That neither *Magna Charta*, nor any other law privileges a peer from being indicted by a grand jury of commoners, either in the King's Bench or before commiſſioners of oyer or the coroner, &c. 2 Hawk. P. C. c. 44. § 15. ——But the court of B. R. cannot receive the plea of not guilty, or the confeſſion of a peer, but only the Lord High Steward; but it may allow a pardon pleaded by a peer to an indictment in that court. 2 Hawk. P. C. c. 44. § 17. ——So, if a peer be attainted of treaſon or felony, he may be brought before the court of B. R. and demanded what he has to ſay, why execution ſhould not be awarded againſt him; and if he plead any matter to ſuch demand, his plea ſhall be diſcuſſed, and execution awarded by the ſaid court, upon its being adjudged againſt him. 2 Hawk. P. C. c. 44. § 18. [In the caſe of Earl Ferrers it was determined by all the judges, that a peer indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the ſame according to the proviſions of the 25 G. 2. c. 37. And ſuppoſing the day appointed by the judgment for execution ſhould lapſe before ſuch execution done, that a new time may be appointed for the execution, either by the high court of parliament before which ſuch peer ſhall have been attainted, although the office of high ſteward be determined, or by the court of King's Bench, the parliament not then ſitting; and the record of the attainder being properly removed into that court. Foſt. Cr. L. 139.]

And therefore in an indictment for treaſon or felony, treſpaſs *vi & armis*, aſſault or riot, proceſs of outlawry ſhall iſſue againſt a peer of the realm; for the ſuit is for the king, and the offence 2 Hal. Hiſt. P. C. 199. 2 Hawk. P. C. c. 44. § 16.

is a contempt againſt him. But in civil actions between party and party, regularly, a *capias* or *exigent* lies not againſt a lord of parliament.

Cro. Eliz. 170. Ld. Stafford v Thynne, *vide* Dyer, 314.

If a peer of parliament be convict of a diſſeiſin with force, a *capias pro fine* and *exigent* ſhall iſſue; for the fine is given by ſtatute in which no perſon is (*a*) exempted.

(*a*) For execution on a ſtatute ſtaple, merchant, on the ſtatute of *Action Burnel*, or on the ſtatute of 23 H. 8. the body of a baron ſhall be taken in execution; for by theſe ſtatutes, ſuch perſons are not exempted. 2 Leon. 173. —— So, a cuſtom to commit perſons who ſhall take an orphan out of the cuſtody of a guardian, is good without exception of peers; for a peer is not privileged in this caſe, and in a *homine replegiando*, where he detains the body, he ſhall be committed. Lev. 162-3.

Cro. Eliz. 503 Earl of Lincoln v. Flowes.

So, in debt upon an obligation againſt the Earl of *Lincoln*, he pleaded *non eſt factum*, which being found againſt him, the judgment was *ideo capiatur:* this on a writ of error brought by him was objected to, in that a *capias* does not lie againſt a peer of the realm: *ſed non allocatur;* for by this plea found againſt him, a fine is due to the king, againſt whom none ſhall have any privilege.

Comb. 49. The King v. Earl of Devonſhire.

An information was exhibited in *B. R.* againſt the Earl of *Devonſhire*, for ſtriking in the king's palace; which being in time of parliament, he inſiſted on his privilege of a peer, and refuſed to plead in chief, but put in his plea of privilege; to which there was a demurrer, and the plea over-ruled, and he was fined 30,000*l.*

3 Mod. 215.

In the caſe of the ſeven biſhops it was inſiſted, that peers of the realm could not be committed in the firſt inſtance, for a miſdemeanor before judgment; and that no precedent could be ſhewn where a peer had been brought in by a *capias*, which is the firſt proceſs for a bare miſdemeanor, and they put in a plea in writing of their being peers, *&c.* but the plea was rejected.

3 Hawk. P.C. c. 22. § 33. 4 Burr. 634.

Alſo peers of the realm are puniſhable by attachment for contempts in many inſtances; as for reſcuing a perſon arreſted by due courſe of law; for proceeding in a cauſe againſt the king's writ of prohibition; for diſobeying other writs wherein the king's prerogative or the liberty of the ſubject are nearly concerned; and for other contempts which are of an enormous nature.

Dyer, 314. Moor, 767. 9 Co. 49. Co. Lit. 157. Jon. 153.

If a peer be returned on a jury, on his bringing a writ of privilege he may be diſcharged: alſo, it ſeems the better opinion, that without ſuch writ he may either challenge himſelf or be challenged by the party.

Paſch. 27 Car. 2. in B. R.

In the caſe of Sir *Edward Bainton*, who was returned on a jury, the court would not force him to be ſworn againſt his will, he being a parliament man, and the parliament then ſitting.

9 Co. 49. a.

A day of grace ſhall not be given againſt a lord of parliament; for he is preſumed to be attendant on the ſervice of the publick.

9 Co. 49. a.

So, if a peer be made ſteward of a baſe court or ranger of a foreſt, he may, from the dignity of his perſon, and the preſumption that he is engaged in the more weighty affairs of the commonwealth, exerciſe theſe offices by deputy; though there are no words for this purpoſe in his creation.

So,

So, if a licence be granted to a peer to hunt in a chaſe or foreſt, he may take ſuch a number of attendants with him as are ſuitable to his ſtate and dignity. 9 Co. 49. b.

A peer or lord of parliament cannot be an approver; for it is againſt *Magna Charta* for him to pray a coroner. 3 Inſt. 129.

If a peer of the realm bring (*a*) an appeal, the defendant ſhall not be admitted to wage battle, by reaſon of the dignity of his perſon. 2 Hawk. P. C. c. 45. §5

(*a*) In an appeal brought againſt him he ſhall be tried by a jury of commoners, and not by his peers; for the words of *mag. char. nec ſuper eum ibimus*, &c. are to be intended only of the ſuit of the king. 3 Inſt. 30. 2 Inſt. 49.

In *Jenkins* the following privileges are laid down as belonging to peers: 1. They are entitled to a letter miſſive. 2. (*b*) They have a knight to try an iſſue which concerns them. 3. They are not to be arreſted for debt, treſpaſs, or any perſonal action. 4. They are exempted from ſerving on juries. 5. To have no day of grace againſt them. 6. Upon the trial of a peer for treaſon or felony, they try him upon their honour only, and not upon oath. 7. When they paſs through any of the king's foreſts to attend upon the king, upon blowing a horn they may have a buck or doe, as the ſeaſon of the year is. 8. They have power in their houſe to reverſe judgments given in the King's Bench. 9. They have the benefit of clergy though they cannot read. 10. They are not liable to find carriages for the king when he removes from one place to another. Jenk. 107.

(*b*) This privilege is taken away by 24 G. 2, c. 18. § 4.

## 4. Of the Commencement and Continuance of this Privilege.

The privilege of the Lords commences from the teſte of the writ of ſummons, and the privilege of a burgeſs at his (*c*) election: but, if he be arreſted, or in execution before his election, he ſhall not have privilege. Moor, 57. 340. Jenk. 118. Daſſ. 58. Dyer, 59, 60. Latch, 46.

150. (*c*) *Vide* 1 Sid. 42. [Sir Richard Temple's caſe, Paſch. 13 Car. 2. A trial at bar, wherein Sir Richard Temple was defendant, being appointed for this term, he moved the court by his counſel to put off the trial, upon the ground of his being elected a burgeſs to ſerve in the next parliament, which was to meet in eight days, and therefore prayed his privilege. But the court doubted whether they could allow the privilege, becauſe it did not appear to them whether it were actually ſo as he ſuggeſted or not, but by affidavit, which they would not admit to prove this ſuggeſtion. And it was ſaid by the court, that if he were arreſted upon meſne proceſs, or taken in execution, it was proper for the parliament (when they ſhould meet) to diſcharge him, for the court doubted whether they had the power to do ſo. The defendant ſaid, that the clerk of the parliament would not make him out a certificate of his election before the meeting of parliament. Upon which Twiſden, J. aſked, why he could not ſue his writ of privilege out of Chancery upon the return of his election? *Quære bien.* But the court refuſed to grant the motion, becauſe the trial was to come on before the day on which the parliament were to meet.—On the 9th of February 1625, a motion was made, that Mr. Giffard, returned a member of the Houſe, and then in execution, might be ſent for. On this motion being examined into, it appears from a report of the committee of privileges on the 15th, "that one of the burgeſſes for Bury was elected on the 6th of "January; that Mr. Giffard was elected on the 11th of January, but that the indenture was not dated "till the 30th of January, the town clerk conceiving it was to bear date the day of the next county-"court; and that Mr. Giffard was arreſted on the 23d of January, after his election, but before the "return." After much debate and conſideration of this difficulty, on the 17th of February, the clerk of the crown, the ſheriff of Suffolk, and the town-clerk of Bury, were all called up to the table, and there, by order of the Houſe, amended the return from the 30th of January to the 11th; and then it was ordered, that Mr. Giffard ſhould have privilege, and be delivered out of execution; and a warrant was iſſued to the clerk of the crown to bring him up the next day. On the 18th he was accordingly brought in, with the keeper of the gate-houſe, the bar down; the writ of *habeas corpus* was handed up to the clerk, and the writ and return being read by him, the Speaker diſcharged Mr. Giffard, and wiſhed him to take the oath, and then his ſeat in the Houſe. 1 Hatſ. Prec. 164.—On the 1ſt of March 1592, Mr. Serjeant

Serjeant Yelverton, from the committee of privileges and elections, reported the following case: "Thomas Fitzherbert of Staffordshire, being outlawed upon a *capias utlagatum* after judgment, is elected burgeſs of this parliament: two hours after his election, before the indenture returned, the ſheriff arreſted him upon this *capias utlagatum*: the party is in execution: now he ſendeth his ſupplication to this Houſe to have a writ from the ſame to be enlarged, to have the privilege in this caſe to be granted." On the 5th of April the Houſe came to the following reſolution; "That Thomas Fitzherbert was, by his election, a member thereof; yet that he ought not to have privilege in three reſpects: 1ſt, Becauſe he was taken in execution before the return of the indenture of his election: 2d, Becauſe he had been outlawed at the queen's ſuit, and was now taken in execution for her majeſty's debt: 3d, and laſtly, In regard that he was ſo taken by the ſheriff, neither *ſedente parliamento*, nor *eundo*, nor *redeundo*." Dewes's Journ. 479. 1 Hatſ. Prec. 107. On the 4th of July 1625, the caſe of Mr. Baſſett was referred to the committee of privileges, who reported, "that he was impriſoned upon meſne proceſs, and afterwards choſen a burgeſs." There is a debate in the Journal, whether, under theſe circumſtances, he were eligible, or to be allowed privilege? Great diſtinction was made between a perſon arreſted on meſne proceſs, or in execution; and it was at laſt reſolved, upon the queſtion, "That Mr. Baſſett ſhould have the privilege of the Houſe;" and a warrant was ordered to the marſhal to bring him up the next morning, which was done accordingly. 1 Hatſ. Prec. 163.]

And. 293. So, perſons outlawed ought not to be knights or burgeſſes of parliament, and ſuch perſons outlawed may be arreſted by *cap. utlag.* privilege of parliament notwithſtanding.

Atkin's Power of Parl. 38. 4 Inſt. 44. Brownl. 91. Scobell's Memorials, 88. 103. As to the time and exact continuance of this privilege, it ſeems in good meaſure unſettled even at this day. It is indeed agreed in moſt books that members of parliament have privilege *eundo*, *morando* (*a*), & *redeundo*; and that they are entitled to privilege as well after a diſſolution as a prorogation of the parliament.

180. Sir Simon Dewes's Journals, 414. [The writ of privilege in the caſe of Trewynnard, in the 36th and 37th H. 8. is to perſons "*venientes ſeu venire intendentes*." Prynn's Fourth Regiſter, 780.] (*a*) By the 35 H. 8. c. 11. members of parliament have their wages ſo many days after the parliament as they may reaſonably ſpend in their return home. *Vide* Raſt. 664. Appendix to Reg. 1.

2 Lev. 72. Chan. Ca. 221. Sid. 29. pl. 2. Keb. Rep. 3. pl. 7. By two orders of the Houſe of Lords, one dated the 28 of *May* 1624, the other the 27 *January* 1628, it is declared, that their privilege commences from the teſte of their writ of ſummons to parliament; and that upon every ſeſſion and prorogation, their privilege is for twenty days before and twenty days after each ſeſſion, which one of the orders ſays is time enough for them to come from all parts of the realm, and to return; but the Commons never aſſented to this, for they claim (*b*) forty days before and after each ſeſſion.

(*b*) In Cotton Record. 704. they claim forty days. So, by Jenk. 118.

Dewes's Journ. p. 410. [On the 27th of *February*, 1586, the Houſe was informed, that one *William White* had arreſted Mr. *Martin*, a member of the Houſe of Commons; therefore it was ordered, "That the Serjeant ſhould warn *White* to be here to-morrow, ſitting the court." On the 6th of *March*, *William White* was brought into the Houſe, to anſwer his contempt for arreſting Mr. *Martin*; who anſwered, "that he cauſed him to be arreſted the 22d day of *January*, "which was above fourteen days before the beginning of the "parliament." The Houſe upon this appoint a committee to ſearch precedents, who, on the 11th of *March*, make report "of "Mr. *Martin* arreſted upon meſne proceſs by *White*, above twenty "days before the beginning of this parliament, holden by pro-"rogation (miſtaken for adjournment), and in reſpect that the "Houſe was divided in opinion, Mr. Speaker, with the conſent "of the Houſe, moved theſe queſtions to the Houſe: 1ſt, Whe-

"ther

" ther they would limit a time certain, or a reaſonable time, to " any member of the Houſe for his privilege? The Houſe " anſwered, A convenient time. 2d, Whether Mr. *Martin* was " arreſted within this reaſonable time? The Houſe anſwered, " Yea. 3d, If *White* ſhould be puniſhed for arreſting *Martin*? " The Houſe anſwered, No; becauſe the arreſt was twenty days " before the beginning of the parliament, and unknown to him, " that would be taken for reaſonable time. But the principal " cauſe why *Martin* had his privilege, was, for that *White*, the " laſt ſeſſion (miſtaken for meeting) of parliament arreſted " Mr. *Martin*, and then knowing him to be a burgeſs for this " Houſe, diſcharged his arreſt; and then afterwards Mr. *Martin*, " again returning to *London* to ſerve in the Houſe, Mr. *White* " did again arreſt him; and therefore the Houſe took in evil " part againſt him his ſecond arreſt, and thereupon judged, that " *Martin* ſhould be diſcharged of his ſecond arreſt out of the " Fleet by the ſaid Mr. *White*."

It is obſerved upon the above caſe, that this parliament met on the 29th of *October* 1586; on the 22d of *December* they were adjourned by commiſſioners from the queen to the 15th of *February* following; ſo that this arreſt was not either before the beginning of the parliament, or during a prorogation, but on the 22d of *January*, during an adjournment, and conſequently clearly within privilege. For an adjournment, even for a very long period, would not affect privilege, as we may collect from the Journals of the Houſe of Commons of the 1ſt of *June* 1621, and the printed debates of that ſeſſion, when it was ordered, agreeably to the opinion and advice of Sir *Edward Coke*, Mr. *Noy*, Mr. *Hakewill*, and others, " that during that adjournment," (which was for above five months, from the 4th of *June* to the 14th of *November*,) " no ſuits againſt members, or their ſervants, " ſhould be proceeded in, in any court of law; and if they were, " that a letter ſhould iſſue, under the Speaker's hand, for the " party's relief therein, as if the parliament was ſitting; and the " party refuſing to obey it to be cenſured at the next acceſs." And a ſimilar reſolution was about the ſame time come to by the Lords. For upon the 2d of *June* 1621, the Lords conſulted the Judges upon this queſtion; and they having anſwered, on the 4th of *June*, that they could not ſatisfy their Lordſhips of any precedents of the continuance of their privileges, during all the time of the long ceſſation, the Lords notwithſtanding reſolve, " That they do know, that the privileges of themſelves, their " ſervants and followers, do continue, notwithſtanding the ad- " journment of the parliament; and they order and adjudge the " ſame to be obſerved in all points accordingly."

1 Hatſ. Prec. 108.

This reſtriction as to ſuits was afterwards limited by ſtat. 12 & 13 W. 3. c. 3. to an adjournment of 14 days.

On the 22d of *January* 1628, Mr. *Rolle* complained of goods being ſeized by an officer of the cuſtoms for dues; and this complaint was immediately referred to the conſideration of a ſelect committee. The ſubſtance of the caſe was, that theſe goods were ſeized by the cuſtomers, or thoſe who had a leaſe of the cuſtoms, for refuſing to pay the duties of tonnage and poundage, which

(*a*) The Houſe had been prorogued from the 20th of June to the 20th of October, and then further

prorogued to the 20th of January. When King Charles the ſecond intended to prorogue the parliament from the 27th of July 1663, to the 16th of March following,

which the Commons had not yet granted to the king; but which the king, as appears from his warrant in the eighth volume of the Parliamentary Hiſtory, p. 311. had directed to be levied by his own authority. The Houſe, on the report from the grand committee upon this violation of their privileges, reſolve, 1. That every member of this Houſe is, during the time of privilege of parliament, to have privilege for his goods and eſtate. 2d, That the 30th of *October* laſt was within the privilege of parliament (*a*); and 3d, That Mr. *Rolle* ought to have privilege for his goods ſeized the 30th of *October* laſt, the 5th of *January* laſt, or at any time ſince.]

(*a*) a ſpace of eight months, he ſaid in his ſpeech to both houſes of parliament upon that occaſion, "I think it neceſſary to make this a ſeſſion, that ſo the current of juſtice may run the two next terms, "without any obſtruction by privilege of parliament, and therefore I ſhall prorogue you to the 16th day "of March." Lords' Journ. 417.

Trin. 8 G. 2. in B. R. Col. Pit's caſe. 2 Stra. 985. Forteſc. Rep. 159. 342. Barnard. K. B. 442. Com. Rep. 44.

In the caſe of Colonel *Pit*, the parliament was prorogued 16 *April* 1734, diſſolved the 17th, and the new writs bore teſte the 18th following, and the defendant *Pit*, who was a member of that parliament, was arreſted on the 20th: One of the queſtions in this caſe was, Whether the arreſt was within time of privilege? And it was determined that it was, although the defendant had lived for two years before no farther diſtant from *London* than *Hammerſmith*; but the court did not think it neceſſary, in the determination of this cauſe, to aſcertain the exact time of privilege members of the Houſe of Commons were entitled to after a diſſolution of parliament.

This point, though left undefined by the Britiſh parliament, is in Ireland aſcertained by a ſtatute of the legiſlature of that country, viz. 3 E. 4. c. 1. and limited to forty days before, and forty days after the concluſion of the parliament.

[The only ſtatutory declarations of the duration of privilege in any inſtances, are the above ſtatute of 12 & 13 *W.* 3. *c.* 3. and the 4 *G.* 3. *c.* 24. & 24 *G.* 3. *c.* 37.; by which two laſt ſtatutes the right of members to ſend their letters free from poſtage, is aſcertained to continue, during the ſitting of parliament, and within forty days before, and forty days after any ſummons or prorogation of the ſame.]

## 5. How Privilege is to be claimed and taken Advantage of.

Dalſ. 16. Stil. 177. 186. 214. 222.

It ſeems, that formerly the uſual and indeed neceſſary way of taking advantage of privilege, was to plead the ſame, or to bring a writ of privilege; and that applications in other manner, or even by motion in court, were held inſufficient.

[But ſo early as the 34th of H. 8. Ferrers, a member in execution, was delivered by the ſerjeant without any other warrant than his mace, even though the Lord Chancellour ordered a writ of privilege. Holling. Chron. 1 Hatſ. Prec. 53. Dyer, 61. a. But *qu.* of this caſe, & *vide infra*.]

Noy, 83. Latch, 48. 150. Hodges v. Moor.

As, where the defendant being a burgeſs of parliament brought a (*b*) letter from the Speaker to the King's Bench, to ſtay, &c. it was diſallowed by the court; for, as the book ſays, it ought to have been a writ of privilege: and in this caſe it was ſaid, that when *Thorpe* was Speaker, he had a general *ſuperſedeas* for all actions

(*b*) See ord. Houſe of Commons,

actions againſt him; and this was held ill, for he ought to have had a particular *ſuperſedeas* for each action. 1ſt June 1621, *ſupra*.

A perſon choſen to ſerve in parliament ſhall not have privilege before the day of ſeſſion; for there is no clerk of parliament to certify, and the court will not admit affidavits in that caſe; he ought to ſue his writ of privilege in Chancery, on the return of his election. Sid. 42. pl. 9. Kel. Rep. 3. pl. 7. T. Raym. 12. See Forteſc. Rep. 162. and the caſes *ſupra*.

Lord *Banbury* was indicted of murder by the name of *Charles Knollys*, Eſq. and he pleaded in abatement, that by letters patent K. *Car.* I. created his grandfather Earl of *Banbury*, and ſo ſhewed the deſcent to him, and prayed judgment of the indictment, becauſe he was not named earl. The Attorney-General replied, that upon his petition to the Houſe of Lords to be tried by his peers, the Lords diſmiſſed his petition, and diſallowed his peerage, *&c.* and upon demurrer, the replication was held to be naught, and the plea good, and the indictment abated. In this caſe the following points were determined: 1*ſt*, That it was not neceſſary for the defendant in his plea to aver that *Banbury* was within any county in *England*; for that in reality there is not any neceſſity that he ſhould be created of any place. 2*dly*, That it was not neceſſary for the defendant to aver that he was *unus parium regni Angliæ*; for whatever is done under the great ſeal of *England*, ought to bear relation to *England*; and to ſuppoſe him a Peer of *Ireland*, is a foreign intendment, and ought to be rejected. 3*dly*, That the concluſion of his plea, *& hoc paratus eſt verificare unde ex quo*, without *prout patet per recordum*, or producing a writ to certify that he was an Earl, was ſufficient (*a*); though baron or not baron is regularly to be tried by the record of his having ſat in parliament: but herein the court took a difference between a creation by writ, and that by patent; and held, that in the latter caſe his ſitting or not ſitting in parliament was not material, as his creation was by patent, which gave him all the privileges of a peer, though he had never ſat in parliament: beſides, his plea does not barely conſiſt of matter of record, but the deſcents are matters of (*b*) fact which might be traverſed, and tried by a jury 4*thly*, It was held, that the replication did not avoid the defendant's plea, nor was he concluded from his peerage by the order of the Houſe of Lords: 1*ſt*, Becauſe in an original cauſe the Lords have no juriſdiction, nor is there any precedent of their having ever determined a right of peerage without a previous petition to the king, who is the fountain of honour, and the king's reference to them. 2*dly*, That this diſmiſſion can amount to no more than an ordinance of one part of the legiſlature, and ſuch ordinance cannot diveſt the party of that in which he hath a freehold and inheritance, and in whoſe advice and ſervices the king and commonwealth are intereſted. 3*dly*, That this diſmiſſion does not amount to a judgment of parliament, and therefore cannot be pleaded in bar to the defendant. 2 Stra. 989. 2 Salk. 509. pl. 1. Skin. 336. pl. 2. Carth. 297. Comb. 273. Ld. Raym. 10. S. C. The King and Queen v. Knollys al. Lord Banbury. Trin. 6 W. & M. in B. R.

(*a*) 22 Aſſ. 24. Bro. Aſſ. 240. 35 H. 5. 46. 6 Co. 53. 9 Co. 31. F. N. B. 247. Regiſt. 287. Cro. Car 205.

(*b*) A trial of peerage in ſome caſes ſhall be by the country, as where a ducheſs is ennobled by marriage. 6 Co. 55.

A bill of *Middleſex* was iſſued out of *B. R.* by an attorney of the court, againſt the Counteſs of *H.* which was diſcharged by *ſuper-* Vent. 298. Counteſs of Hunting-

don's caſe. [*Vide infr.*]

*ſuperſedeas* without pleading; becauſe it appeared by the record that ſhe was a peereſs, and the attorney committed for ſuing out the proceſs.

2 Ld. Raym. 1247. 2 Salk. 512. pl. 2. S. C.

A motion was made in the behalf of the Lord *Banbury* for a *ſuperſedeas* to a *latitat* which was iſſued out of the court of *B. R.* againſt him, and on which he had been taken; and to induce the court to grant it, they offered to produce an exemplification of the judgment in the indictment in this court againſt my Lord, and the letters patent of creation, and an affidavit that my Lord was the ſame perſon in the record of the judgment; and it was alſo pretended, that if my Lord ſhould put in bail he would be eſtopped to plead his peerage. But the court denied the motion, and the Ch. J. ſaid, that they could not take notice that this *Charles Knolly's* is Earl of *Banbury;* that there was a difference between this caſe and the caſe of a peer that had ſat in the Houſe of Lords. If my Lord had been ever ſummoned to parliament and had a writ to ſhew, and there were no diſpute about the identity of the perſon, it would have been reaſonable to have granted a *ſuperſedeas*; but in this caſe of a lord who has never ſat, they could not do it; for they could not try peerage on a motion, but his Lordſhip might plead it, and pray a *ſuperſedeas*.

Salk. 3. pl. 7. Smith v. Villars. Stil. 454.

*Villars* was arreſted as *J. Villars, Armiger*, and pretended himſelf to be Earl of *Buckingham*; and upon a motion, the queſtion was, How he ſhould put in bail ſo as not to eſtop himſelf? & *per cur.* he need not join in the recognizance, and then there is nothing to eſtop him; for the act of others cannot conclude him.

4 Inſt. 15. Skin. 521.

If a biſhop has occaſion to plead to the juriſdiction of a court, he muſt plead that he is *unus de paribus hujus regni Angliæ*; for he has no patent to produce in teſtimony of his peerage, but is only a peer *ratione baroniæ*, which he holds in *jure eccleſiæ:* otherwiſe, of a temporal peer.

M. 7 G. 2. Col. Pit's caſe, at Serjeants-Inn. 2 Barnard. K. B. 423. 433. 448. Com. Rep. 444. pl. 208. 2 Str. 905. Forteſc. Rep. 159. 342.

In the caſe of Colonel *Pit* who was arreſted two days after the diſſolution of that parliament of which he was a member, and which was held to be within time of privilege, the queſtion of the greateſt difficulty was, How he ſhould be relieved, and whether he could not be diſcharged on motion without bringing his writ of privilege? And it was held by ten judges, that though a writ of privilege was heretofore held a ſure and legal remedy, that notwithſtanding, and eſpecially ſince the ſtatute 12 & 13 *W.* 3. *c.* 3. which expreſsly provides, that no perſon entitled, *&c.* ſhall be arreſted during time of privilege, that he might be diſcharged on motion; for the judges are to take notice of every act of parliament, and to take care that they be duly executed; and this method was ſince the making of the above-mentioned ſtatute thought more adviſable by the judges than a plea or writ of privilege, as the act does not make the proceſs void, but only avoidable; and as there could be no plea to a proceſs for irregularity which is aided by the appearance of the party. And this caſe was compared to an arreſt of an ambaſſador's ſervant contrary to the 7 *Ann. c.* 12. § 3. and to an arreſt on a *Sunday* againſt the

[Col. Pit was firſt brought up by *habeas corpus* into the court of Common Pleas, but as he had been taken by proceſs out of the

ſtatute

ſtatute 29 *Car. c.* 7. and to other caſes of privilege, as when a juror or witneſs, or the plaintiff himſelf, is arreſted in going to or returning from the court; who are all diſcharged upon motion. King's Bench, the court of Common Pleas refuſed to interfere, and remanded him. Dutton v. Pit, Barnes, 199.]

## 6. What ſhall be deemed a Breach of Privilege.

The privilege, order, or cuſtom of parliament, either of the Upper Houſe or Houſe of Commons, belongs to the determination or deciſion only of the court of parliament; ſo that they are the proper judges of all breaches of privilege, of which the courts of *Weſtminſter* only take notice incidently. 13 Co. 63, 64. Prinn's 4 Inſt. 16. Cro. Car. 181. 604.

And accordingly in the caſe of *Patty* and others who were committed to *Newgate* for a breach of privilege in commencing and proſecuting actions at common law againſt the late conſtable of (*a*) *Aileſbury*, the court of *K. B.* by the opinions of three judges againſt *Holt* Ch. J. refuſed to relieve or diſcharge them on a *habeas corpus*, this being a parliamentary matter in which the Houſe of Commons are the ſole judges. 2 Ld. Raym. 1105. The Queen v. Paty. (*a*) See the caſe of Aſhby v. White. 6 Mod. 45. 2 Ld. Raym. 938. 1 Salk. 19.

So, in the caſe of one *Ferrers*, the ſheriff was committed for detaining a member in execution. Dyer, 61. [Before this caſe of Ferrers, the Houſe, if in truth the privilege of parliament extended to perſons in execution, had been very tender in their mode of exerting it. It had indeed been the practice to releaſe members in confinement in execution, but this had not been done by any immediate authority of the Houſe itſelf, or even by writ of privilege, but by petition by the Commons to the king, and a ſpecial act of parliament for that purpoſe, an act being ſuppoſed to be neceſſary as well to protect the gaoler from an action for the eſcape, as to ſecure the debt of the creditor, who would otherwiſe have loſt his right to a new execution. See the caſes of Lark, Rot. Parl. 8 H. 6. No. 57. of Clark, Rot. Parl. 39 H. 6. No. 9. and of Hyde, Rot. Parl. 18 E. 4. No. 55. There can be no doubt, however, of the exiſtence of ſuch privilege at preſent, as the ſtat. 1 Ja. 1. c. 13. which is a general law paſſed for the purpoſe of obviating in all caſes the difficulties which were the objects of the above-mentioned ſpecial acts, expreſsly provides, "That nothing "therein contained ſhall extend to the diminiſhing of any puniſhment, to be thereafter by cenſure in par- "liament inflicted upon any perſon which thereafter ſhould make, or procure to be made, any ſuch arreſt "as is aforeſaid," that is, any arreſt in execution; and is therefore a parliamentary declaration, that, during the privilege of parliament, it is not lawful to arreſt, even in execution, any member of either houſe of parliament. We cannot help remarking with what a high hand the privilege was aſſerted in Ferrers's caſe; for though, as we have before mentioned, it had not been the practice in any preceding time, to releaſe members in execution without a ſpecial act of parliament, yet it appears, that Ferrers was delivered by the ſerjeant, without any other warrant than his mace, even though a writ of privilege was offered by the Lord Chancellour; that the perſons who oppoſed the delivery were impriſoned by the Houſe of Commons, ſome in the Tower, and ſome in Newgate; and the creditor himſelf, who procured the arreſt, was alſo committed for the contempt of the privilege of parliament. And theſe powers, according to Hollinghead, were admitted by all the judges of England to be legal. Hollingh. Chron. and 1 Hatſ. Prec. 53. Dyer too, in his argument as counſel in Trewynnard's caſe, (Dy. 61. a.) cites the caſe of Ferrers, to ſhew what the law was in this reſpect; but, when in a ſubſequent caſe he was delivering his opinion as judge, he ſaid, "If a man be condemned in debt or treſpaſs, and be elected a "member of parliament, and then be taken in execution, he cannot have the privilege of parliament; "and ſo it was holden by the ſages of the law in the caſe of Ferrers, in the time of H. 8. And though "privilege was at that time allowed, *eco fuit minus juſt.*" Moor, 57. pl. 153. We may add, that even ſince the ſtat. of 1 Ja. 1. c. 13. no inſtance occurs where any perſon entitled to privilege, if in cuſtody in execution, hath been delivered by any other mode, than by virtue of a writ of privilege, or by a writ of *habeas corpus*, iſſued in obedience to a warrant under the Speaker's hand, ſome formal proceſs being deemed neceſſary to give the act its full operation. See Sir Thomas Shirley's caſe, 5 Parl. Hiſt. 113. and 1 Hatſ. Prec. 155.]

But, where in *aſſumpſit* the defendant pleaded the ſtatute of limitations, and the plaintiff replied that the defendant was a parliament Sir George Binion v. Evelin. Lev. 111.

liament man, &c. the plea was over-ruled; becauſe one may file an original againſt a parliament man, and continue it down without any breach of privilege, here being no actual moleſtation of his perſon or eſtate; and that this ſhould be ſo is of abſolute neceſſity in order to ſave the bar of the ſtatute, for ſuch caſe not being provided by an exception, the plaintiff would be barred of his action, though he could not file an original.

Mod. 145. 2 Salk. 512. pl. 2. Show. 99. Carth. 137. 2 Ld. Raym. 1113. S. C.

So, a man whilſt member of parliament may alien his eſtate by fine with proclamations; and a perſon who has a right may be neceſſitated to commence an action to ſave the bar that would incur againſt him by the ſtatute of 4 *H.* 7. *c.* 24.

2 Ld. Raym. 1113. *per* Holt, C. J.

So, one may commence an action againſt a member of parliament that is executor.

2 Ld. Raym. 1113. *per* Holt.

## 7. Of the Proceedings in Courts by and againſt Perſons entitled to Privilege of Parliament.

By the ſtatute 12 & 13 *W.* 3. *c.* 3. § 1. it is enacted, "That "any perſon may proſecute any ſuit in any of his Majeſty's courts "at *Weſtminſter* or Chancery or Exchequer, or the Duchy Court "or in the Court of Admiralty; and in all cauſes matrimonial "and teſtamentary in the Court of Arches, the Prerogative Courts "of *Canterbury* and *York*, and the delegates, and all courts of "appeal, againſt any lord of parliament, or any of the knights, "citizens, and burgeſſes of the Houſe of Commons, or their "ſervants or any other perſon entitled to privilege of parliament; "at any time immediately after the diſſolution or prorogation of "parliament, until a new parliament ſhall meet, or the ſame be "re-aſſembled, and immediately after any adjournment of both "Houſes for above fourteen days until both Houſes ſhall meet; "and the ſaid courts may, after ſuch diſſolution, prorogation, or "adjournment, proceed to give judgment, and to make final "decrees and ſentences thereupon; any privilege of parliament "notwithſtanding.

§ 2. "Provided that this act ſhall not ſubject the perſon of "any of the knights, citizens, and burgeſſes, or any other perſon "entitled to privilege of parliament, to be arreſted during the "time of privilege; nevertheleſs if any perſon have cauſe of "action or complaint againſt any peer, ſuch perſon after ſuch "diſſolution, prorogation, or adjournment as aforeſaid, or before "any ſeſſions of parliament, may have ſuch proceſs out of his "Majeſty courts of King's Bench, Common Pleas and Exchequer "againſt ſuch peer as he might have had out of time of privilege; "and if any perſon have cauſe of action againſt any of the "knights, citizens, or burgeſſes, or any other perſon entitled to "privilege of parliament, after any diſſolution, prorogation, or "ſuch adjournment, &c. ſuch perſon may proſecute ſuch knight, "citizen, or burgeſs, or other perſon entitled to privilege, in his "Majeſty's courts of *K. B. C. P.* and Exchequer, by ſummons "and diſtreſs infinite, or by original bill and ſummons, attach-"ment and diſtreſs infinite, which the ſaid reſpective courts are

"empowered

" empowered to iſſue, until they enter a common appearance, or " file common bail; and any perſon having cauſe of ſuit or " complaint may, in the times aforeſaid, exhibit any bill or " complaint againſt any peer, or againſt any of the ſaid knights, " citizens, or burgeſſes, or other perſon entitled to privilege, in " the Chancery, Exchequer, or Duchy Court, and proceed there- " upon by letter or *ſubpœna* as uſual; and upon leaving a copy of " the bill with the defendant, or at his laſt place of abode, may " proceed thereon, and for want of an appearance or anſwer, or " for non-performance of any order or decree, may ſequeſter the " eſtate of the party, as is uſed where the defendant is a peer, " but ſhall not arreſt the body of any of the ſaid knights, citizens " and burgeſſes, or other privileged perſon, during the continuance " of privilege of parliament."

And § 3. " Where any plaintiff ſhall by reaſon of privilege of " parliament be ſtaid from proſecuting any ſuit commenced, " ſuch plaintiff ſhall not be barred by any ſtatute of limitation, or " nonſuited, diſmiſſed, or his ſuit diſcontinued for want of pro- " ſecution, but ſhall upon the riſing of the parliament be at liberty " to proceed."

And § 4. " No ſuit or proceeding in law or equity againſt the " king's original and immediate debtor, for the recovery of any " debt originally and immediately due to his Majeſty, or againſt " any perſon liable to render an account to his Majeſty, for any " part of his revenues, or other original or immediate duty, or " the execution of any ſuch proceſs, ſhall be impeached or delayed " by privilege of parliament; yet ſo that the perſon of ſuch " debtor or accountant, being a peer, ſhall not be liable to be " arreſted, or being a member of the Houſe of Commons, ſhall " not, during the continuance of privilege, be arreſted by any " ſuch proceedings."

§ 5. " This act ſhall not give any juriſdiction to any court to " hold plea of any real or mixed action in other manner than ſuch " court might have done before."

[By the 2 & 3 *Anne*, *c.* 18. An act for the further explanation and regulation of privilege of parliament, in relation to perſons in publick offices, it is enacted, " That any action or ſuit " may be commenced or proſecuted againſt any officer or perſon " entruſted or employed in the revenue, *&c.* for any forfeiture, " miſdemeanour, or breach of truſt, *&c.* and ſhall not be ſtaid " or delayed by or under colour or pretence of any privilege of " parliament, although ſuch officer or perſon be a peer of the " realm, or lord of parliament, or one of the knights," *&c.*

Provided, " That nothing therein ſhall extend to ſubject the " perſon of ſuch officer, being a peer of the realm, or lord of " parliament, to be arreſted or impriſoned: but that all proceſs " ſhall iſſue againſt ſuch officer or perſon, being a peer of the " realm, or lord of parliament, as ſhould have iſſued againſt him " out of the time of privilege: nor ſhall extend to the perſon of " ſuch officer, being a knight, citizen, or burgeſs of the *Houſe of* " *Commons*, to be arreſted or impriſoned, during the time of

" privilege of parliament; and that againſt ſuch officer or other
" perſon, being a knight, citizen, or burgeſs of the *Houſe of*
" *Commons*, entitled to privilege, ſhall be iſſued ſummons and
" diſtreſſes infinite; which the ſaid reſpective courts are hereby
" empowered to iſſue in ſuch caſe, until the party ſhall appear
" upon ſuch proceſs, according to the courſe of ſuch reſpective
" courts."

The act of 12 & 13 *W.* 3. *c.* 3. reſtraining only the privilege of parliament, in actions or ſuits commenced in the courts therein ſpecified, by the 11 *G.* 2. *c.* 24. in amendment of the act of King *William*, it is enacted, " That any perſon and perſons ſhall
" and may commence and proſecute, in *Great Britain* or *Ireland*,
" any action or ſuit in any court of *Record*, or court of *Equity*,
" or court of *Admiralty*; and in all cauſes matrimonial and
" teſtamentary, in any court having cognizance of cauſes matri-
" monial and teſtamentary, againſt any peer or lord of parliament
" of *Great Britain*, or againſt any of the knights, citizens, and
" burgeſſes of the *Houſe of Commons* of *Great Britain*, for the time
" being, or againſt them and any of their menial and other ſer-
" vants, or any other perſon entitled to the privilege of the par-
" liament of *Great Britain*, at any time from and immediately
" after the diſſolution or prorogation of any parliament, until a
" new parliament ſhall meet, or the ſame be re-aſſembled; and
" from and immediately after any adjournment of both Houſes
" of Parliament, for above the ſpace of *fourteen days*, until both
" Houſes ſhall meet or re-aſſemble; and the ſaid reſpective
" courts may proceed," &c.

Provided, " That the ſaid act ſhall not extend to ſubject the
" perſon of any knight, &c. to be arreſted during the time of
" privilege. And § 2. authoriſes proceeding as above in any
" of the courts *of great ſeſſions in* Wales, *courts of ſeſſion in the*
" *counties palatine of* Cheſter, Lancaſter, *and* Durham; *the courts of*
" *King's Bench, Common Pleas*, and *Exchequer*, in *Ireland*, after
" any ſuch diſſolution, &c. And the *court of Chancery* in *Ireland*,
" and *equity of Exchequer*, are authoriſed to proceed in like
" manner as the *court of Chancery*, and *equity court of Exchequer*
" in *England* may, againſt any *peer*, *knight*, &c. after ſuch
" diſſolution," &c.

§ 3. ſaves the ſtatute of *limitations* in like manner as the act of King *William*.

And by § 4. No action or ſuit commenced againſt the *king's debtor*, &c. to be ſtaid in any court in *England* or *Ireland* [as by § 4. in the act of King *William*.

And laſtly, by the *ſtat.* 10 *G.* 3. *c.* 50. The preamble of which ſtates, that the acts already in being are inſufficient to obviate the inconveniences ariſing from delay of ſuits, by reaſon of the privilege of parliament, it is enacted, " That any perſon or per-
" ſons ſhall and may, *at any time*, commence and proſecute any
" action or ſuit, in any court of *Record*, or court of *Equity*, or
" *Admiralty*; and in all cauſes matrimonial and teſtamentary,
" any court having cognizance of cauſes matrimonial and teſta-
" mentary

" mentary, againſt any peer, or lord of parliament of *Great* " *Britain*; or againſt any of the knights, citizens, or burgeſſes, " and the commiſſioners for ſhires and burghs of the *Houſe of* " *Commons* of *Great Britain*, for the time being; or againſt their " or any of their menial or any other ſervants, or any other " perſon entitled to the privilege of parliament of *Great Britain*; " and no ſuch action, ſuit, or any other proceſs or proceeding " thereupon, ſhall, at any time, be impeached, ſtaid, or de- " layed, by or under colour or pretence of any privilege of " parliament."

2. Provided, that " Nothing in this act ſhall extend to ſubject " the perſon of any of the knights, citizens, and burgeſſes, or the " commiſſioners, *&c.* for the time being, to be arreſted or im- " priſoned upon any ſuch ſuit or proceedings."

3. And whereas the proceſs by *diſtringas* is dilatory and expenſive: For remedy thereof, be it enacted, " That the court out " of which the writ proceeds, may order the iſſues levied, from " time to time, to be ſold; and the money ariſing thereby to be " applied to pay ſuch coſts to the plaintiff as the ſaid court ſhall " think juſt, under all the circumſtances, to order; and the ſur- " plus to be retained until the defendant ſhall have appeared, or " other purpoſe of the writ be anſwered."

4. Provided always, when the purpoſe of the writ is anſwered, that then the ſaid iſſues ſhall be returned; or if ſold, what ſhall remain of the money ariſing by ſuch ſale, ſhall be repaid to the party diſtrained upon.

5. And it is further enacted, " That obedience may be en- " forced to any rule of his Majeſty's courts of *King's Bench*, " *Common Pleas*, or *Exchequer*, againſt any perſon entitled to " privilege of parliament, by diſtreſs infinite, in caſe any perſon " or perſons, entitled to the benefit of ſuch rule, ſhall chooſe " to proceed in that way: and the laſt clauſe extends them to " *Scotland*."]

It has been always held, that a peer is to put in his anſwer to a bill in equity, on his (*a*) honour only, and not on his oath; but when he is (*b*) examined as a witneſs, he muſt be ſworn.

(*a*) The 6 May 1628, it was reſolved by the Houſe of Lords, that the nobility of this kingdom are of ancient right to anſwer in all courts as defendants, upon proteſtation of honour only, and not upon the common oath. W. Jon. 155. Forteſc. Rep. 395. (*b*) Dyer, 314. Jon. 153. 2 Mod. 99. 3 Keb. 631.

Alſo, if a peer is by order of court to be examined on interrogatories, or to make an affidavit, the ſame muſt be on oath. 2 Salk. 513. & Freem. 422. pl. 566. *vide* Proced. Chan. 92.

As, where the Lord *Stourton* brought a bill againſt Sir *Thomas Meers* to compel him to a ſpecific performance of articles for the purchaſing of Lord *Stourton*'s eſtate, Sir *Thomas* in his defence inſiſted, that there were defects in Lord *Stourton*'s title to the eſtate; and it being ordered that Lord *Stourton* ſhould be examined on interrogatories touching his ſaid title, it was objected, that Lord *Stourton*, being a peer of the realm, ought to anſwer upon honour only; but it was ruled by Lord *Harcourt*, that though 1 P. Wms. 146. pl. 39. 2 Salk. 511. S. C. Sir Thomas Meers v. Ld. Stourton.

privilege of peerage did allow a peer to put in his anſwer upon honour only, yet this was reſtrained to an anſwer; and that as to all affidavits, or where a peer is examined as a witneſs, he muſt be upon his oath; and that this examination upon interrogatories, being in a cauſe wherein his Lordſhip was plaintiff, to enforce the execution of an agreement, as his Lordſhip would have equity, ſo he ſhould do equity, and allow the other ſide the benefit of a diſcovery, and that in a legal manner; and accordingly ordered Lord *Stourton* to put in his examination on oath.

Vern. 329. It hath been held, that though a court of Equity will not proceed againſt a member that has privilege of parliament, yet if a parliament-man ſues at law, and a bill is brought here to be relieved againſt that action, the court will make an order to ſtay proceedings at law till anſwer or further order.

Raym. 12. Sid. 42. S. C. *R. T.* being choſen a burgeſs for *Buckingham*, and having a trial at bar to be had on *Tueſday* before the ſitting of the parliament, moved to have his privilege allowed him; but was denied in regard the parliament was not ſitting nor to ſit till after the trial had.

H. 10 G. 1. in B. R. Wadſworth v. Handiſide. It hath been held, that in an action founded on the above-mentioned ſtatute 12 & 13 *W.* 3. *c.* 13. the defendant ſhall have an imparlance; and it was ſaid in this caſe, that the practice is to file a bill in nature of a ſpecial *capias* againſt the defendant, and then to ſummon him; and if he appears upon ſuch ſummons, the plaintiff may declare againſt him, as *in cuſtodia mareſcalli*.

Jenk. 107. Peers are entitled to a letter miſſive, which method was introduced upon a preſumption that peers would pay obedience to the Chancellour's letter; and is founded on that reſpect that is due to the peerage.

If the lord doth not appear upon the letter, a *ſubpœna* on motion is awarded againſt him; becauſe no ſubſequent proceſs can be awarded but upon a contempt to the great ſeal; and the Chancellor's letter is only *ex gratia*.

2 Vent. 342. Har. Chanc. Pract. 50. Gilb. Chanc. 65, 66. 3 Seld. 1543. If, on the ſervice of the *ſubpœna*, the peer doth not appear, or if he appears and does not put in his anſwer, no attachment can be awarded againſt him, becauſe his perſon cannot be impriſoned; but the proceedings muſt be by ſequeſtration, unleſs cauſe, &c. and this is regularly made out, upon affidavit made of the ſervice of the letter and the *ſubpœna*, though ſometimes it is moved for without, ſince the peer may ſhew want of ſervice at the day aſſigned to ſhew cauſe why the ſequeſtration ſhould not iſſue; and this order for a ſequeſtration is never made abſolute without an affidavit of the ſervice of the order to ſhew cauſe, and a certificate of no cauſe ſhewn.

A bill being filed againſt a peer or peereſs, the firſt application is for my Lord Chancellour's letter returnable in term-time; or it may be *immediate*, if the peer or peereſs lives in town; but in this caſe there muſt be an affidavit, that the original letter is left with the peer at his houſe, with a copy of the petition as anſwered; and therewith alſo is left an office-copy of the bill ſigned by the ſix clerk; for if the bill is not ſigned, the ſervice is irregular.

This

This letter is only a compliment, and no proceſs to found proceedings on; ſo that a peer may appear or not, as he pleaſes; if he fails, a *ſubpœna* iſſues againſt him, and his time for appearing and anſwering being out, an attachment muſt be actually ſealed and entered againſt him, though never executed, to ground a ſequeſtration upon. It is a motion of courſe for a ſequeſtration upon an attachment for want of an anſwer.

The peer muſt be perſonally ſerved with this order, and he hath eight days to ſhew cauſe after perſonal ſervice of the order; if no cauſe, the order is abſolute; but if the ſequeſtration is for want of an appearance, and he appears, the plaintiff muſt run the ſame race over again for want of an anſwer, and the peer muſt pray time to anſwer, as ſuitors do.

The proceeding is the ſame againſt a member of the Houſe of Commons: there, the party proceeds by way of ſequeſtration, only with this difference, that inſtead of a letter there is always a *ſubpœna* ſued out; and when a cauſe either againſt a peer or a commoner ſtands in the paper, and is called, and cannot proceed (privilege being in *) the court never ſtrikes it out as they do in other caſes where the party is not ready; but they let it ſtand over from one term to another, till privilege is out, and never put the party to ſue out a new *ſubpœna* to hear judgment. And the direction of the court to the regiſtrar is to put all privileged cauſes (which have been put off on that account) the very firſt cauſes in the paper when the court ſits after privilege is out.

* This was before 10 G. 3. c. 50. which enacts, That privilege ſhall not delay proceedings in law, equity, or eccleſiaſtical courts.

A ſequeſtration was granted, unleſs cauſe, againſt the Lord *Clifford* for want of an anſwer; he afterwards put in an anſwer, which being reported inſufficient, it was moved for a ſequeſtration abſolutely, an inſufficient anſwer being as no anſwer. But the court thought it a hardſhip in the caſe of a peer or member of the Houſe of Commons, that a ſequeſtration, which in ſome reſpects is in nature of an execution, ſhould be the firſt proceſs againſt them; and therefore allowed, that in caſe of an anſwer which is reported inſufficient, the plaintiff is to move again *de novo*, for a ſequeſtration *niſi*.

2 P. Wms. 385. pl. 117. Ld. Clifford's caſe.

[The cauſe ſhewn againſt an order *niſi* for a ſequeſtration for want of an anſwer from a member of the Houſe of Commons, was, an anſwer come in; to which it was replied on the part of the plaintiff, that, as exceptions were taken, it was no anſwer, and therefore the order ought to be made abſolute. On the other hand was cited the above caſe of Lord *Clifford*. But by Lord Chancellour—If there is a ſequeſtration *niſi* for want of an anſwer againſt a member of parliament, and he puts in an anſwer before the order is made abſolute, and exceptions are taken to his anſwer, the court *will enlarge the time for ſhewing cauſe* till it ſhall appear whether the anſwer is ſufficient or no. Mr. *Goldſborough*, who ſaid, when Lord *Clifford*'s caſe was before the court, that it was the ſtanding rule of the court there ſhould be a new ſequeſtration *niſi* in this caſe, was a good officer, but yet I ſhould think what I have mentioned is the proper medium. But his

Butler v. Raſhfield, 3 Atk. 740.

Lordſhip at preſent allowed the cauſe, as it was the courſe of the court.]

1 P. Wms. 535. pl. 155. It was moved for a ſequeſtration *niſi*, for want of an anſwer, againſt a menial ſervant of a peer of the realm, as the firſt proceſs for contempt, in the ſame manner as in the caſe of the peer himſelf; and though the motion was granted by the Maſter of the Rolls, yet the Regiſtrar refuſed to draw it up as thinking it againſt the courſe of the court; which being moved again before the Lord Chancellour, his Lordſhip, upon reading the ſtatute 12 & 13 *W.* 3. *c.* 13. likewiſe granted the motion, it appearing to be both within the meaning and words of the ſtatute; and if it were not ſo, as it was plain no attachment would lie againſt their perſons, conſequently, there would be no remedy againſt them, and they would have a greater privilege than their lord, if the proceſs againſt ſuch menial ſervant were to be a *ſubpœna*.

Martin v. Townſhend, 5 Burr. 2725. [The plaintiff, in an action againſt a member of parliament, had proceeded agreeably to the act of 10 *G.* 3. *c.* 50. and had obtained rules for ſelling the iſſues levied upon a *diſtringas*, *alias*, and *pluries*; and alſo a rule for an attachment againſt the ſheriff: but no iſſues had been actually levied, and at length defendant appeared; whereupon it was moved, that theſe rules ſhould all be diſcharged. For as no iſſues had been levied, they could not be ſold; [*vide* § 3. of the ſtatute 10 *G.* 3. *c.* 50.] and as the defendant in the action had now appeared, the end and purpoſe of the writs were anſwered. On the other ſide, the plaintiff inſiſted on the coſts of iſſuing the writs, before the rules ſhould be diſcharged. And the court thought that reaſonable; and directed *that on payment of coſts* the rules ſhould be diſcharged. They were of opinion, that theſe coſts were not to attend the event of the ſuit, but were to be paid to the plaintiff at all events, whether he ſhould finally ſucceed in his ſuit or not.

Cowp. 844. In *Trinity* term, 18 *George* 3. in the *King's Bench*, in the caſe of *Goſling and wife againſt Lord Viſcount Weymouth*, the queſtion was, whether a *peer* could be ſued there by *bill of privilege?* And adjudged that he might. The caſe was this:

The plaintiffs commenced an action againſt the Lord *Weymouth by bill of privilege*, to which he pleaded in abatement, that he ought to have been ſued by *original writ*, and *not by bill of privilege*; and thereupon, there was a *demurrer and joinder*. On the argument of which, the court relied on the caſe of *Say* againſt Lord *Byron* in that court, a few years before, and awarded a *reſpondeat ouſter*.

In the caſe of *Say* v. Lord *Byron*, Mr. *L. Robinſon* moved (upon an affidavit, that the plaintiff had ſued out two writs of *diſtringas*, whereupon the ſheriff had levied 40*s.* and 4*d.* and that no bill was filed) for a rule to ſhew cauſe why the ſaid two writs ſhould not be quaſhed, and the money levied thereon be reſtored. He objected that a peer ought not to be ſued by bill, but by original writ; and that the ſtat. of 12 & 13 *W.* 3. does not make any variation in the proceedings againſt peers, but reſpects,

this particular, *commoners* only. Mr. *Stowe* ſhewed cauſe, and the rule was enlarged. Upon ſhewing cauſe at a farther day, the court declared, that there were many precedents of actions againſt peers of parliament for many years before the ſtatute of *W.* 3. as certified by the Maſter, and the clerk of the rules; and ſaid, why could not the court ſupport its ancient juriſdiction, as well as the court of Exchequer, as *debitor domini regis?* The court therefore diſcharged the rule.

It is however very remarkable, that when the act of King *William* went to the *Lords* for their concurrence to the proceedings therein, againſt the members of both Houſes, *by bill and ſummons thereon*, the *Lords* expunged that part of the clauſe relating to themſelves being ſued by *original bill and ſummons*, and ſent back the amended bill to the Commons; which afterwards paſſed accordingly. Which clearly proves, that the *Lords*, at that time, did not think themſelves included therein.

Nor is it clear even at this day, notwithſtanding the above caſes, that they are included in the act. For upon a writ of error by the Earl of *Lonſdale*, to reverſe judgment becauſe he had been ſued by bill, the two following queſtions were propoſed to the judges by the Houſe of Lords. 1ſt, Whether the court of King's Bench hath any juriſdiction to hold plea in a perſonal action againſt a peer, or lord of parliament, who is neither in the cuſtody of the marſhal, nor is an officer or miniſter of that court, without the king's original writ iſſuing out of his Chancery, to warrant ſuch action? 2d, If the court has no ſuch juriſdiction, can it derive ſuch juriſdiction from the acquieſcence of the defendant, by pleading to iſſue in an action commenced without the king's original writ? In anſwer to which the Lord Chief Juſtice *Eyre* ſtated the unanimous opinion of the judges to be, that the firſt queſtion would have admitted of conſiderable doubt, if the objection had been made in an earlier ſtage of the cauſe, and that the caſes of *Say* v. Lord *Byron*, and *Goſling* v. Lord *Weymouth*, were not to be conſidered as deciſive authorities upon the ſubject. But that after pleading in chief it was too late for the defendant to object to the juriſdiction of the court.

Earl of Lonſdale v. Littledale, 2 H. Bl. 267. 299.

A member of the Houſe of Commons may be ſued either in *B. R.* or *C. B.* by bill; but he cannot be declared againſt in *B. R.* as *in the cuſtody of the marſhal.*

2 Str. 734. Say. Rep. 634.

All the ſubſequent proceedings to the declaration againſt a *peer or privileged perſon* are the ſame as in other caſes, except that their bodies cannot be taken *in execution*, unleſs the judgment is obtained upon a *ſtatute-ſtaple*, or *ſtatute-merchant, or upon the ſtatute of* Acton Burnell, 11 *Edw.* 1. and then a *capias ad ſatisfaciendum* lies even againſt peers of the realm.

By ſtat. 4 *G.* 3. *c.* 33. the creditor of a member, a merchant, may on affidavit ſue out a writ, and ſerve him, and if he does not make ſatisfaction in two months, he ſhall be bankrupt from the time of ſervice. Merchant committing act of bankruptcy,

creditors may ſue out commiſſion, and commiſſioners proceed, notwithſtanding privilege. But the perſon ſhall not be arreſted or impriſoned, except for caſes made felony by the bankrupt acts.]

# Prohibition.

2 Inſt. 601. F. N. B. 40. 12 Co. 65. And. 279. 2 Jon. 213. Skin. 628.

AS all external juriſdiction, whether eccleſiaſtical or civil, is derived from the crown, and the adminiſtration of juſtice is committed to a great variety of courts, hence it hath been the care of the crown, that theſe courts keep within the limits and bounds of their ſeveral juriſdictions preſcribed them by the laws and ſtatutes of the realm. And for this purpoſe the writ of prohibition was (*a*) framed; which iſſues out of the ſuperior courts of common law to reſtrain inferior courts, whether ſuch courts be temporal, eccleſiaſtical, maritime, military, &c. upon a ſuggeſtion that the cognizance of the matter belongs not to ſuch courts; and in caſe they exceed their juriſdiction, the officer who executes the ſentence, and in ſome caſes the judges that give it, are in ſuch ſuperior courts (*b*) puniſhable, ſometimes at the ſuit of the king, ſometimes at the ſuit of the party, ſometimes at the ſuit of both, according to the nature of the caſe.

(*a*) And is of great antiquity, 3 E. 1. An attachment granted againſt the biſhop and official, for holding plea after a prohibition. 2 Rol. Abr. 281.

(*b*) Eccleſiaſtical courts holding plea by fraud of matters of which they had not cognizance, were puniſhable in the Star-Chamber. Dav. 52.

Show. Par. Ca. 63.

The object of prohibitions in general is, the preſervation of the right of the king's crown and courts, and the eaſe and quiet of the ſubject. For it is the wiſdom and policy of the law, to ſuppoſe both beſt preſerved when every thing runs in its right channel, according to the original juriſdiction of every court; for by the ſame reaſon that one court might be allowed to encroach, another might; which could produce nothing but confuſion and diſorder in the adminiſtration of juſtice.

2 Inſt. 602. Rol. Rep. 252. 3 Bulſt. 120. Palm. 297.

So that prohibitions do not import that the eccleſiaſtical or other inferior temporal courts are *alia* than the king's courts, but ſignify that the cauſe is drawn *ad aliud examen* than it ought to be; and therefore it is always ſaid in all prohibitions (be the court eccleſiaſtical or temporal to which they are awarded) that the cauſe is drawn *ad aliud examen contra coronam & dignitatem regiam.*

Under

Under this Head we ſhall conſider:

(A) What Courts may grant a Prohibition.

(B) Whether the granting of a Prohibition be diſcretionary, or *ex debito juſtitiæ*.

(C) Who have a Right to ſuch Writ, and may demand it.

(D) Who may join in ſuch Writ.

(E) Of the Suggeſtion and Manner of obtaining a Prohibition.

(F) When to be granted abſolutely, or *quouſque* only; and therein, of directing the Party to declare on his Prohibition.

(G) Whether more than one ſuch Writ is to be awarded.

(H) At what Time to be granted; and therein, in what Caſes it may be granted after Sentence.

(I) To what Courts a Prohibition may be awarded; and therein, that the Superior Courts are to determine the Boundaries of all Inferior Juriſdictions.

(K) Prohibitions to Inferior Temporal Courts in what Inſtances to be granted.

(L) Prohibitions to the Spiritual Court in what Inſtances: And herein,

1. Where they meddle with a Matter purely Temporal.
2. Where they determine on a Matter of Freehold.
3. In what Caſes a Prohibition lies when they determine on Criminal Offences.
4. Where the Eccleſiaſtical Courts determine on Acts of Parliament.
5. In what Caſes they have a concurrent Juriſdiction, and may determine Incidents.

(M) The Offence of diſobeying a Prohibition.

## (A) What Courts may grant a Prohibition.

F. N. B. 53. 4 Inſt. 71.

THE ſuperior courts of *Weſtminſter*, having a ſuperintendency over all inferior courts, may in all caſes of innovation, &c. award a prohibition. In this the power of the court of *B. R.* has never been doubted, being the ſuperior common law court in the kingdom.

Bro. Prohibition, pl. 6. 4 Inſt. 81. 1 P. Wms. 43.

Alſo, the court of Chancery may award a prohibition, which may iſſue (*a*) as well in vacation as in term-time, but ſuch writ is returnable into *B. R.* or *C. B.*

(*a*) If one be ſued in an inferior court for a matter out of its juriſdiction, the defendant may either have a prohibition from one of the common law courts of *Weſtminſter-hall*; or, in regard this may happen in a vacation, when only the Chancery is open, he may move that court for a prohibition; but then it muſt appear by oath made, that the fact did ariſe out of the juriſdiction, and that the defendant tendered a foreign plea, which was refuſed. And if a prohibition has been granted out of Chancery *improvide*, and without theſe circumſtances attending it, the court will grant a *ſuperſedeas* thereto. 1 P. Wms. 476. pl. 135.

(*b*) Bro. Prohibition, pl. 6. Noy, 153. (*c*) 12 Co. 58. 108. Bro. Conſultation, pl. 3. 4 Inſt. 99. 2 Brownl. 17.—Prohibitions for encroaching juriſdictions

As the juriſdiction of the court of *C. B.* is founded on original writs iſſuing out of Chancery, it hath been heretofore (*b*) doubted, whether this court could without writ or plea depending award a prohibition; but this point has been (*c*) determined by the unanimous ſenſe of all the judges, *viz.* That this court may upon a ſuggeſtion grant prohibitions, to keep as well temporal as eccleſiaſtical courts within their bounds and juriſdictions, and that without any original writ or plea depending; the common law being, in theſe caſes, a prohibition of itſelf, and ſtanding inſtead of an original.

iſſue as well out of the C. B. as B. R. Vaugh. 157. *per* Vaugh. Ch. J. [The Author of the Commentaries ſays, that the writ of prohibition is iſſuing properly only out of the court of King's Bench, being the King's prerogative writ, but that for the furtherance of juſtice it may now alſo be had in *ſome* caſes out of the court of Chancery, Common Pleas, and Exchequer. 3 Bl. Comm. 112. And Lord Hardwicke is reported to have ſaid, that where the eccleſiaſtical court proceeds to try a cauſe by a different evidence from that which the common law courts would have done, *no other court* has the cognizance of it, but the court of King's Bench. 3 Atk. 628. Rotheram v. Fanſhaw. In the caſe of the Company of Horners in London, it is ſaid that it is the *proper* power and honour of the court of King's Bench to limit the juriſdictions of all other courts. 2 Roll. Rep. 471.]

Moor, 861. 2 Rol. Abr. 317. Hutton's caſe. Hob. 15. S. C. and there ſaid by Hob. that the party might likewiſe have a prohibition out of the *Ducby* court.

Accordingly it hath been adjudged, that a prohibition ought to be granted by the court of *C. B.* to the court of delegates, for ſuing there to avoid an inſtitution of a clerk to a church in *Lancaſhire*, after induction made of him thereto, though the *quare impedit* for this church could not be brought in *C. B.* but only in the county of *Lancaſter*; becauſe the title of the advowſon was not queſtioned by this prohibition, but the intruſion upon the common law, of which this court has ſpecial care.

Noy, 77. Dixy v. Brown. Palm. 422. Latch, 114. S. C. (*d*) That if it be inſiſted on, a prohi-

But as to the courts of *B. R.* and *C. B.* this difference hath been made, that in the firſt of thoſe courts a prohibition may be awarded upon a (*d*) bare ſurmiſe, without any ſuggeſtion of record; and ſuch writ is only in nature of a commiſſion prohibitory, which is (*e*) diſcontinued by the demiſe of the king; but that as to a prohibition iſſuing out of *C. B.* the ſuggeſtion muſt be

be on record, and therefore is conſidered as the ſuit of the party, in which he may be nonſuited, and is not diſcontinued by the demiſe of the king.

bition cannot be moved for till the ſuggeſtion be entered on the roll. Salk. 136. *per* Holt, Ch. J. [For want of a ſuggeſtion on record the court of B. R. diſcharged the rule to ſhew cauſe why a prohibition ſhould not be granted. Hawkins, Aſſignee of Wooldridge, v. Blaquiere and others, Aſſignees of Sampſon, Hil. 20 G. 3. 2 Crompt. Pr. 239.]

(e) But, if an attachment iſſues upon ſuch prohibition, or the party puts in bail, then it becomes a private ſuit, not diſcontinued by the demiſe of the king; and after ſuch proceeding the party may be nonſuited, though not before. Palm. 423. Latch, 114. *per* Dodderidge and Jones.

If the king's farmer, or a copyholder of the king's manor, be ſued in the eccleſiaſtical court for tithes, upon a ſuggeſtion in the court of Exchequer that he preſcribes to pay a certain *modus* in lieu of tithes, he ſhall have a prohibition out of the ſaid court, and ſuch *modus* ſhall be tried there.

Palm. 525. Lane, 39. Rol. Abr. 539.

The grand ſeſſions of *North Wales* may ſend a prohibition and write to the ſpiritual courts there, as well as the courts here may. 341. Jon. 330.

Sid. 92. but for this *vide* Cro. Car. Vaugh. 411.

## (B) Whether the granting of a Prohibition be diſcretionary, or *ex debito juſtitiæ*.

IT is laid down in *Hob.* that though a ſurmiſe be a matter of fact, and triable by a jury, yet it is in the diſcretion of the court to deny a prohibition, when it appears to them that the ſurmiſe is not true.

Hob. 67. in the caſe of Aſton Pariſh v. Caſtle Birmidge Chapel.

This authority has been often quoted in queſtions of this kind, and in ſome caſes denied to be law. But yet it ſeems the better opinion, and to have been ſo holden by the greater number of our judges, that the awarding of a prohibition is a matter diſcretionary, that is, that from the circumſtances of the caſe the ſuperior courts are at liberty to exerciſe a legal diſcretion herein, but not an arbitrary one, in refuſing prohibitions, where in ſuch like caſes they have been granted, or where by the laws and ſtatutes of the realm they ought to be granted.

Winch, 78. it is ſaid to be a matter diſcretionary.—But in Raym. 3, 4. Sid. 65. Prohibitions are ſaid by the Judges to be *ex debito juſtitiæ*, and not *de gratia*. In Raym. 92. Hide, Ch. J. affirms, that a prohibition is *ex gratia*, but Keling and Twiſden poſitively denied it.——Salk. 33. pl. 6. Comb. 148. they are held to be diſcretionary.——Ld. Raym. 220, 578. it is ſaid by Holt, Ch. J. that Hale and Windham held prohibitions to be diſcretionary in all caſes.——And of this opinion is Holt; and ſo in Ld. Raym. 586.

It hath been determined in the Houſe of Lords, that no writ of error will lie upon the refuſal of a prohibition; but, when a conſultation is awarded, it is with an *ideo conſideratum eſt*, and then a writ of error will lie.

Ld. Raym. 545. in the Biſhop of St. David's caſe.

If a maſter of a ſhip ſues in the Admiralty for his wages, and a prohibition is moved for, upon a ſuggeſtion that the contract was made on land, and the court is of opinion that a prohibition ought by law to be granted; in this caſe they will not compel the party to find (*a*) ſpecial bail to the action in the court above.

Salk. 33. pl. 4. Carth. 518. Com. 74. Ld. Raym. 576. S. C. [Clay v. Snelgrave. 3 Term Rep. K. B. 315.]

(*a*) But Holt, Ch. J. confeſſed that the court had ſometimes interpoſed, and procured bail to be given, but that was by conſent. Ld. Raym. 578. [For without conſent it cannot be done, and the caſe of Wharton v. Pitts, Salk. 548. where ſuch terms were impoſed was over-ruled in Velthaſen v. Ormſley, 3 Term Rep. K. B. 315.]

If

Comp. Incumb. 43. Sid. 65.

If there is judgment againſt a ſimoniſt, who by the aſſent of parties is to continue for a certain time on the benefice, and who at the expiration of the time refuſes to remove, but commits waſte on the houſe or glebe, a prohibition to ſtay his doing waſte may be had by the patron, incumbent, or any other perſon, becauſe that is the king's writ; and any one may pray a prohibition for the king, and it is grantable *ex debito juſtitiæ*, and not in the diſcretion of the court.

## (C) Who have a Right to ſuch Writ, and may demand it.

F. N. B. 40.

THE king may ſue for a prohibition, though the plea in the ſpiritual court be between two common perſons, becauſe the ſuit is in derogation of his crown and dignity.

2 Inſt. 607.

So, if the eccleſiaſtical court will hold plea of any matter which belongs not to their juriſdiction, upon information thereof to the king's courts, either by the plaintiff, defendant, or by a mere ſtranger, a prohibition will iſſue.

2 Rol. Abr. 312. Leon. 130. Goulſ. 149.

As, if a man libels in the ſpiritual court for a matter which does not appertain to that court, but to the common law, as a matter of frank-tenement; yet he himſelf, againſt his own ſuit, may pray a prohibition, and ſhall have it.

Cro. Jac. 351. 2 Bulſt. 283. Lit. Rep. 20. Wort v. Cliſton.

So, where the plaintiff in the ſpiritual court brought a prohibition to ſtay his own ſuit there, for that he ſuing for tithes by virtue of a leaſe made by the vicar of *A.* for three years, the defendant claimed to be diſcharged of the tithes by a former leaſe and compoſition by deed; it was held, that the plaintiff himſelf may have a prohibition to ſtay the ſuit; for the eccleſiaſtical judges are not to meddle with the trial of leaſes or real contracts, though they have juriſdiction of the original cauſe (*viz.* the tithes); for the leaſe is in the realty, and is not merely accidental. And it makes no difference, that the plaintiff bring this prohibition to ſtay his own ſuit; for if the temporal court has knowledge by any means, that the ſpiritual court meddles with temporal trials, a prohibition ought to be awarded.

2 Rol. Abr. 312. Robert's caſe. (a) Cro. Eliz. 251. Keilw. 110.

If a vicar ſues a pariſhioner for tithes in the ſpiritual court, and the parſon appropriate appears there (*a*) *pro intereſſe ſuo*, and prays a prohibition, it ſhall be granted.

Moor, 915. Cro. Eliz. 55.

If leſſee for years is ſued in the ſpiritual court for tithes, he in reverſion may have a prohibition.

March, 22. 45.—A prohibition *quia timet* does not lie. Allen, 56.

But no man is entitled to a prohibition, unleſs he is in danger of being injured by ſome ſuit actually depending; and therefore upon a petition to the archbiſhop, or other eccleſiaſtical judge, no prohibition lies.

Tarrant v. Mawr. 1 Str. 576.

[If the wife libel in the ſpiritual court to recover her fame, a prohibition ſhall not be granted upon the motion of her huſband.]

(D) Who

## (D) Who may join in ſuch Writ.

IF ſeveral libels are exhibited againſt *A.* and *B.* in a matter in which the court hath not conuſance, *A.* and *B.* cannot join in a prohibition. So, if the griefs be ſeveral, as ſome books ſay. Noy, 132. Leon. 286. Cro. Car. 162.

But, where the vicar of *A.* libelled ſeveral perſons ſeverally for tithes, who joined in a prohibition, ſuggeſting a *modus*; though the court held in this caſe, that the prohibition was not regularly brought, being in all their names, when there were ſeveral libels; yet inaſmuch as this was on a cuſtom, and matter triable at common law, in which the eccleſiaſtical court was properly prohibited, though not in exact form, they refuſed to award a conſultation, but directed that the parties ſhould put in ſeveral declarations, as if there had been ſeveral prohibitions. Yelv. 128-9. Burgeſs and Dixon v. Aſhton. Owen, 13. Bartue's caſe, L. P. adjudged.

So, if *A.* libels againſt *B.* and *C.* for defamation, and they ſue a prohibition, they ſhall join in attachment upon it; and it is no objection to ſay, that the defamation was ſeveral. Ld. Raym. 127. *per* Treby, C. J. *& vide* for this, Vent. 266. Raym. 425. Comb. 448.

Where two or more are allowed to join in a prohibition, and one of them dies, the writ ſhall not abate; becauſe nothing is by them to be recovered, but they are only to be diſcharged. Owen, 13. *per cur.*

## (E) Of the Suggeſtion and Manner of obtaining a Prohibition.

WHERE the matter ſuggeſted for a prohibition appears upon the face of the libel, an affidavit is never inſiſted upon; but if it does not appear upon the face of the libel, or, if a prohibition is moved for as to more than appears upon the face of the libel to be out of their juriſdiction, there ought to be an affidavit of the truth of the ſuggeſtion. 2 Salk. 549. pl. 8. *per* Holt, Ch. J. 1 P. Wms. 677. [4 Burr. 2037. Cowp. 330.]

The ſuggeſtion in the temporal courts may be traverſed. 2 Inſt. 611. 2 Co. 44.

Prohibition not to be granted upon proceſs before libel or appearance. Salk. 35. pl. 8. ——Where it is in nature of a *ſuperſedeas*. Lev. 253. ——That a perſon may alter his ſuggeſtion. Show. 179. ——Where a variance between the libel and ſuggeſtion is not material. Yelv. 79.

On a rule to ſhew cauſe why a prohibition ſhould not be granted to ſtay a ſuit againſt the plaintiff in the court of the archdeacon of *Litchfield*, for not going to his pariſh-church, nor any other church, on *Sundays* or holidays, nor receiving the ſacrament thrice a year, upon ſuggeſtion of the ſtatute *Eliz.* and toleration act, and then qualifying himſelf within the act, and alleging that he pleaded it below, and they refuſed to receive his plea; cauſe was ſhewn, that this fact, that ſuch a plea had been put in and refuſed, was falſe, and that the plaintiff was not a diſſenter, nor had qualified himſelf *ut ſupra*, and therefore hoped the court would not ſuffer the rule to ſtand, unleſs there was an affidavit of the above fact; for by that means any perſon 2 Ld. Raym. 1211. Burdett v. Newell.

might come and ſuggeſt a falſe fact, and ouſt the ſpiritual court of their juriſdiction; which the court admitted; and therefore for want of ſuch affidavit the rule was diſcharged.

Skin. 20. pl. 20. Hard. 406. 3 Keb. 217. 4 Mod. 367. [1 Str. 187. 4 Burr. 2032. 2039. See Dougl. 380. as to this cuſtom of London.] Vent. 10. Day v. Pitts.

If a plea to an inferior juriſdiction be properly tendered, and they refuſe it, though this be a good cauſe for a prohibition, yet an affidavit muſt be made of the refuſal.

A motion was made for a prohibition to the eccleſiaſtical court of *London*, for calling a woman *whore*, upon a ſuggeſtion that the words were actionable there by cuſtom of the place; but the court would not grant a prohibition without oath made, that if any ſuch words were ſpoken, they were ſpoken in *London*, and not elſewhere.

On a libel for calling the plaintiff *old thief and old whore*; the defendant ſuggeſted for a prohibition, that if any ſuch words were ſpoken, they were ſpoken at the ſame time; but this ſuggeſtion was held ill, becauſe the words ought to have been fully confeſſed.

(a) Rehearſed in the ſtatutes 27 H. 8. c. 20. and 32 H. 8. c. 7. to which this act refers.

By 2 & 3 *Ed.* 6. *c.* 13. § 14. it is enacted, "That if any "party at any time hereafter, for any matter or cauſe before (a) "rehearſed, limited, or appointed by this act, to be ſued or "determined in the king's eccleſiaſtical court, or before the "eccleſiaſtical judge, do ſue for any prohibition to any of the "king's courts where prohibitions before this time have been "uſed to be granted, that then in every ſuch caſe the ſame party, "before any prohibition ſhall be granted to him or them, ſhall "bring and deliver to the hands of ſome of the juſtices or judges "of the ſame court, where ſuch party demanded prohibition, the "very true copy of the libel, depending in the eccleſiaſtical court "concerning the matter wherefore the party demandeth pro-"hibition, ſubſcribed or marked with the hand of the ſame "party, and under the copy of the ſaid libel ſhall be written the "ſuggeſtion, wherefore the party ſo demandeth the ſaid pro-"hibition; and in caſe the ſaid ſuggeſtion, by two honeſt and "ſufficient witneſſes at the leaſt, be not proved true in the court "where the ſaid prohibition ſhall be ſo granted, within ſix months "next following after the ſaid prohibition ſhall be ſo granted and "awarded, that then the party, that is letted or hindered of his "or their ſuit in the eccleſiaſtical court by ſuch prohibition, "ſhall, upon his or their requeſt and ſuit, without delay, have a "conſultation granted in the ſame cauſe in the court where the "ſaid prohibition was granted, and ſhall recover double coſts and "damages againſt the party that ſo purſued the ſaid prohibition; "the ſaid coſts and damages to be aſſigned or aſſeſſed by the "court where the ſaid conſultation ſhall be ſo granted; for which "coſts and damages the party to whom they ſhall be awarded "may have an action of debt by bill, plaint, or information, in "any of the king's courts of record."

In the conſtruction of the above-mentioned ſtatute the following opinions have been holden.

2 Inſt. 662. Comp. Incumb. 600.

That this ſtatute referring to the ſtatutes 27 *H.* 8. *c.* 20. and 32 *H.* 8. *c.* 7. which extend to tithes and offerings generally, all ſuch

ſuch tithes and church-duties as are mentioned in thoſe ſtatutes, are as much within this act as if particularly enumerated. Dyer, 170. b.

And therefore it extends to prohibitions to ſuits for ſmall tithes as well as great. Yelv. 102. 2 Ld. Raym. 1172.

So it hath been adjudged, that the ſuggeſtion of a *modus decimandi* ought to be proved within ſix months, being within the act. Noy, 148. Yelv. 102. L. P.

So, where one that was ſued for tithe of hay in the ſpiritual court, ſuggeſted for a prohibition, that he was to pay ſo much upon an arbitrament; it was held, that this ſuggeſtion ought to be proved, as well as one made of a *modus decimandi*. So, on a ſuggeſtion upon the ſtatute 31 *H.* 8. *c.* 13. that lands are tithe-free, becauſe the clauſe requiring the proof of a ſuggeſtion is general, and not limited to real compoſition. Rol. Rep. 55. Reynolds v. Hay.

So, upon a ſuggeſtion, that the ſuit in the ſpiritual court was for tithes of heath and barren ground improved within ſeven years after the improvement, contrary to the ſtatute; in this caſe, proof of the ſuggeſtion within ſix months was held neceſſary. Jon. 231. Strande v. Hoſkins. Cro. Car. 208.

But it hath been held, that there needs no proof of the ſuggeſtion, where the ſuit is for tithes contrary to common right, or, where the (*a*) contract of the party is ſuggeſted. (*a*) For this *vide* Yelv. 102. 119. 2 Leon. 29.

Brown. and Goulſ. 99. Hetl. 145. 2 Keb. 134. Lit. Rep. 297.

It hath been held, that the ſuggeſtion need not be proved (*b*) ſtrictly, nor with preciſe certainty as to all its circumſtances; but that if it be proved in ſubſtance, or in ſuch a manner as to (*c*) ſhew that the eccleſiaſtical court has not juriſdiction, it is ſufficient. Cro. Eliz. 736. 819. Ca. temp. Hardw. 292. Moor, 911. (*b*) That proof by hearſay is ſufficient. Palm. 377.——Or that it is ſo by common fame. Noy, 28. (*c*) As, where a *modus* was alleged to be, that one ſhould pay 20 s. in ſatisfaction of tithes, and the proof was, that he ſhould pay 40 s., this was held ſufficient proof; becauſe thereby the court above had ſufficient juriſdiction. Hetl. 100. So, where the ſuggeſtion was to pay 2 s. 6 d. for tithes, and the witneſſes proved the *modus* to be to pay 3 s., this was held good by two judges againſt one; becauſe it ouſted the eccleſiaſtical court of juriſdiction. Noy, 44. Hetl. 110. & *vide* Yelv. 55. 2 Keb. 57. 407.——So, if one ſurmiſe that the inhabitants of B. (of which he himſelf is one) have paid a *modus*, and the proof be that he himſelf had paid it, this is ſufficient; becauſe it ouſts the eccleſiaſtical court of its juriſdiction. Noy, 28.

The ſuggeſtion muſt be proved by honeſt and ſufficient witneſſes, which is required by the expreſs words of the ſtatute; and therefore the teſtimony of one attainted of felony, excommunicated or convicted of recuſancy, is, as in other caſes, to be rejected. 2 Bulſt. 154.

But it hath been held, that perſons, ſuch as pariſhioners of the pariſh, &c. who may not be ſufficient and able witneſſes at a trial at law, may notwithſtanding be ſufficient witneſſes to prove the ſuggeſtion; the chief intent of the ſtatute being to prevent frivolous and vexatious ſuggeſtions. Alſo it hath been held, that after admitting and recording the proof of the ſuggeſtion, nothing is to be objected againſt the perſons of the witneſſes or their evidence. M. 27 Car. 2. in C. B. Sharp v. Hobart.

If a ſuggeſtion conſiſts of two parts, it is ſaid to be ſufficient to produce one witneſs to the one, and another to the other. Vent. 107.

Hob. 179. Lit. Rep. 19. 2 Mod. 58. [2 Rol. Abr. 521. Foy v. Liſter, 2 Salk. 554. 2 Ld. Raym. 1172.

It hath been held, that the ſix months for proof of the ſurmiſe ſhall be accounted according to the calendar; for that this being a computation which concerns the church, it is but reaſonable that it ſhould be done according to the computation uſed in the eccleſiaſtical law.

S. C. ſemb. [*Vide contr.* and that this computation is confined only to the caſe of a lapſe in *quare impedit*, Co. Lit. 135. b. Cro. Jac. 166, 167. 4 Mod. 186. 3 Burr. 1455. Skin. 314. And that depends on the words in the act of 13 E. 1. ſt. 1. c. 5. "*tempus ſemeſtre.*" But, in all acts where "months" are ſpoken of, without the word "calendar;" and nothing is added from which a clear inference can be drawn that the legiſlature intended calendar months, it is underſtood to mean lunar months. Lacon v. Hooper, 6 Term Rep. 226.]

(*a*) Moor, 573. (*b*) Noy, 30. 2 Ld. Raym. 1172. 2 Salk. 554. pl. 20.

It is ſaid in (*a*) *Moor*, that the time of ſix months given by the ſtatute to prove the ſuggeſtion, ought to be intended ſix months in term-time, and that the vacation ſhould be no part of the time; but this hath been ſince (*b*) adjudged otherwiſe, and that the time ſhall commence from the *teſte* of the writ of prohibition, and not from the time of the rule made for awarding it.

Maltom v. Acklom. Barnes, 428.

[When the declaration is ordered to be amended, the time for proving the ſuggeſtion is to be computed from the amendment.]

Noy, 30. (*c*) That it muſt be entered in the office. 2 Show. 308. pl. 316.

If the (*c*) ſurmiſe be proved before one of the judges within the ſix months, although it be not recorded till after the ſix months by the court, it is well enough.

Lit. Rep. 355.

It hath been held, that proof which is not ſufficient may be ſupplied by better proof within the ſix months, but not after.

Arg. Creake v. Pitcairn, Tr. 13 G. 2. Caſ. Pr. C. B. 158.

[It is ſaid, if the party who has obtained a writ of prohibition, be ordered to declare in prohibition, that he is not obliged to make proof of his ſuggeſtion within ſix months purſuant to the 2 & 3 *Ed.* 6. becauſe the proof is, in ſuch caſe, to be made at the trial of the cauſe.]

Bendl. 143. (*d*) *Vide* ſtat. 8 & 9 W. 3. c. 11.

The party, on failure of proof of the ſuggeſtion, ſhall not only have double coſts and damages, but alſo his (*d*) coſts and damages in the action he brings for the recovery of them.

Brownl. Goulſ. 99. Yelv. 119.

But, if the prohibition be grounded partly on a *modus*, which needs proof, and partly on the contract of the parties, which needs no proof, there ought not to be double coſts; for the mixing of the contract with the manner of tithing privileges the whole.

Yelv. 79, 80.

So, where for a variance between the libel and ſuggeſtion, a conſultation was awarded, and double coſts adjudged to the defendant; this was held to be error by the very letter of the ſtatute, which gives double coſts (*e*) only for want of proving the ſuggeſtion, and for no other cauſe.

(*e*) Carth. 463.

Latch, 140. Watkinſon v. Sir G. Pacy.

So, where a prohibition was obtained upon a ſuggeſtion which was not proved within the ſix months, in which the defendant took iſſue with the plaintiff, which was found for the plaintiff; in this caſe it was reſolved, that the defendant ſhould not have double coſts for want of the ſuggeſtion's being proved; for the ſtatute is, that he ſhall have a conſultation and double coſts; but in this caſe he could not have a conſultation, the matter and iſſue being found againſt him; but ought to have prayed a conſultation

upon

upon the ſuggeſtion's not being proved, and then ſhould have had his double coſts.

[Where a conſultation is granted, becauſe the ſuggeſtion has not been proved within ſix months, the court will not make the payment of the double coſts and damages given in ſuch caſe to the defendant in prohibition by the 2 & 3 *Edw.* 6. *c.* 13. a part of the rule;—that would be unneceſſary, for if a conſultation be awarded for want of ſuch proof, double coſts and damages follow of courſe. Foy v. Liſter, 2 Ld. Raym. 1172.

A ſuit was inſtituted in an eccleſiaſtical court againſt an *adminiſtrator* for tithes *due from the inteſtate in his lifetime*, to which ſuit the adminiſtrator, alleging a *modus*, obtained a prohibition, but did not prove his ſuggeſtion within the time limited for that purpoſe by the 2 & 3 *Edw.* 6. *c.* 13. and it was doubted, whether or not he was liable to double coſts according to that ſtatute. Creake v. Pitcairne, T. 13 & 14 G. 2. Barnes, 129. *Sed vid.* S.C. Caſ. Pr. C. B. 157.

Pract. Reg. 118. According to theſe books, the court reſolved, that the plaintiff in prohibition was *not* liable to pay any coſts.

If a defendant in prohibition bring an action of debt for the recovery of the double coſts and damages, given by the 2 & 3 *Edw.* 6. where a conſultation is granted for want of the ſuggeſtion's being proved within ſix months, he ſhall alſo have coſts in ſuch action. 1 Rol. Abr. 516. l. 37.

The 2 & 3 *Edw.* 6. *c.* 13. § 14. gives coſts where the party applying for a prohibition fails in proving the truth of his ſuggeſtion within ſix months; and this continued to be the only caſe, where either a plaintiff or defendant in prohibition was entitled to recover any coſts until the 8 & 9 *W.* 3. *c.* 11. By the third ſection of that ſtatute it is enacted, "That in all ſuits upon prohibitions, the "plaintiff obtaining judgment, or any award of execution after "plea pleaded, or demurrer joined therein, ſhall likewiſe recover his coſts of ſuit; and if the plaintiff ſhall become nonſuit, "or ſuffer a diſcontinuance, or a verdict ſhall paſs againſt him, "the defendant ſhall recover his coſts, and have execution for the "ſame by *capias ad ſatisfaciendum*, *fieri facias*, or *elegit*." Comb 20. The 5th ſect. of 8 & 9 W. 3. c. 11. provides, that nothing in that act contained ſhall be conſtrued to alter the laws then in being, relative to the payment of coſts by executors or adminiſtrators.

Where judgment is given for the plaintiff, in a ſuit in prohibition, upon demurrer, or after plea pleaded, he ſhall have coſts taxed from the ſuggeſtion, and ſo as to include the coſts incurred by the motion. 2 Str. 1062. Caſ. temp. Hardw. 396. Andr. 62. Barnes, 130.

Thus in prohibition, a motion being made that the prothonotary ſhould not allow coſts, except from the time of the delivery of the declaration, the court unanimouſly declared, that the plaintiff ought to have his coſts from the time of the ſuggeſtion, and of the ſuggeſtion itſelf, and all coſts incident and ſubſequent thereto. Wills v. Turner, H. 2 G. 1. Caſ. Pr. C. P. 11. S. C. B. N. P. 331.

So where, after judgment for the plaintiff in prohibition, the queſtion was, whether the coſts payable by the defendant ſhould be computed from the firſt motion, or only from the declaration? Upon ſearch, it was found to be the courſe of all the courts, to tax only from the time of declaring, except in two inſtances, viz. *Eads* v. *Jackſon*, *B. R.* 2 *G.*, and *Brown* v. *Turner* and others, in Sir Harry Houghton v. Starkey. In Scacc. H. 4 G. 1. 1 Str. 82. S. C. Fort. 348. S. C.

cited Caſ. temp. Hardw. 396.

in *C. B.*, where coſts were allowed from the time of the original motion for the prohibition. And Mr. Baron *Forteſcue* ſaid, that this queſtion had been put to all the judges, whoſe opinions were conformable to theſe two deciſions. Therefore, in the principal caſe, the court of Exchequer ordered coſts to be taxed from the firſt application to the court incluſively; and directed the officer to purſue that mode of taxation, in all ſuch caſes for the future.

1 Str. *ubi ſup. Sed vide* Ca. temp. Hardw. 396. where this caſe is cited differently,

Afterwards, in *Swetnam* v. *Archer*, the ſame queſtion occurred, and received the ſame determination; and, in this caſe, it was agreed that the practice had been uniformly ſuch, ſince the reſolution in *Houghton* v. *Starkey*,

and ſaid to have been never determined.

Bury v. Croſs, 1 Str. 83. S. C. 2 Barnard. K. B. 47. S. C. cited Caſ. temp. Hardw. 396.

And this point was again agitated, in a ſubſequent caſe, on account of a doubt entertained on the ſubject by a new Maſter of the King's Bench; when the court reſolved, that the plaintiff in prohibition ſhould have coſts from the very firſt application for the prohibition, becauſe the whole is but one ſuit, and the words of the 8 & 9 *W.* 3. *c.* 11. are, that the plaintiff ſhall recover his coſts of ſuit.

But it hath been holden, that a defendant in prohibition, in caſe of the nonſuit of the plaintiff, is not entitled to the coſts occaſioned by oppoſing the rule for the prohibition, but merely to the coſts of the nonſuit.

Carliſle v. Meyrick, C. B. H. 17 G. 3. Say. on Coſts, 237.

Thus, upon a rule to ſhew cauſe why the prothonotary ſhould not review his taxation of coſts, it appeared, that the plaintiff in a ſuit in prohibition had been nonſuited; upon which the queſtion was, whether the defendant ought to have the coſts incurred by oppoſing the rule to ſhew cauſe why the writ of prohibition ſhould not be granted, as well as the coſts of the nonſuit? It was determined, that he ought to have no more than the coſts of the nonſuit. If the defendant had ſucceeded in his oppoſition to the rule to ſhew cauſe why the prohibition ſhould not be granted, it would even then have been for the conſideration of the court whether, upon all the circumſtances of the caſe, that rule ſhould be diſcharged with coſts; but as he did not ſucceed in that oppoſition, it muſt be now intended that it was groundleſs, and, conſequently, there is no pretence for his being allowed the coſts thereof.

If, upon argument of a demurrer to a declaration in prohibition, a writ of prohibition be awarded as to ſome of the points contained in the libel in the court below, and a conſultation as to others, the plaintiff in prohibition ſhall have coſts.

Middleton v. Croſt, Caſ. temp. Hardw. 395. S. C. Andr. 57. 2 Str. 1062.

Thus, where *John Middleton* and his wife were libelled against in the ſpiritual court, for being married out of canonical hours, without licence or banns, and in a private houſe; a prohibition was applied for, upon a ſuggeſtion that the power of the eccleſiaſtical court was taken away by the ſtatute of 7 & 8 *W.* 3. *c.* 35. by which penalties were laid on the clergyman marrying, and on parties married, without banns or licence, which penalties were to be recovered in the temporal court. In order to bring the ma-

ter fully before the court, the plaintiffs were ordered to declare in prohibition; the defendant by his plea denied (in common form) that he had proceeded in the ſpiritual court contrary to the writ of prohibition; and for a conſultation demurred generally. After joinder in demurrer by the plaintiffs, *John Middleton*, the huſband, died; however, notwithſtanding his death, the court, at the inſtance of the parties, and becauſe the eccleſiaſtical court might ſtill proceed againſt the wife, gave judgment, that the prohibition ſhould ſtand as to that part of the libel which was for marrying at an uncanonical hour, (*i. e.*) not between the hours of eight and twelve in the forenoon, and that a conſultation ſhould be awarded *quoad* the reſidue of the cauſe.

In conſequence of this judgment, application was made to the court that the Maſter might be directed to tax *Anne Middleton*, the wife, her coſts, upon the 8 & 9 *W.* 3.; but no ſuggeſtion being then made upon the roll, of the huſband's death, the court refuſed, at that time, to grant any rule.

This ſuggeſtion being afterwards made, the matter was moved again, and a rule to ſhew cauſe was granted.

For the plaintiff, the caſe of Dr. *Bentley* and the Biſhop of *Ely* was cited; where, in a ſuit in prohibition in this court, judgment was given that the prohibition ſhould ſtand as to all the articles, concerning which the Doctor was libelled below; but, upon a writ of error in the Houſe of Lords, that judgment was reverſed, and a new judgment given,—That the prohibition ſhould ſtand as to part of the articles, and a conſultation go as to the reſt; and there it came to be debated, whether the plaintiff in prohibition was entitled to coſts, he having judgment only for part? and this was ſolemnly argued, upon a day appointed for that purpoſe, by all the judges then preſent; and finally the plaintiff had judgment thereupon for his coſts. *Vide* 4 Bro. Parl. Caſ. 66.

Upon the firſt argument of the principal caſe, the whole court were clearly of opinion, that where a prohibition goes to part, and a conſultation to other part, the plaintiff in prohibition is entitled to coſts. And Lord *Hardwicke*, then Chief Juſtice of this court, obſerved, that this caſe was within the very words of the ſtatute of 8 & 9 *W.* 3. *c.* 11. § 3. which are, *if the plaintiff obtain judgment, or any award of execution after plea pleaded, or demurrer joined*; and the ſtatute only provided for the defendant's recovering his coſts in ſuch ſuits where the plaintiff ſhould become non-ſuit, ſuffer a diſcontinuance, or a verdict ſhould paſs againſt him; neither of which was the caſe here. And as to the *quantum* of the coſts, he ſaid, that though it was an equitable conſtruction of the ſtatute, to give coſts from the firſt motion; yet, where a conſultation was awarded as to part, it was in the diſcretion of the court, upon the circumſtances of the caſe, whether they would allow coſts for that time or not. Hil. Term, 10 Geo. 2.

However, it being objected, that the death of the huſband before judgment had abated the ſuit, no rule was then made for coſts, but the court ordered this point to ſtand over for further argument.

Accordingly, this queſtion was argued in a ſubſequent term, when the court were unanimouſly of opinion, that in this caſe the circumſtance of the huſband's death, previous to the judgment, was not an abatement of the ſuit, even at the common law; or, if it was, that it was clearly aided by the 8 & 9 *W.* 3. *c.* 11. § 7. And thereupon they made the rule for the allowance of coſts to the wife abſolute; and added, that ſuch coſts muſt be allowed from the time of the original motion for the prohibition.

Andr. 62.

So, it hath been determined, that a defendant in a ſuit in prohibition is entitled to coſts, where a verdict is found for him, though it be for part only of the matter in iſſue, and a conſultation be awarded for the reſidue.

Malton v. Acklam, Barnes, 138.

If, in a ſuit in prohibition, the plaintiff be obliged to declare as adminiſtrator, (as if the prohibition be granted to a ſuit, in the ſpiritual court againſt the plaintiff as adminiſtrator, for tithes due in the inteſtate's lifetime,) and become nonſuit at the trial, he is not liable to the payment of coſts.

Creek v. Pitcairne, Caſ. Pr. C. P. 157. Pract. Reg. 118.

A plaintiff in prohibition is entitled to coſts, by the ſtatute of 8 & 9 *W.* 3. *c.* 11. only where he obtains judgment after plea pleaded, or demurrer joined; but, if there be judgment by default in a ſuit in prohibition, and the plaintiff have damages upon a writ of inquiry for the contempt in proceeding after the writ of prohibition delivered, he will be entitled to coſts, by virtue of the ſtatute of *Glouceſter*, *c.* 1.: this was determined in the following caſe.

Upon a motion to ſet aſide a writ of inquiry of damages in a prohibition, after judgment by default, upon which the jury had found damages for the plaintiff, it was alleged on the part of the plaintiff, that the citing him to appear in the ſpiritual court in a plea of which that court has no cognizance, and whereby the plaintiff may ſuſtain great damage, is a contempt of the laws of the land, and therefore the defendant ought to make the plaintiff ſatisfaction for the damage ſuſtained by the proceedings in the court below; and this the defendant tacitly admits, by ſuffering judgment to go againſt him by default. And if the plaintiff be entitled to damages, he is alſo to coſts, under the ſtatute of *Glouceſter*.

Sir E. Bettinſon v. Dr. Hinchman, Caſ. Pr. C. P. 20. S. C. B. N. P. 331. Lill. Ent. 320. Acc. Raym. 387. 2 Jon. 128. 1 Vent. 337. 348. 350. 3 Lev. 360.

The court inclined to be of this opinion, but took further time to conſider of the matter. On a ſubſequent day, the queſtion was ſolemnly argued; after which the court gave the plaintiff leave to proceed on his inquiry, and directed the prothonotary to tax his coſts. But becauſe, in this caſe, the defendant was proſecuted for a contempt at common law, as judge of the ſpiritual court, and he could not poſſibly be in contempt until the rule was made abſolute to ſtay his proceedings, the coſts were allowed only from the time that the rule for the prohibition was made abſolute.

It ſhould ſeem that the caſe reported, by the name of Sir *Edward Bettiſon* v. *Savage*, in *Com.* 335. is the ſame with that above ſtated; though it muſt be confeſſed, the reports differ very widely in ſeveral material points.

Hull. on Coſts, 322.

Accordin

According to *Comyns*, the plaintiff having declared in prohibition, the defendant, *quoad* any proceedings ſince the writ of prohibition delivered, pleaded not guilty, and for a conſultation demurred: there was judgment for the plaintiff upon the demurrer, and upon a writ of inquiry of damages in that iſſue, the jury found 2*d.* damages. And the court were of opinion, the plaintiff ſhould have coſts; and, upon error in the King's Bench, this judgment was affirmed. And, afterwards the reporter adds, a writ of error was brought in parliament, which was dropped upon his perſuaſion that it was reaſonable, and agreeable to the authorities in law, that the plaintiff ſhould have coſts.

If one of the iſſues joined upon a declaration in prohibition be, whether the defendant hath proceeded in the ſpiritual court ſubſequent to the granting of a writ of prohibition, and, at the trial, it be found againſt the defendant; or if, in an attachment upon a prohibition, it be found that the party proceeded after the writ of prohibition awarded, the plaintiff, in both caſes, is entitled to recover damages and coſts for the contempt. Facy v. Lange, Cro. Car. 559. S. C. 1 Rol. Abr. 516. 575. Jon. 447. *Vide* 1 Str. 485. 8 Mod. 1.

If defendant in prohibition compels the plaintiff to declare, and then pleads a nugatory plea, the court will, on motion, order him to pay coſts to the plaintiff.

Thus, at the defendant's inſtance, it was made part of the rule for a writ of prohibition, that the plaintiff ſhould declare in prohibition. The defendant afterwards demanded a declaration, and threatened a *nonpros* for want thereof. Whereupon the plaintiff's agent prepared a declaration, but when it was ready, he was told by the defendant's agent that he need not deliver it; however, having been at the trouble and expence of preparing it, he delivered the ſame, and demanded a plea. Defendant pleaded nothing to the merits, but only that he did not proceed in the ſpiritual court after the prohibition, gave a rule to reply, and demanded a replication. Upon which the plaintiff obtained a rule for the defendant to ſhew cauſe why he ſhould not pay the plaintiff the coſts of the proceedings in prohibition. The rule was now made abſolute. The court looked upon the plea to be a ſham nugatory plea, not being to the merits of the cauſe; the allegation that the defendant has proceeded contrary to the prohibition, is, and muſt be put into every declaration of this kind; but whether he has ſo proceeded or not, is totally immaterial. The ſtatute 8 & 9 *W.* 3. *c.* 11. gives coſts after plea pleaded, or demurrer, but this is not a plea within that ſtatute. Seed v. Wolfenden, Barnes, 148.

But, though a plaintiff in prohibition may have prepared, and actually tendered, a declaration to defendant, proceedings ſhall be ſtaid without coſts, where the defendant is deſirous of ſubmitting without further litigation.

Thus, upon ſhewing cauſe againſt a prohibition, the court made the rule abſolute, with a direction that the plaintiff ſhould declare in prohibition. He tendered a declaration, but the defendant refuſed it, and applied to ſtay proceedings, as being willing to ſubmit. The plaintiff inſiſted he had a right to go on, in order to Gegge v. Jones, 2 Str. 1149.

get at the costs of the motion, which he could not otherwise have. But the court staid the proceedings *without* costs; saying, the direction to declare was in favour of the defendant, who might waive it.]

Leon. 286. The surmise or suggestion may be brought in by attorney, and need not be in proper person.

Latch, 7. 2 Rol. Rep. 456. [Rolle adds, "or on "the last day but one." Gibs. 1029. 3 Burn's Eccl. Law, 213.] A prohibition is not to be granted the last day of term, but on motion on that day a rule may be obtained to stay proceedings till the ensuing term.

## (F) When to be granted absolutely, or *quousque* only; and therein, of directing the Party to declare on his Prohibition.

6 Mod. 308. PRohibitions are granted either absolutely, or *hoc usque* only till such an act be done. The first of these is peremptory, and ties up the inferior jurisdiction till a consultation is awarded: the second is *ipso facto* discharged upon performing the act, and that without any writ of consultation.

Vent. 252. 2 Salk. 553. pl. 19. When a prohibition is moved for, because a copy of the libel is denied to be delivered, the court requires that oath should be made of the denial, and the prohibition is only *quousque* the copy is delivered.

6 Mod. 308. A prohibition *quousque* they give copy of the libel, if it be granted before any libel exhibited, does not bind them from exhibiting any libel, and after they shall not proceed till they give a copy of it.

Ld. Raym. 442. (*a*) 2 H. 5. c. 3. A prohibition was denied to be granted to the Admiralty court upon a suggestion that they refused to give the party sued there a copy of the libel, because the (*a*) statute extends only to the ecclesiastical courts.

2 Ld. Raym. 991. *per* Holt, Ch. J. and so ruled by him in a like case. Salk. 553. (*b*) Lord Raym. 236. (*c*) Cro. Eliz. 736. 4 Mod. 351-2. Lev. 125. Raym. 88. (*d*) Stile's Pract. Reg. 473. (*e*) If the jury, upon an issue joined in a prohibition *de modo decimandi*, find a It was formerly held by all the judges of *England*, that where there was a proceeding *ex officio* in the ecclesiastical court, they were not bound to give the party a copy of the articles. But the law is otherwise; for in such cases, if they refuse to give a copy of the articles, a prohibition shall go *quousque* they deliver it.

On (*b*) motions for prohibitions it is frequent in doubtful cases to grant them *nisi*, or that the adverse party should shew cause why they should not be granted. Also, in (*c*) nice and difficult cases it is usual to direct the plaintiff to (*d*) declare on his prohibition, and so proceed to (*e*) issue, that the merits of the cause may be brought before the court with the greater exactness, and they thereby the better enabled to judge of the reasonableness of granting or refusing the prohibition. [(*f*) But, if the court be clearly of opinion that there is no ground for a prohibition, it ought to be denied, without putting the defendant to expence, and delaying in the mean time the exercise of what appears to them a lawful jurisdiction. For this denial is not conclusive to the plaintiff. If there is no jurisdiction, the sentence will be a nullity, and upon any attempt

to excuſe or enforce it, the whole may be tried in an action (*g*). The plaintiff may alſo apply to any other court in *Weſtminſter-hall* for a prohibition, and take their opinions. *Per* Lord *Mansfield*.

different *modus*, yet the defendant ſhall not have a conſultation;

for it appears that he ought not to ſue for tithes in ſpecie, there being a *modus* found. Vent. 32. *vide ſupra*. (*f*) Saint John's College v. Todington, 1 Burr. 198-9. (*g*) Lindo v. Rodney, Dougl. 620.

If however the court incline in favour of the prohibition, the defendant has, it ſeems, a right to put the plaintiff to declare: and having ſuch right, he may of courſe waive it, and, after a rule given to declare, ſubmit and ſtay proceedings.]

1 Burr. 198. 2 Str. 1149. Gegge v. Jones.

The court is not obliged to give direction for ſuch declaration, but are abſolute judges of the ſufficiency or inſufficiency of the ſuggeſtion.

Leon. 181

[Where the party is ordered to declare in prohibition, he ought not to take out the writ, for ſerving the other ſide with a rule is ſufficient; and if in that ſuit he obtain judgment, the judgment is *ſtet prohibitio*, otherwiſe it is *eat conſultatio*: therefore if the party be excommunicated, the mandatory part of the writ to abſoil the party is not to be obeyed till after trial had.

Dean and Biſhop of Wells, Mich. 25 Geo. 2.

The declaration in prohibition is a *qui tam* declaration, for it ſuppoſes a contempt to the king in proceeding after the writ delivered. But the contempt is merely form, not traverſable, and no verdict need be given about it.]

12 Co. 61. Statford v. Neale, Str. 482. Seed v. Wolfenden, Barn. 148.

If the declaration varies from the ſuggeſtion, this is naught, and a conſultation will be awarded.

7 Mod. 113, 114. Leon. 128.

for the ſurmiſe is as the writ.

[Where an iſſue is joined in a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they ſhall give no more than 1*s*. damages; for it is in nature of an iſſue to inform the conſcience of the court: but, after he has had judgment, *quod ſtet prohibitio*, he may bring his action upon the caſe, and recover the damages he has ſuſtained.

Carter v. Leeds, M. 2 G. 2.

In tithe caſes, and matters of ſuch ſort, where many things are in controverſy, it is frequent to order the prohibition to ſtand as to part, and a conſultation to go as to the other part.]

1 Ld. Raym. 59.

## (G) Whether more than one ſuch Writ is to be awarded.

BY the 50 *E*. 3. *c*. 4. it is enacted, "That where a conſultation "is once duly granted upon a prohibition made to the judge "of (*a*) Holy Church, that the (*b*) ſame judge may proceed in "the cauſe by virtue of the ſame conſultation, notwithſtanding "any (*c*) other prohibition (*d*) thereupon to be delivered; pro-"vided always, that the matter in the libel of the ſaid cauſe be "not enlarged or otherwiſe (*e*) changed."

(*a*) Intended ſpiritual judge, and therefore this ſtatute extends not to the court of Admiralty. 2 Brownl. 35. Popn. 159.

(*b*) Eccleſiaſtical judge in general, or perſon competent, and not the ſame individual perſon. Adm. 418. Latch, 6. 75. (*c*) But, if the firſt prohibition was unduly obtained, as on proceedings

by Engliſh bill in Chancery, &c. a ſecond prohibition may be awarded notwithſtanding this ſtatute. Cro. Eliz. 736. p. 5. (*d*) Whether proceeding out of the ſame court or another, if for the ſame cauſe. Cro. Eliz. 277. (*e*) 2 Rol. Rep. 207.

2 Brownl. 26. 247. Leon. 130. 3 Bulſt. 182. Moor, 917.

This ſtatute hath been conſtrued to extend to thoſe caſes where a conſultation hath been lawfully granted; that is, upon the right and merits of the thing in queſtion, and not to ſuch caſes where for defect of form, miſpriſion of a clerk, miſpleading an act of parliament, &c. conſultations have been awarded.

Jones, 231. Yelv. 102. Cro. Car. 208. 2 Keb. 719. (*a*) But muſt pay double coſts. Carth. 463.

So, if a conſultation be awarded for default of proof of the ſuggeſtion purſuant to the ſtatute 2 & 3 *E.* 6. *c.* 13. the plaintiff is not precluded, but may bring (*a*) another prohibition; for this ſtatute goes to the ſuggeſtion made upon the (*b*) ſame libel, and to a conſultation duly granted, and not to the caſe of not having witneſſes ready to prove the ſuggeſtion through negligence.

(*b*) It is ſaid by Juſtice *Holloway*, that after a conſultation awarded for not proving his ſuggeſtion, &c. the party ſhall be for ever barred from having another prohibition on the ſame libel. Comb. 63.——[*Sed qu.*]

2 Vent. 47.

A motion was made for a prohibition to a ſuit for tithe-lamb upon ſuggeſtion of a *modus* to pay 2*d.* a lamb for lambs falling in the plaintiff's farm in the pariſh. It was objected, that a prohibition was granted before to ſtop this ſuit, upon a ſuggeſtion which was tried and found for the plaintiff, and a conſultation granted. But it was anſwered, that that ſuggeſtion was for every lamb which fell in the pariſh, whereas this only is for lambs falling in a particular farm, and ſo not within this ſtatute. However the court inclined againſt the prohibition, thinking it within the ſtatute.

Keb. 286. [See Com. Dig. tit. Prohibition. (K. 4.) *contr.*]

If upon the trial of a ſuggeſtion the plaintiff be nonſuit, no new prohibition ſhall be granted, although the nonſuit was occaſioned for want of ſome of the plaintiff's witneſſes, who were to prove the truth of the ſuggeſtion, and who were neceſſarily obliged to be abſent.

Moor, 917.

If the eccleſiaſtical court refuſe to grant a copy of the libel, for which a prohibition is granted, and thereupon they grant the copy and afterwards proceed in the cauſe, the matter not being within their juriſdiction, another prohibition lies.

Owen v. —— 2 Show. 195.

[A prohibition was granted in a ſuit for tithes, upon a ſuggeſtion that the lands were barren and newly improved, and a trial had on the declaration in prohibition, and a verdict for the plaintiff that the lands were not barren, on which a conſultation was granted, and he obtained ſentence. From the inferior court there was an appeal to the Arches, and an allegation entered that the land was barren; and the court there were proceeding to reverſe the ſentence, becauſe barren land, though contrary to the verdict at law; upon which a prohibition was granted *quoad* the allegation of barren land.]

Lit. Rep. 155.

If the defendant in a prohibition die, his executors may proceed in the eccleſiaſtical court, and the judges of the court, out of which the prohibition was granted, will alſo in ſuch caſe make a rule to the ſpiritual court to proceed; but the plaintiff may, if he pleaſe, have a new prohibition againſt the executors.

## (H) At what Time to be granted; and herein, in what Caſes it may be granted after Sentence.

IT is clearly agreed, that in all caſes where it appears upon the face of the libel, that the Admiralty, Spiritual Court, &c. have not a juriſdiction (*a*), a prohibition may be awarded, and is grantable as well after as before ſentence; for the king's ſuperior courts have a ſuperintendency over all inferior juriſdictions, and are to take care that they keep within their due bounds. 2 Inſt. 602. 2 Rol. Abr. 318, 319. Noy, 137. Sid. 65. Cro. Eliz. 571. Moor, 462, 907. Skin. 299. pl. 2. Carth. 463. March, 153. 2 Roll. Rep. 24. Comb. 356. [Ca. temp. Hardw. 317. 1 Burr. 314. 2 Burr. 813. 3 Burr. 1922. 2 Str. 1133. 4 Burr. 2037. Cowp. 424.

(*a*) Either never had any at all, or have exceeded that which they had. 3 Term Rep. 37. Prohibition will be granted to a court of appeal where it appears that they have no juriſdiction over the ſubject-matter even after they have remitted the ſuit to the court below, and awarded coſts againſt the appellant, if they are proceeding to enforce the payment of theſe coſts. Darby v. Coſens, 1 Term Rep. 552. On a libel to charge a man to repair a church in reſpect of a light-houſe, a prohibition was granted after ſentence, and an appeal to the Delegates. Sir Iſaac Rebow v. Bickerton, Bunb. 81.]

But, where the court has a (*b*) natural juriſdiction of the thing, but is reſtrained by ſome ſtatute; as by 23 *H.* 8. *c.* 9. for citing out of the dioceſe, there, the party muſt come before ſentence; for after pleading and admitting the juriſdiction of the court below, it would be hard and inconvenient to grant a prohibition. *Vide* the authorities *ſupra*, and Cro. Car. 97. 2 Show. 145. pl. 123. 155. pl. 141. Vent. 63. 6 Mod. 252. 7 Mod. 137. Godb. 163. 243. 5 Mod. 341. Hetl. 19. 12 Co. 76.—

(*b*) 2 Salk. 549. Like point; becauſe the cauſe belongs to the ſpiritual court, and though not to that ſpiritual court, yet it belongs to ſome other, and not to the king's temporal courts; & *vide* Carth. 33, 34. where it appeared on the face of the libel, that the party was cited out of his proper dioceſe.——Cro. Jac. 429. Cro. Car. 97. Comb. 448 where the party obtained a prohibition before ſentence, but did not ſerve it till two terms after, which was after ſentence definitive, it was held to be too late.

[If a man libels in the ſpiritual court for tithes in kind, and the defendant below ſuggeſts and inſiſts upon a modus, *there*, the ſpiritual court have no juriſdiction to try the modus, their method of trial of preſcription being different from ours: but, if a man libels for a modus, and the defendant admits the modus, the ſpiritual court may proceed in the cauſe. But even in the firſt caſe, if the party permit the ſpiritual court to proceed to ſentence, he comes, *then*, too late for a prohibition, it being *pro defectu triationis* only: but a party can never be too late, where it is *pro defectu juriſdictionis*.] Offley v. Whitehall, Bunb. 17.

Upon a motion for a prohibition the caſe was, the defendant libelled in the ſpiritual court for tithes of faggots made of loppings of trees; and the ſuggeſtion for a prohibition was, that theſe loppings were cut from the ſtumps of timber-trees above the growth of twenty years; and it was alleged, that ſentence was given in the ſpiritual court, and therefore the plaintiff comes here too late to have a prohibition: But *per Holt* Ch. J. the ſentence will not hinder the having a prohibition in any caſe, but in caſe of prohibitions grounded upon 23 *H.* 8. *c.* 9. for not citing out of the dioceſe; but becauſe the plaintiff had not pleaded this matter in the ſpiritual court, they denied the prohibition, becauſe the ſpiritual court has a general juriſdiction of tithes; and if any 2 Ld. Raym. 835. Dike v. Brown.

ſpecial matter deprives them of their juriſdiction, it muſt be pleaded there; and if it had been pleaded there, and iſſue joined upon it, and upon the trial it had been found not to be *ſolus cædda*, it had been well; but if they had refuſed to admit the plea, a prohibition ſhould have been granted.

## (I) To what Courts a Prohibition may be awarded: And herein, that the Superior Courts are to determine the Boundaries of all Inferior Juriſdictions.

F. N. B. 43. 45. 4 Inſt. 231. 249. 3 Bulſ. 120. 2 Rol. Abr. 317-8. (a) The honour of B. R. to keep inferior courts in order. 2 Roll. Rep. 471.

THE king's ſuperior courts of *Weſtminſter* have a ſuperintendency over all inferior courts of what nature ſoever, and are by law intruſted with the expoſition of ſuch laws and acts of parliament as preſcribe the extent and boundaries of their juriſdiction; ſo that if ſuch courts aſſume a greater or other power than is allowed them by law, or if they refuſe to allow acts of parliament, or expound them otherwiſe than according to the true and proper expoſition of them, the ſuperior courts (a) will prohibit and controul them.

Show. P. C. 63. (b) That the ſpiritual juriſdiction exerciſed within this realm is derived from the king. Dav. 97. (c) Where they exceed their authority, or proceed in matters not properly within their cognisance, may be prohibited. Moor, 460. 463. Latch, 85, 86. [So they are grantable to naval and military courts martial. 2 H. Bl. 100.]

Hence prohibitions are grantable to almoſt all ſorts of courts which differ from the common law in their proceedings, to the courts (b) Chriſtian, to the Admiralty, nay to the (c) Delegates, and even to the ſteward and marſhal, upon the ſtatute of *articuli ſupra chartas*.

4 Inſt. 322. —Lay to the high commiſſion court. 4 Inſt. 333. Lit. Rep. 152. 189. 274.

A prohibition lies to the convocation, *ſi concilium teneant de aliquibus quæ ad coronam regis pertinent, vel quæ perſonam regis, vel ſtatum ſuum vel ſtatum concilii ſui contingunt.*

4 Inſt. 243. 2 Rol. Abr. 317. Roll. Rep. 309. 311. Winch, 78. 103. Raym. 191. Vent. 300. Jon. 248.

Prohibitions have been granted to the marches of *Wales*, of which there are many inſtances;

3 Ld. Raym. 1408. Vaughan v. Evans, 1 Str. 630. S. C. 8 Mod. 374. S. C.

As, where a bill of foreclosure was brought againſt one in the grand ſeſſions for the county of *Montgomery*, upon a mortgage of lands that lay there, but the party himſelf was not an inhabitant; it was held in this caſe, that a prohibition ought to go; for that the party living out of the juriſdiction could not be ſerved with proceſs, and, conſequently, could not be guilty of a contempt, on which a ſequeſtration on his lands could be grounded.

Hutt. 59. 2 Rol. Abr. 318. Stile, 285. 3 Bulſt. 116. Hob. 15. Roll. Rep. 246. 331. Sid. 180.

So, prohibitions have been granted to the county palatine of *Cheſter* in many inſtances where they have exceeded their juriſdiction.

So,

So, prohibitions have been granted to the duchy court of *Lancaſter* (*a*), for holding plea of land, not parcel of the duchy (*b*), for determining on the validity of letters patent granted of a manor. (*a*) 2 Rol. Abr. 317-8. Hob. 77. (*b*) 3 Bulſt. 119. Rol. Rep. 252. Skin. 43. pl. 14.

So, where a ſuit was commenced in the Duchy Chancery court, to diſcover matters whereby the defendant there would forfeit his freehold; a prohibition was granted. 2 Salk. 550. pl. 11.

A prohibition was moved for to the Chancery court of the Cinque Ports, in which a bill was filed, ſetting forth a cuſtom, that every ſhip that uſed the pier of *Ramſgate* ſhould pay 4*d.* for all their gettings in the year, for the maintenance of the pier, and for a diſcovery of the defendant's gettings; and ſuch prohibition was held to lie, as to the cuſtom, which is only triable by law; but the court held, that ſuch bill might be proper as to the diſcovery. Comb. 261.

A prohibition was prayed to the court of the chamberlain of *Cheſter*, where an *Engliſh* bill was preferred, ſetting forth, that *J. S.* being indebted to the plaintiff, the defendant upon good conſideration promiſed, that if *J. S.* did not pay it, he would, and that he wanted ſuch preciſe proof as the law required, and ſo prayed to be relieved by the equity of the court: the defendant confeſſed the promiſe in his anſwer, and ſaid that he had paid the money: and a prohibition was granted; for the plaintiff had now obtained the end of his ſuit, and might have remedy at law upon the evidence of the defendant's anſwer. Vent. 212. Mekins v. Minſhaw.

The plaintiff in prohibition ſuggeſts, that by the laws of *England*, when iſſue is joined between the parties, it ought to be tried by the evidence *vivâ voce*, and not by notes or minutes of their teſtimony: That an information was exhibited againſt him before the commiſſioners of exciſe, purſuant to 12 *Car.* 2. *c.* 23. & 15 *Car.* 2. *c.* 11. ſetting forth, that he was a common brewer, and did keep a common ſtore-houſe without acquainting the ſaid commiſſioners therewith; that he was found guilty; and that he appealed from their ſentence to the commiſſioners of appeals, before whom the informer did produce as evidence the minutes taken before the commiſſioners of exciſe, and that the witneſſes who gave evidence there were ſtill alive; which minutes were allowed as evidence by the commiſſioners of appeals, *&c.* and after great conſideration a prohibition was granted *quoad* the admitting this evidence. 2 Salk. 555. 5 Mod. 272. 278. S. C. Bredon v. Gill. Ld. Raym. 219. Comb. 414

If the commiſſioners for determining policies of inſurance graſp at more power, or proceed otherwiſe than as they are enabled by the acts of parliament which create their juriſdiction, they will be prohibited by the king's ſuperior courts. *Vide* Show. 396.

A prohibition lies to the vice-chancellour's court in *Oxford* and *Cambridge*, where they exceed their juriſdiction. Lit. Rep. 10.

On a motion for a prohibition to the court of the vice-chancellour of *Cambridge*, it was ſuggeſted, that one *Richardſon* had a libel preferred there againſt him, becauſe he had preferred an information in this court againſt divers perſons for a riot committed within M. 26 Car. 2. in B. R. Richardſon's caſe.

the juriſdiction of their court, and the libel was read in this court; and upon that the court declared, that their juriſdiction was concurrent, but not exempt from this court, and that they ought to plead their privilege here, if they had any ſuch privilege, but they ought not to proceed againſt the informer as a criminal; and ſo the court granted a prohibition, *niſi*, upon the motion of Serjeant *Scroggs*.

Lit. Rep. 163. If juſtices of peace take upon them more juriſdiction than they are allowed by law, as, where they determined on the ſtatutes of uſury, a prohibition lies.

4 Inſt. 229. Cro. Car. 333. So, a prohibition lies to the court of *Stannaries*, which is confined to tin matters only, and where the parties who ſue, or one of them, is a tinner, if they exceed their juriſdiction.

Bulſt. 110. A prohibition was granted to the council of *York*, for holding pleas in replevin and avowries; the court being clearly of opinion that theſe are matters determinable at common law.

Bulſt. 20. So, a prohibition hath been granted to the court of Requeſts, for injoining a creditor to give time to his debtor to pay his debt upon ſecurity given.

Show. P. C. 58. in the caſe of Dr. Oldis and Donmille, where there is good learning on this ſubject. It hath been reſolved, that a prohibition lies to the court of the Earl Marſhal, for proceeding againſt a perſon for painting arms and marſhalling funerals. 4 Mod. 128. S. C.

2 Salk. 553. pl. 18. 7 Mod. 125. Chambers v. Sir John Jennings. So, a prohibition was holden to lie to the court of Honour, to prohibit a ſuit there for theſe words, *you a knight! you are a pitiful fellow*, and in this caſe *Holt*, Ch. J. at firſt doubted whether there was, or could be any ſuch court; but ſaid a prohibition would lie to a pretended court.

[A prohibition will go, where viſitatorial authority is uſurped. Reg. 40. b.]

3 Bulſt. 120. (*a*) If the judges of C. B. hold plea of an appeal, a prohibition is to be granted by B. R.

It is ſaid by my Lord *Coke* in 3 *Bulſt.* that the court of King's Bench may prohibit (*a*) any court in *Weſtminſter-hall*, if they exceed their juriſdiction. But this notion of Lord *Coke*, of which he was very fond, eſpecially as to proceedings in courts of equity, hath been ſo ſhaken and contradicted of late years, that his authority herein ſeems to be but of very little weight; but for this we muſt refer to title *Courts and their Juriſdiction*.

3 Bulſt. 120. —— So, if the court of Exchequer hold common pleas without a writ of privilege. 3 Bulſt. 120. *& vide* 2 Salk. 550. pl. 12. —— So, an Engliſh court, or court of equity, holding plea of a thing whereof judgment was given at common law, hath been prohibited. Moor, 836. Cro. Jac. 335. —— But for this *vide* Juriſdiction of the Court of Chancery, and Ld. Raym. 531.

Lit. Rep. 42. 2 Rol. Rep. 471. The ſuperior courts of *Weſtminſter* not only grant prohibitions where inferior courts aſſume a juriſdiction, which properly belongs to ſuch ſuperior courts, but alſo in caſes where one inferior court incroaches upon another, and that even in matters in which ſuch ſuperior courts have not a juriſdiction.

5 Co. 73. Show. P. C. 63. As, if the eccleſiaſtical court grant the probate of a will made within a manor, when by cuſtom or of right ſuch probate belongs to the lord of the manor.

So, where the marches of *Wales* held plea of a matter that belonged to the court Chriſtian, it was holden that a prohibition lay. 2 Rol. Abr 313. Winch. 78.

So, in *London*, where the lord mayor and court of aldermen have the government of city orphans, if any orphan ſue in the eccleſiaſtical court or elſewhere, for a legacy or duty due to them by cuſtom, a prohibition lies. 4 Inſt. 249.

If a biſhoprick be void, and the juriſdiction devolve on the metropolitan, he muſt hold the courts within the inferior dioceſes, otherwiſe he will be prohibited. Hob. 178.

If there be a controverſy, whether ſuch a will ought to be proved before a peculiar or before the ordinary; whether by the archbiſhop of one province or another, or both; and what ſhall be (*a*) *bona notabilia*: In theſe and the like caſes the common law retains the juriſdiction of determining. Mod. 211. *per* North, Ch. J. (*a*) But in 10 Mod. 272. this point is taken notice of and denied to be law, for that the ſpiritual and common law are the ſame as to *bona notabilia*; and there ſaid, that if a prohibition lay, there muſt be frequent inſtances of it.

## (K) Prohibitions to Inferior Temporal Courts in what Inſtances to be granted.

IT is clearly agreed, that a prohibition doth lie as well to a temporal court as to the ſpiritual, court of Admiralty, or other court, whoſe proceedings are different from the common law, if ſuch temporal court exceed the bounds of its juriſdiction, or take cognizance of (*b*) matters not ariſing within its juriſdiction. F. N. B. 45. 2 Inſt. 229. 243. 601. 2 Rol. Rep. 279. Rol. Rep. 252. (*b*) Or if but part only, cannot have juriſdiction Ld. Raym. 698.

As, if treſpaſs *vi & armis* be brought in the county court, a prohibition lies to the plaintiff or ſheriff. F. N. B. 47.

So, if one ſue another in a court-baron or other court, which is not a court of record, for charters concerning inheritance or freehold, there ſhall be a prohibition. F. N. B. 47.

A perſon having obtained judgment in *B. R.* for his debt and damages, brought his action for the recovery of them againſt the bail in the court of the Tower of *London*, in which action the party was taken on a *capias*, and was (*c*) reſcued; after which the plaintiff brought his action on the caſe in the ſame court for the reſcue; and all this appearing to the court of *B. R.* they granted a prohibition. Rol. Rep. 54. (*c*) If an officer let a man at liberty who is in execution upon a bond ſued in an inferior court, the bond not being made within the juriſdiction thereof; this is no eſcape. 2 Mod. 29. Squibb v. Hole.—So, where the plaintiff, in an action brought againſt an officer, declared in Hull upon a bond made at Halifax, and had judgment and execution, and the defendant eſcaped; in an action brought for this eſcape the declaration was held ill, becauſe it did not allege the bond to be made *infra juriſdictionem curiæ*. Roll. Abr. 809. Richardſon v. Bernard.

So, where an action of debt was brought in the *Marſhalſea*, on a judgment in *B. R.* a prohibition was granted. 2 Salk. 439. pl. 2.

A ſuit was ſurmiſed to be before the Lord Preſident of the Marches, for an office, between the grantee of the Lord Preſident and a ſtranger, wherein the only queſtion would be, Whether Keb. 648. (*d*) Salk. 396. pl. 1. That where

a judge has an intereſt, neither he nor his deputy can

ther the grant of that office belonged to the Lord Preſident? and becauſe in this caſe he would be as it were (*d*) both judge and party, a prohibition was granted.

determine a cauſe or ſit in court, and in ſo doing a prohibition lies. Hard. 503.

19 H. 6. 5. 2 Rol. Abr. 280. F. N. B. 46.

If there be one entire contract above 40*s.* and a man ſue for it in a court-baron, ſevering it into divers ſmall ſums under 40*s.* a prohibition ſhall be granted, becauſe this is done to defraud the court of the king.

Palm. 564. Clarke v. Corke.

An action was brought in the hundred-court for 40*s.* in which action the plaintiff confeſſed that he was ſatisfied one ſhilling, which being done with an intent to give that court juriſdiction, and to defraud the ſuperior courts, a prohibition was granted.

Vent. 65. ſaid to have been adjudged in the caſe of the Savoy court and Standford.

If there be ſeveral contracts between *A.* and *B.* at ſeveral times for divers ſums, each under 40*s.* but amounting in the whole to a ſum ſufficient to entitle the ſuperior court to a juriſdiction, they ſhall be ſued for in ſuch ſuperior court, and not in an inferior one, which is not of record.

Vent. 73. Girling v. Alders. 2 Keb. 617. S. C. Show. 11. S. C. cited.

So, in a prohibition to the court of the Honour of *Eye*, where the caſe was: One contracted with another for divers parcels of malt, the money to be paid for each parcel being under 40*s.* and he levied divers plaints thereupon in the ſaid court; wherefore the court here granted a prohibition; becauſe, though there be ſeveral contracts, yet, inaſmuch as the plaintiff might have joined them all in one action, he ought to have ſo done, and ſued here, and not put the defendant to unneceſſary vexation, any more than he can ſplit an entire debt into divers, to give the inferior court juriſdiction *in fraudem legis*.

2 Inſt. 231. Sand. 74. 2 Jon. 230. Show. 10. *& vide* tit. Courts and their Juriſdiction.

It is laid down by my Lord *Coke*, and admitted in a great variety of caſes, that no inferior court can hold plea of an obligation, contract, battery, or other tranſitory action, if not made within the juriſdiction, and that the cauſe of action muſt be alleged to ariſe within ſuch juriſdiction.

Rol. Abr. 545. 809. See the caſes *infra*, vol. 2. 195. Ld. Raym. 211. but ſee *contra* Ld. Raym. 742.

And therefore, in an action on a promiſe in an inferior court, not only the promiſe, but the conſideration muſt be alleged to ariſe within the inferior juriſdiction, and muſt be ſo proved on the trial.

But, if the plaintiff had ſhewn that the money had been lent *infra juriſdictionem curiæ*, or if it had been for goods there ſold, the plaintiff would have had no need to ſay that the defendant aſſumed to pay *infra juriſdictionem curiæ*; becauſe the law creates the promiſe upon the creation of the debt, which debt being within the juriſdiction, the promiſe ſhall be intended there alſo.

8 Mod. 146. Carth. 402. 3 Salk. 201. pl. 3. 1 P. Wms. 476. pl. 235.

In all caſes where inferior courts aſſume a juriſdiction, or hold plea of a matter not ariſing within their limits, the party hath his remedy, and may ſtay their proceedings by prohibition. But ſuch prohibition can only regularly be obtained by its appearing on oath made, that the fact did ariſe out of the juriſdiction, and that the defendant tendered a foreign plea, which was refuſed.

In

In the case of (*a*) *Mendyke* v. *Stint* it was greatly insisted upon, that, though the party neglected to plead to the jurisdiction, yet the matter arising out of the inferior jurisdiction, the superior courts ought to grant a prohibition; for that otherwise the parties, their counsel and attornies, would give a jurisdiction to inferior courts which they were not entitled to by law. But it was otherwise adjudged in this case; and it seems to be now agreed, that after admitting the jurisdiction, or after (*b*) imparlance, the party cannot apply for a prohibition.

(*a*) 2 Mod. 271-2.
(*b*) *Vide* Imparlance under tit. Pleadings.

But in the abovementioned case these things were agreed by the court, 1. That if any matter appears in the declaration, which sheweth that the cause of action did not arise *infra jurisdictionem*, there, a prohibition may be granted at any time. 2. If the subject-matter in the declaration be not proper for the judgment and determination of such court, there also, a prohibition may be granted at any time. 3. If the defendant, who intended to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, or by the attorney's refusing to plead it, &c. or, if his plea be not accepted, or is over ruled; in all these cases, a prohibition likewise will lie at any time.

2 Mod. 273. [See acc. Cro. Ja 96. 1 Term Rep. 552. 3 Term Rep. 3. 315.]

A motion was made for a prohibition to be directed to the sheriff's court in *Bristol*, upon suggestion that causes of action arising out of the jurisdiction of the sheriff's court ought not to be sued there; and this motion was made in behalf of the defendant in the action, before he had appeared, to stay the proceedings of the court, who proceeded to attach his goods in the hands of a garnishee. Sir *B. Shower* opposed the motion; because the defendant could not pray a prohibition upon suggestion of a matter which he could not plead; and as here he could not plead this before appearance, so he ought not to make such a motion before appearance. And *per Holt*, C. J.—A man shall not plead to the jurisdiction until he appear; but if the original cause of action arose out of the jurisdiction of the court, the garnishee may plead it; and of that opinion, he said, was *Hale*, C. J.; but, if it was debt upon a simple contract, it is attachable where the person of the debtor is.

Ld. Raym. 346. Coke v. Licence.

So, in the case of *Clerk* v. *Andrews*, where *Shower* moved for a prohibition to the court of the sheriffs of *London* to stay proceedings, where they attached the debt of the garnishee, because it arose out of the jurisdiction; it was denied, because the debt was upon simple contract, which follows the person of the debtor.

Show. Rep. 9. cited Ld. Raym. 347.

[The misinterpretation of a statute by an inferior court, the consideration of which ariseth incidentally in the course of a proceeding, which is confessed to be within its jurisdiction, should seem to be rather a matter of appeal than a ground for a prohibition. But clearly in such a case a prohibition will not lie, unless it be made appear to the superior court, that the party applying for the prohibition, has, in the course of the proceedings in the inferior court, alleged the grounds for a contrary interpretation of the

Home v. Earl of Camden, 1 H. Bl. 487. 4 Term Rep. 382. 2 H. Bl. 533.

the ſtatute on which he applies for a prohibition, and that the inferior court has proceeded notwithſtanding ſuch allegation.

*Id.* As no right is veſted by any of the prize acts in the captors of an enemy's ſhip and cargo in war, before the ultimate adjudication of the courts of prize; it follows, that the iſſuing of a monition to the prize agents by the court of commiſſioners of appeals in prize cauſes, to bring in the proceeds of a ſhip and cargo, which have been ſold, after a ſentence of condemnation as lawful prize, but from which ſentence there is an appeal, (on a ſubject diſtinct from the queſtion, whether prize or not, which is not diſputed,) cannot be a ground for a prohibition to that court, for the monition neither interferes with nor defeats any veſted rights.]

## (L) Prohibitions to the Spiritual Court in what Inſtances: And herein,

### 1. Where they meddle with a Matter purely Temporal.

F.N.B. 40. IF one ſues another in the ſpiritual court for a chattel or debt, the defendant ſhall have a prohibition. So, if he ſues for a treſpaſs.

2 Rol. Abr. 291. 7 Co. 44. If the ſpiritual courts take upon them to try the boundaries of pariſhes, a prohibition lies.

Roll. Rep. 332. Cro. Eliz. 228. 3 Leon. 129. 3 Keb. 286. S. P. *per* Hale, Ch. J. becauſe the preſcription is the ground thereof.

2 Rol. Abr. 282. Show. 10. cited Noy, 147. S. P. but that it muſt ſo appear by the pleadings in the ſpiritual court. Vent. 335. S. P. and that a plea thereof muſt be tendered in the eccleſiaſtical court. As, if a ſuit be by a parſon for tithes, and the defendant plead, that the place for which the tithes are ſued is in another pariſh, a prohibition lies; becauſe they meddle with that which is out of their juriſdiction, though the original thing be of their cognizance, and this come in (*a*) obliquely.

(*a*) So, where the defendant pleaded that he reſorted to and received the ſacrament in a different pariſh from that in which he inhabited. R. Bulſt. 159. C. Hard. 406. D. Salk. 166. pl. 6. 6 Mod. 188.

2 Rol. Abr. 291. [The bounds of pariſhes, though coming in queſtion in a ſpiritual matter, ſhall be tried in the temporal courts. This is a maxim in which all the books of common law are unanimous; though our provincial conſtitutions expreſsly mention *Limites parochiarum* among the matters *quæ merè ad forum eccleſiaſticum pertinere noſcuntur*, and *quæ non poſſunt ad forum ſeculare aliquatenùs pertinere*, complaining of this as one incroachment, among others, which the temporal courts were making upon the ſpiritual at that time. Gibſ. Cod. 239.] So, if a vicar of a pariſh libel againſt another to avoid his inſtitution to the church of *D.* which he ſuppoſes to be a chapel of eaſe appertaining to his vicarage, and the defendant ſuggeſt, that *D.* is a pariſh of itſelf, and not a chapel of eaſe; a prohibition will be granted, for they ſhall not try the bounds of the pariſh.

2 Rol. Abr. 291. ſeveral caſes to this purpoſe. So, if the queſtion be in the court Chriſtian, Whether a church be a parochial church, or but a *chapel of eaſe*; a prohibition lies.

But,

But, if the bounds of two vills lying in the ſame pariſh come in queſtion in the ſpiritual court, no prohibition lies; for that ſuch bounds are triable in the eccleſiaſtical court, though thoſe of pariſhes are not. Lev. 78. Petler v. Yaleman. [1 Sid. 89. S. C. 1 Keb. 369. S. C. 2 R. Abr. 312. pl. 7. S. P. But ſee Gibſ. Cod. 239.]

The eccleſiaſtical courts have cognizance of a way to a church, and for not repairing ſuch way the parties may be proceeded againſt in the ſpiritual court. March, 45.

So, if a parſon is prevented from carrying away his tithe by the ſtopping up the uſual way, he may have his remedy in the eccleſiaſtical court, grounded on the ſtatute 2 & 3 *E.* 6. *c.* 13. Bulſt. 67. Jon. 230.

But, if the queſtion be, Whether he is to have one way or another, or whether ſuch a way be a (*a*) highway or not? this cannot be tried in the ſpiritual court. March, 45. Bulſt. 67. (*a*) 2 Rol. Abr. 287. S. P. adjudged.

So, if the churchwardens of a church ſue for a way to the church, which they claim to appertain to all the pariſhioners by preſcription, a prohibition ſhall be granted; for this right being grounded on the preſcription, is to be tried in the temporal courts. 2 Rol. Rep. 41. 287.

If a man be admitted, inſtituted, and inducted, and a ſuit be commenced in the eccleſiaſtical court to avoid the inſtitution, ſuppoſing it not valid; though the thing be of their cognizance, yet, becauſe the induction, which is temporal, and gives a lay right, may depend upon it, a prohibition lies. Hob. 15. Latch, 205. Bulſt. 179. Lit. Rep. 165. Poph. 133. Rol. Abr. 282. Show. Rep. 10.

If there be a ſuit for tithes in the eccleſiaſtical court, and the tenant plead, that the party who ſues is not incumbent, but that *J. S.* is; and this plea, becauſe it goes to the right of the incumbency, be rejected, a prohibition lies; for by denying the tenant this liberty he might be twice charged for his tithes. Cro. Eliz. 228. 3 Leon. 265. Green v. Penilden.

There are frequent inſtances of prohibitions being granted to the eccleſiaſtical courts to ſtay ſuits for fees by chancellours, regiſtrars, and proctors in thoſe courts, on this foundation, that demands *pro opere & labore* are properly determinable at common law, and that fees cannot be ſettled by the canon law; and that the ſpiritual court can only give coſts and expences of ſuit, but that no action of debt will lie for ſuch coſts at common law; and that the profits of an office being temporal, the remedy for them ought to be by *quantum meruit*, or in caſe it be an office of freehold, by aſſiſe; the denial of juſt fees being a diſſeiſin. It therefore ſeems to be now ſettled, that neither a proctor nor regiſtrar can ſue for fees in the ſpiritual court (*b*); but that the proper remedy is, in caſe of a fee certain, by an *indebitatus aſſumpſit*, or in caſe of an uncertain fee, by *quantum meruit*; and in ſuch ſuits it is ſaid not to be neceſſary to prove a retainer, that being implied by law. 2 Rol. Rep. 59. 3 Leon. 268. Mod. 167. 2 Keb. 615. 3 Keb. 303. 441. 516. Salk. 333. pl. 11. 5 Mod. 238. Bunb. 170. and 4 Mod. 254. where, *per* Holt, if a proctor might ſue in the ſpiritual court for his fees, he would avoid the ſtatute of limitations; & *vide* Ld. Raym. 703. Cum. 18. and Vent. 165. where notwithſtanding it is ſaid, that for ſuch fees as are due by provincial conſtitutions they may ſue in the ſpiritual court. 10 Mod. 262.

[(*b*) The ſame law of an apparitor, Pearſon v. Campion, Doug. 629.]

If

Yelv. 38. 2 Vern. 31. but 2 Rol. Rep. 260. S. P. cont.

If a legatee takes a bond from the executor for payment of the legacy, and afterwards ſues him in the ſpiritual court for the legacy, a prohibition will be granted; for by taking the obligation the nature of the demand is changed; and it becomes a debt or duty recoverable in the temporal courts.

Stedman v. Hay, Com. Rep. 368.

[Where a perſon is ſued in the eccleſiaſtical court for a ſeat in the church, if he would obtain a prohibition, and ouſt the ordinary of juriſdiction, he muſt ſhew ſuch a legal title as cannot be tried in the eccleſiaſtical court, which can only be by *preſcription*, and *preſcription* can in ſuch caſe be no otherwiſe proved than by ſhewing repairs; therefore, in a declaration in prohibition, the plaintiff regularly ought to ſet out a cuſtom of repairing; but, if he do not, and if the defendant do not demur, but go to trial, it will be aided by the verdict, for the plaintiff ought not to have a verdict, unleſs he proves a cuſtom to repair.

Nutkins v. Robinſon, Bunb. 247. Snowden v. Herring, *Id.* 289.

If a churchwarden has made up his accounts, and had them allowed at veſtry; if there is a libel againſt the churchwarden in the ſpiritual court, relating to his accounts, a prohibition ſhall go.]

## 2. Where they determine on a Matter of Freehold.

F. N. B. 40. 2 Rol. Abr. 286. Lit. Rep. 164. Cro. Jac. 270. Vent. 41. cited.

Matters of freehold and the rights of inheritances, are only determinable in the temporal courts; ſo that if the eccleſiaſtical courts intermeddle with thoſe, a prohibition lies.

As, in a feoffment of tithes and lands, where there is no livery, if they adjudge the tithes to paſs, notwithſtanding there is no livery, a prohibition will lie.

Dyer, 151. 264. Hob. 265. 2 Rol. Abr. 284-5. 2 Show. 50. pl. 36. Cro. Car. 16. Sid. 279. 2 Keb. 5. Lev. 179.

So, if a man deviſes, that his lands ſhall be ſold for the payment of his debts, and that the overplus ſhall be paid to ſuch and ſuch perſons in certain ſhares; the legatees in this caſe cannot ſue in the eccleſiaſtical court; for the proviſions intended them ariſe originally out of lands, and their proper remedy in this caſe is in a court of equity.

(*a*) Where the legacy was to ariſe

But, if a rent be deviſed out of a farm for years, the eccleſiaſtical courts may hold plea thereof; for the term for years being only a (*a*) chattel is teſtamentary, and, conſequently, the rent deviſed thereout.

as well out of a term for years, as out of lands of inheritance, and the executor received it; but being dead without payment, ſo that no action of account could be brought at common law againſt his executor, it was held that the eccleſiaſtical court ſhould have cognizance thereof. Cro. Jac. 279. Action of account is given againſt executors, by ſtat. 4 Ann. c. 16. § 27.

2 Rol. Abr. 285-6. Noy, 91. Latch, 228. Palm. 450. Godb. 390. Cro. Car. 65. 2 Rol. Rep. 306. Raym. 88. Lev. 125. 4 Mod. 27. Comb. 306.

The rights of offices for life in the eccleſiaſtical or courts of Admiralty are determinable at common law; as, in the queſtion concerning the validity of two patents, by which the office of a regiſtrar to a biſhop was granted, it was held, that this ſhould not be tried in the ſpiritual court, though the ſubject-matter be ſpiritual; becauſe the office itſelf being matter of freehold is for that reaſon of temporal cognizance.

Treſpaſs on a glebe being freehold cannot be determined in the eccleſiaſtical court. Bro. Juriſdiction, pl. 41.

A parſon libelled againſt the defendant in the ſpiritual court of *York* for having cut elms in the church-yard; and a prohibition was granted, upon ſuggeſtion that they grew on his freehold. Ld. Raym. 212. Hilliard v. Jeffreſon.

[A prohibition was granted to a ſuit in the ſpiritual court for breaking a church-wall, and cutting down the boughs of a tree in a church-yard; for the rector having a freehold in him has a right to bring his action, whereby the party would be ſubjected to a double proſecution. Beſides, the ordinary cannot puniſh a treſpaſs committed on the body of the church, unleſs it hinder divine ſervice.] Binſted v. Collins, Bunb. 229.

3. In what Caſes a Prohibition lies when they determine on Criminal Offences.

It is clearly agreed, that the ſpiritual courts have no juriſdiction as to crimes and capital offences; ſo as to puniſh perſons guilty of treaſon, felony, or other offences, which are cognizable in the king's temporal courts. But it is held, that a ſpiritual perſon may, eſpecially after a conviction for a criminal offence at common law, be proceeded againſt *pro ſalute animæ*, and in order to a deprivation. And this juriſdiction they are indulged in from a neceſſity of purging their body of all ſcandalous members. But they are not to inflict a collateral puniſhment for ſuch matters as are only indictable at common law; and if they take upon them to do ſo, a prohibition lies. Keilw. 181. Dyer, 293. Cro. Jac. 430. March, 174. Hob. 288. 2 Ld. Raym. 1507.

And therefore if a clerk be convicted of homicide or manſlaughter, and afterwards libelled againſt, the libel ought not to charge that he is an homicide, or that he is guilty of manſlaughter, *&c.* and if it do, a prohibition lies. But the regular way is only to charge that he was convicted of homicide, *&c.* and ſo the ſentence of deprivation ought to be grounded on the conviction in the temporal court, without any further examination of the matter, by which the verdict there given is not to be impeached, but affirmed. And though the perſon convicted deſire that he may be admitted to his defence in the ſpiritual court, to prove his innocency againſt the verdict, yet this is not to be allowed him; becauſe this would be to impeach in an improper court a ſentence given in a proper court. Hob. 121. 288. Cro. Jac. 430. Searl's caſe. Comp. Incumb. 53-4.

So, where a libel was exhibited in the eccleſiaſtical court againſt a woman *cauſa jactitationis maritagii*, and ſhe ſuggeſted, that the perſon libelling was indicted at the ſeſſions in the *Old Bailey* for marrying her, he then having a wife living, *contra formam ſtatuti*, and that he was thereupon convicted, and had judgment to be burnt in the hand; that being tried by a jury and a court which had a juriſdiction of the cauſe, and the marriage found, a prohibition was prayed, and granted. 3 Mod. 164. Boyle v. Boyle.

If a matter of eccleſiaſtical cognizance be made felony or treaſon by act of parliament, the ſpiritual courts (unleſs there Jon. 320.

be a saving of their jurisdiction in such statute) cannot take cognizance thereof, nor of any defamation in relation thereto.

Lev. 138. Sid. 217. Keb. 721. 762. Slader v. Smalbroke.

A layman forges orders, and obtains a benefice, for which he is prosecuted in the ecclesiastical court in order to deprivation; and he prays a prohibition, because forgery is triable at common law: but the prohibition was denied, for the forgery is touching an ecclesiastical matter, and he is suable there for it in order to his deprivation only.

Comb. 71.

If the spiritual court proceeds against a man for writing a libel, a prohibition lies; for this is an offence indictable at common law.

F.N.B. 42. 2 Rol. Abr. 304.

The ecclesiastical courts cannot punish or hold plea *pro reformatione morum* in case of legal perjury, or *pro læsione fidei* in a temporal matter; as, that the party will pay a debt, make a feoffment &c. So, if a jury give a false verdict, they cannot be punished for this in the ecclesiastical courts.

Jenk. 184. Keilw. 39. pl. 5.

But, for perjury in their own courts, and in matters in which they have cognizance, as matrimony, tithes, testaments, &c. they may punish, and no prohibition lies.

2 Rol. Abr. 286. Hob. 246. Hetl. 132.

If a presentment be made by the churchwardens of a parish in the ecclesiastical court, that *J. S.* a parishioner, is a railer and sower of discord among the neighbours, a prohibition lies; for this belongs to the leet, and not to this court, unless it was in the church, or such like.

## 4. Where the Ecclesiastical Courts determine on Acts of Parliament.

4 Leon. 16. Vaugh. 206. 2 Inst. 614. 618. 2 Lev. 64.

The construction of acts of parliament is of temporal cognizance; so that if the spiritual courts expound them in a different sense than they ought to do, a prohibition lies; as, if upon the statute 32 *H.* 8. *c.* 38. which only prohibits marriages within the *Levitical* degrees, the ecclesiastical courts should molest or call in question marriages without those degrees, a prohibition lies; because they act contrary to that which is declared to be lawful by the statutes of the realm. But, where they are not bounded by any law, their jurisdiction still continues, and therefore within the *Levitical* degrees they are still judges of incest.

Jon. 259, 260.

So, if it be made a question in the ecclesiastical court, Whether the words of the statute 25 *H.* 8. *c.* 22. have given sufficient power to the archbishop to grant marriage licences, and they determine against the power, a prohibition lies; for by this they determine against an act of parliament, which is a temporal fair: but, if they allow the power, they may determine as to the form of the licence, the notice, and other circumstances requisite, &c. for in these they have a jurisdiction, as such licences have been, and still are, notwithstanding this statute, of ecclesiastical cognizance.

2 Rol. Abr. 303.

If an administration is granted to the next of blood, and upon this an appeal is sued to the delegates, and there they intend to revoke the said sentence, and to grant it to another, who is a

earer of blood by our law, but is by the eccleſiaſtical law; a pro-ibition lies: becauſe this being ordained by ſtatute ought to be nterpreted according to our law.

If there be a controverſy, whether a perſon hath diſpoſed of he guardianſhip of his child purſuant to the ſtatute 12 *Car.* 2. . 24. or whether he hath revoked ſuch diſpoſition; this cannot be etermined in the eccleſiaſtical courts. Vent. 207. Lady Cheſter's caſe. 3 Keb. 30.

On a motion for a prohibition to the eccleſiaſtical court, to ſtay ſuit there againſt a perſon for brawling in the belfry, and ſtrik-ng a man there, the ſtatute of 5 & 6 *E.* 6. *c.* 4. was ſuggeſted; nd it was alleged, that all ſtatutes are conſtruable by the com-on law, and that the perſon ſtriking was mayor of the town, nd that he came there to ſuppreſs a riot: but *(abſente Holt)* he prohibition was denied; becauſe this offence was conuſable n the eccleſiaſtical court before this ſtatute *ratione loci;* and he ſtatute, though it provides a penalty, does not alter the ju-ſdiction. 2 Ld. Raym. 850. Wea-mouth v. Collins.

The defendant was preſented in the eccleſiaſtical court for orking upon holidays, *viz.* carrying hay on St. *John Baptiſt's* ay in church-time; but a prohibition was granted, becauſe this as out of the ſtatute by the very words of the act 5 & 6 *E.* 6. 3. it being a work of neceſſity; and this being an holiday by ct of parliament, it belongs to the judges of the common law determine whether it was broken or not. Godb. 218. Wheeler's caſe.

## In what Caſes they have a concurrent Juriſdiction, and may determine Incidents.

The eccleſiaſtical courts have in ſome inſtances a concurrent riſdiction with the temporal courts; as, in laying violent hands a clerk (*a*), a penſion by preſcription, &c. So that, if a clergy-an be beaten, an action at law lies for the battery; as alſo a it in the ſpiritual court for irreverence to his character. But ch proceedings in the eccleſiaſtical court muſt be *pro ſalute animæ,* d to puniſh the ſin, not to recover damages. 2 Inſt. 492. 9 E. 2. *Articuli Cleri.* Cro. Eliz. 655. 6 Mod. 156. *vide* 4 Co. 20. a. in the abbot of St. Alban's caſe. 6 Mod. 252.

(*a*) Vent. 3. 120. 265. Ld. Raym. 578. 2 Salk. 550. pl. 10.

But, if a clerk be arreſted by (*b*) proceſs of law, he cannot for s ſue in the eccleſiaſtical court. Bro. Prohibition, pl. 21. 2 Inſt. 492.

If a perſon be proceeded againſt for defamation in the ſpiritual court, for giving evidence in a court ſtice, he may have a prohibition. Bro. *Prohibition*, 21. 2 Bulſt. 296. Roll. Rep. 61.——— k ſued Webb in the ſpiritual court for ſaying that he had a *baſtard*; Webb, the defendant, alleged he ſpiritual court, that the plaintiff was adjudged the reputed father of a baſtard by two juſtices of e, according to the ſtatute, whereupon he ſpoke theſe words, and they of the ſpiritual court ac-d his confeſſion, but would not allow his juſtification, wherefore he prayed a prohibition; which granted him. Cro. Jac. 535. Webb v. Cook.

So, if a clergyman be only aſſaulted, no remedy is to be had in ſpiritual court, but in the common law courts. Cro. Eliz. 753 Prynn's caſe.

So, if one be ſued in the eccleſiaſtical courts for laying violent ds on a clergyman; the party being an officer or conſtable (*c*) ſuggeſt, that the plaintiff made an affray upon another, 2 Inſt. 608. (*c*) On the ſtatute 5 & 6 E. 6. c. 4.

against brawling, &c. in a church or church-yard

and that he, to preſerve the peace, laid hands on him, and ſo hav a prohibition.

it hath been held, that he who ſtrikes another in a church or church-yard ca not juſtify or excuſe himſelf by ſhewing that the other aſſaulted him. Cro. Jac. 367.——But in lay hands on a clerk in any other place, he may juſtify. Moor, 915. Cro. Eliz. 655.

7 Mod. 80.

Alſo it is ſaid, that though the crime of laying violent hand on a clergyman be within the expreſs words of the ſtatute *circumſpecte agatis*, that yet the party is not puniſhable in the ſp ritual court before he is found guilty in a temporal court; a that if he be proceeded againſt ſooner, a prohibition lies.

Cro. Car. 89. Cro. Jac. 538. Jon. 440.

In caſe of criminal converſation with a man's wife, an acti lies at common law, in which the huſband recovers damages, a the offender is likewiſe puniſhable in the eccleſiaſtical court f adultery.

7 Mod. 80.

So, in caſe of a lewd woman who hath a baſtard chargeable the pariſh, though by the ſtatute 7 *Jac.* 1. *c.* 4. ſhe is to be ſe to the houſe of correction; yet ſhe may be proceeded againſt incontinency in the ſpiritual court.

2 Salk. 552. 7 Mod. 79. Galizard and Rigault; and 2 Ld. Raym. 809. S. C. where it is ſaid, that the court was of this opinion; but at the prayer of the defendant's counſel they ordered that it ſhould be argued by civilians; but afterwards, an apparent fault being in the pleadings, they refuſed to hear the civilians, and gave judg that the prohibition ſhould ſtand.

The defendant libelled againſt plaintiff in the eccleſiaſti court, for having ſolicited the chaſtity of his wife, after the pla tiff had been indicted for an aſſault upon the ſame woman, w an intent to raviſh her, and convicted and fined upon it; after an action of aſſault and battery againſt him for the ſame fence, which action was depending at the ſame time that t proſecution was in the ſpiritual court; and all this matter appe ing on the pleadings, the queſtion was, Whether a prohibiti ſhould go to ſtay the proceedings in the eccleſiaſtical court, o conſultation ſhould be awarded? and it was held in this caſe, t a prohibition ſhould be granted; for that this being an atte and ſolicitation to incontinence, coupled with force and violen it did by reaſon of the force, which is temporal, become a t poral crime *in toto*.

2 Rol. Abr. 295. 2 Ld. Raym. 809.—So, if A. ſays of B. *you are a bawd, and thou keepeſt a bawdy-houſe*; the keeping a bawdy-houſe being a matter indictable at mon law, makes the whole of temporal cognizance; but calling *whore* or *bawd* only are puniſha the eccleſiaſtical courts. 2 Salk. 552. pl. 15. 2 Ld. Raym. 809. *& vide* 2 Inſt. 488. where Coke, *More ſpiritualia ſunt quæ non habent mixturam temporalium.*

So, if *A.* calls *B. whore* and *thief*, the action ſhall be ſue common law; and *B.* cannot libel againſt *A.* in the ſpiri court for the word *whore*, and have an action at law for word *thief*.

3 Lev. 17. Crandon v. Walden.

But on a motion for a prohibition for ſaying of a parſon *he preaches nothing but lies and malice in the pulpit*, on ſugge that theſe words were actionable at common law, the cour fuſed to grant it; for that theſe words concerning and rel to an eccleſiaſtical perſon and an eccleſiaſtical matter, it w to be tried there.

2 Ld. Raym. 1101. Evans v. Brown.

So, where the words were, *You are known by the name of* Nell, *and do live with another woman's huſband*; and an a

ing brought at law for theſe words, grounded on a ſpecial damage ſuſtained by the defendant's ſpeaking them, and alſo a ſuit in the eccleſiaſtical court, it was moved for a prohibition; for being actionable at law by reaſon of the ſpecial damage, the party ought not to be twice puniſhed for the ſame offence; but the court refuſed to grant a prohibition.

If there be a mutual contract of marriage between a man and a woman *per verba de futuro*, and either of them refuſe; for this breach of contract an action lies at common law for the temporal loſs to the party, although there might have been a remedy in the eccleſiaſtical courts for enforcing ſuch contract *. Salk. 24. pl. 6. 120. 6 Mod. 155. 172. Ld. Raym. 386. See 12 Mod. 214.

* No ſuit now in the eccleſiaſtical courts to compel marriage by reaſon of any contract, &c. 26 G. 2. c. 33. ſ. 13.

If the churchwardens take away the bells of a church, they may be proceeded againſt in the eccleſiaſtical courts for ſuch ſacrilegious taking; and the rather, as (*a*) they are churchwardens, although an action lies againſt them at common law by their ſucceſſors; and the remedy in this caſe is ſaid to be moſt proper in the ſpiritual court, becauſe at common law damages only are recovered, but in the eccleſiaſtical court they decree a reſtitution of the thing in *ſpecie*. Carth. 467. 5 Mod. 411. Sid. 281. Welcome v. Lake. (*b*) It is ſaid in 2 Salk. 547. pl. 2. that a prohibition was granted to ſtay a ſuit in the eccleſiaſtical court for taking away two bells out of the ſteeple, for theſe reaſons, that the churchwarden is a corporation, and the property is in him, and he may bring trover at common law; & *vide* 2 Inſt. 492. Rol. Rep. 255.

*J. S.* ſued his brother whom his father made executor, for his reaſonable part of the goods of the father, in the ſpiritual court, according to the cuſtom of the province of *York*; upon which a prohibition was moved for, and it was inſiſted, that this was a temporal cauſe founded upon a cuſtom, and that there was an original form in the regiſter, by which it appeared that it was a matter conuſable at common law: but it was holden by three judges, in the abſence of *Hale*, that in this caſe both courts had a (*b*) concurrent juriſdiction. 2 Lev. 128. Trafford v. Trafford. (*a*) Where in matters of legacies the courts of equity and eccleſiaſtical courts have a concurrent juriſdiction, *vide* 2 Vern. 47. 2 Vent. 362. Preced. Chan. 546.

If a pariſh-clerk be guilty of ſeveral ſcandalous offences, which are puniſhable at common law, yet he may be proceeded againſt in the ſpiritual court in order to a deprivation, though his office be for life. 2 Ld. Raym. 1506. Fitzg. 189.

It is laid down as a rule in a great variety of caſes, that the eccleſiaſtical courts having cognizance of the principal thing, they ſhall have it of incidents and acceſſaries. But this hath been underſtood in this manner, that if ſuch incident matter be merely temporal, or if a temporal matter be pleaded in bar to an eccleſiaſtical demand, they muſt proceed in the eccleſiaſtical court, according to the temporal law, otherwiſe they will be prohibited. 2 Inſt. 493. 613. 12 Co. 65. 2 Bulſt. 227. Cro. Eliz. 66. Hob. 12. Hetl. 87. 2 Rol. Abr. 298. Sid. 89. 161. Cro. Jac. 269. Ld. Raym. 73.

As, if a releaſe be pleaded to a demand of tithes, or payment in bar of a legacy, which can only be proved by one witneſs, and 2 Rol. Rep. 42. Godb. 272. Cro.

Eliz. 666. Hob. 188. 247. Latch, 217. for this reaſon is rejected by the eccleſiaſtical courts, becauſe their law requires two witneſſes; there, a prohibition will be granted.

Noy, 12. Moor, 413. Vent. 291. Sid. 161. Show. 158. Carth. 142. 2 Salk. 547. pl. 1. Ld. Raym. 220. 3 Mod. 283. Comb. 160. Holt, 752. pl. 1.

2 Inſt. 653. Latch, 48. 2 Lev. 63. 3 Bulſt. 231. Rol. Rep. 419. 2 Co. 45. So, although tithes, oblations, mortuaries, and penſions are of eccleſiaſtical conuſance, yet, if to a demand of theſe a (*a*) *modus* or cuſtom is pleaded, ſuch cuſtom, like all others, muſt be determined in the temporal courts; and (*b*) if the eccleſiaſtical courts take upon them to determine it, a prohibition will lie.

(*a*) But, if a *modus* be there pleaded and admitted, no prohibition ſhall go; *ſecùs*, if the queſtion be *Modus* or no *modus*. 2 Salk. 551. pl 13. *Per* Holt, Ch. J.—If they agree in the *modus*, and only vary in the manner of payment, no cauſe for a prohibition. Winch. 33. [So, a prohibition ſhall not go to ſtay a ſuit for a mortuary, unleſs the cuſtom hath been denied in the ſpiritual court. Johnſon v. Oldham, 1 Ld. Raym. 609. 12 Mod. 416. S. C. (*b*) Churchwardens libel againſt the rector, that there hath been time out of mind, and is, a chapel of eaſe within the pariſh; and that the rector of the pariſh, time out of mind, hath repaired and ought to repair the chancel of the ſaid chapel; and that the chancel being out of repair, the defendant, being rector, hath not repaired it. The rector denied the cuſtom in the ſpiritual court, and a decree was made for the rector, that there was no ſuch cuſtom, and coſts were taxed there for the rector. The churchwardens moved for a prohibition; and it was argued for the prohibition, that it ought to be granted, becauſe it appears that the libel is upon a cuſtom, which the defendant hath denied, and it may be, the queſtion was in the ſpiritual court, cuſtom or not, which is not triable there, but at the common law; and then this appearing upon the libel, that the court hath not juriſdiction, a prohibition may be granted after ſentence. But all the court held the contrary. For by Holt, C. J.—The reaſon for which the ſpiritual court ought not to try cuſtoms is becauſe they have different notions of cuſtoms, as to the time which creates them, from thoſe which the common law hath; for in ſome caſes the uſage of ten years, in ſome twenty, in ſome thirty years make a cuſtom in the ſpiritual court; whereas by the common law it muſt be for time immemorial. And therefore ſince there is ſo much difference between the laws, the common law will not permit that court to adjudge upon cuſtoms, by which in many caſes the inheritances of perſons may be bound. But, in this caſe, that reaſon fails; for the ſpiritual court is ſo far from adjudging, that there is any ſuch cuſtom which the common law allows, that they have adjudged that there hath not been any cuſtom allowed by their law, which allows a leſs time than the common law to make a cuſtom. And the plaintiffs having grounded their libel upon a cuſtom, which was well grounded if the cuſtom had not been denied, (for libels there may be upon cuſtoms,) but the cuſtom being denied and found no cuſtom, it is not reaſon to prohibit the court in executing their ſentence againſt the plaintiffs. For the deſign of the motion for a prohibition, is only to excuſe the plaintiffs from coſts. And there is no reaſon but that they ought to pay them; ſince it appears, that they have vexed the defendant without cauſe. Churchwardens of Market Boſworth v. the Rector of Market Boſworth, 1 Ld. Raym. 435.——The vicar of *N.* was libelled againſt in the ſpiritual court, for that by cuſtom out of mind, the vicars of *N.* had, by themſelves or others, ſaid and performed divine ſervice in the chapel of *C.* for which there was ſuch a recompence, and that he neglected. The defendant came for a prohibition, and without traverſing this cuſtom, ſuggeſted, that all cuſtoms were triable at common law. And it was urged, that it was enough for a prohibition, that a cuſtom appeared to charge the vicar with a duty, for which he was not liable of common right. But by Holt, C. J.—A parſon may be bound to an eccleſiaſtical duty by cuſtom, and when he is bound by cuſtom, the ſpiritual court may puniſh him if he neglects that duty: the cuſtom might have a reaſonable commencement by compoſition in the ſpiritual court, and begin by an eccleſiaſtical act; and a bare preſcription only is not a ſufficient ground for a prohibition unleſs it concerns a layman; whereas here, it is an eccleſiaſtical right, an eccleſiaſtical perſon, and an eccleſiaſtical duty, and the preſcription not denied. Jones v Stone, 1 Ld. Raym. 578. 2 Salk. 550. S. C. And if the ſubject of the ſuit be within the juriſdiction of the ſpiritual court, the mere ſuggeſtion of a cuſtom in the pleadings there, if they do not go on to try it, will be no ground for a prohibition. Dutens v. Robſon, 1 H. Bl. 100.]

Carth. 143. But, if there be but one witneſs to prove a nuncupative will, and the eccleſiaſtical court refuſe the probate thereof, becauſe to every ſuch will the law requires two witneſſes, no prohibition lies; becauſe there is no other way of authenticating ſuch will but in the ſpiritual court.

Yelv. 172. Noy, 129. Cro. Jac. 234. Starkey v. Barton and Gore. So, where the churchwardens libelled for a church-rate, which was ſentenced againſt them, and then they appealed to the metropolitan, but, pending the appeal, one of the appellants releaſed to the appellee all actions, ſuits, and demands, but the other appellant

ellant proceeded in his and his partner's name to reverſe the ntence; whereupon the appellee prayed a prohibition; it was djudged, that no prohibition lay; for the principal matter being f eccleſiaſtical cognizance, things dependant thereon will be ſo oo; and whether this releaſe will bar both the churchwardens s what they are to determine and not the court of *B. R.*

A libel was exhibited on a cuſtom, that the conſtable of the own ſhould collect the rates aſſeſſed for repairing the pariſh- hurch; which he refuſed to do; and on a motion for a prohibi- ion it was ſuggeſted, that it was not triable there, whether the arty was conſtable and duly elected or not: but the court denied o grant one, becauſe this matter is pleadable there, and prohibi- ions ought not to go unleſs, upon a trial of the matter, their law nd proceedings croſs the common law, and in that caſe a pro- ibition lies only till trial here, and after that a conſultation ſhall e granted. Hard. 510. Goddin v. Wain- wright.

But it hath been reſolved, that if a feme covert ſue another in he ſpiritual court for incontinence with her huſband, and recover oſts, if the huſband releaſe them the wife is barred; for ſince he huſband is liable to the charges of the ſuit expended by the ife, he ſhall have the coſts in recompence: beſides, the wife annot have a chattel intereſt excluſive of her huſband. 5 Mod. 69. Salk. 115. pl. 4. Ld. Raym. 73. Cham- berlain v. Hewitſon. See 12 Mod. 891.

But, if the huſband and wife are divorced *a menſa & thoro*, and he wife has alimony allowed her, and ſhe ſues for defamation, or ther injury, and recovers coſts, the huſband releaſes them, yet he wife ſhall recover them; becauſe they come inſtead of that he has expended out of her alimony, which was a ſeparate main- enance, and not in the power of the huſband. Ld. Raym. 74. *per cu- riam.*

## (M) The Offence of diſobeying a Prohibition.

THE diſobeying of a prohibition is a contempt to the ſuperior court that awards it, and puniſhable by attachment, which ues againſt the judge and (*a*) party for proceeding after ſuch pro- ibition, and for which they are ſubject to fine and impriſonment, ccording to the diſcretion of the ſuperior court. F. N. B. 40. Bro. Att. Bro. pl. 5. pl. 9. pl. 11. And. 279.

(*a*) Though the writ of rohibition was not directed to the party. 19 H. 6. 54.——And ſuch attachment may be awarded gainſt a peer of the realm. 21 E. 3. 3. pl. 7. 2.

An attachment was granted, upon affidavit that the party pro- ceeded after a prohibition delivered to him, in a ſuit for a ſeat in church which the plaintiff claimed by preſcription; and upon is appearance and examination upon interrogatories he confeſſed he matter, and was fined five marks. 2 Jon. 47. Dr. Wain- right's caſe.

And not only an attachment lies for proceeding in the ſame auſe pending a prohibition, but alſo for inſtituting a new ſuit for he ſame thing; as, if a parſon libels for tithes, and a prohibition brought, and he libels for tithes of another year, the firſt not eing determined, an attachment ſhall be awarded. Moor, 599. Leon. 111.

Cro. Car. 559. 2 Jon. 128. Vent. 348. 3 Lev. 360.

In an attachment upon a prohibition, the plaintiff ſhall recover damages and coſts againſt the party for proceeding after the writ of prohibition awarded.

---

# Releaſe.

A Releaſe is the giving or diſcharging of a right of action which a man hath or may claim againſt another, or that which is his; or, it is the conveyance of a man's intereſt or right which he hath to a thing to another who (*a*) hath poſſeſſion thereof, or (*b*) ſome eſtate therein.

(*a*) But it is contrary to the nature of a releaſe to give poſſeſſion. 4 Co. 25. Hutt. 65.——And therefore one tenant in common cannot releaſe to his companion, becauſe they have diſtinct freeholds. Co. Lit. 200. (*b*) A releaſe cannot operate but upon an eſtate, intereſt, or right. Roll. Rep. 197.

Co. Lit. 264. a.

Releaſes are diſtinguiſhed into expreſs releaſes, or releaſes in deed, and thoſe ariſing by operation of law; and are made of lands and tenements, goods and chattels, or of actions, real, perſonal, and mixt.

Hob. 163. 4 Co. 63.

Theſe are to be adapted to the nature of the caſe, and the purpoſes for which the releaſe is intended; ſo that if a man be diſſeiſed of lands, or diſpoſſeſſed of goods, and releaſe all actions, he may, notwithſtanding, enter into his lands, or retake his goods, the right and property being ſtill in him though he has diveſted himſelf of his remedy.

8 Co. 152. Co. Lit. 286.

So, where a man has divers means to come to his right, he may releaſe one, and yet take advantage of the other: but, if a man has not any means to come to his right but by way of action, there, by a releaſe of all actions his right by judgment of law is gone, becauſe by his own act he has barred himſelf of all means to come at it.

Dyer, 56-7. a. Plow. 289. Hetl. 15. 5 Co. 148. Show. 154.

Heretofore releaſes were conſtrued with much nicety and great ſtrictneſs, and being conſidered as the deed or grant of the party were according to the rule of law taken ſtrongeſt againſt the releaſor. They now however receive ſuch interpretation as other grants and agreements do, and are favoured by the judges as tending to repoſe and quietneſs.

Mod. 99. Ld. Raym. 235.

Hence it hath been eſtabliſhed as a general rule in the conſtruction of releaſes, that where there are general words only in a releaſe they ſhall be taken moſt ſtrongly againſt the releaſor; but, where there is a particular recital in a deed, and then general words follow, the general words ſhall be qualified by the ſpecial words,

For

For the better underſtanding hereof we ſhall conſider,

(A) Releaſes that are expreſs and by Deed: And herein,

1. Of the Words and Ceremony requiſite in an expreſs Releaſe.
2. How far a Covenant or Agreement may operate as a Defeaſance or Releaſe.
3. How far a Diſpoſition by Will may operate as a Releaſe.

(B) Releaſe by Operation of Law, how created, and the Effect thereof.

(C) Releaſes of Lands and Hereditaments, how they enure: And herein,

1. Of Releaſes that enure by way of *Mitter le Eſtate*.
2. Releaſes by way of *Mitter le Droit*.
3. Releaſes that enure by way of Extinguiſhment.
4. Releaſes that enure by way of Enlargement: And therein, of the modern Manner of Conveyancing by Leaſe and Releaſe.
5. What Eſtate or Intereſt paſſes by the Releaſe: And therein, of the Words requiſite to an Enlargement.

(D) Who in reſpect of their Right and Intereſt are capable of releaſing.

(E) Of Releaſes by Executors and Adminiſtrators.

(F) How far the Huſband's Releaſe ſhall bind the Wife.

(G) To whoſe Benefit a Releaſe ſhall enure; and who ſhall be bound thereby, though not a Party to the Releaſe.

(H) How far a Poſſibility or Contingent Intereſt may be releaſed.

(I) How the operative Words in a Releaſe have been conſtrued: And therein, of the Words,

1. Claims and Demands, what are releaſed thereby.
2. By a Releaſe of all Actions and Suits.

(K) Releaſe, in what Caſes reſtrained to the ſpecial Purpoſe for which it was given.

(L) What Right and Intereſt ſhall be ſaid to be releaſed: And therein, of Miſrecitals and Exceptions in Releaſes,

## (A) Releaſes that are expreſs and by Deed: And herein,

### 1. Of the Words and Ceremony required in an expreſs Releaſe.

Lit. ſect. 445. Co. Lit. 264. (a) Plow. 140.

*Littleton* tells us, that the proper words of a releaſe are *remiſiſſe, relaxaſſe, & quietum clamaſſe*, which have all the ſame ſignification. Lord *Coke* adds (*a*), *renunciare, acquietare;* and ſays, that there are other words which will amount to a releaſe; as, if the leſſor grants to the leſſee for life, that he ſhall be diſcharged of the rent; this is a good releaſe.

Sid. 265.—So, the words *ei reddidit* enure as a releaſe. Cro. Jac. 696. ——So, an obligee's acknowledging himſelf on good conſideration ſatisfied or diſcharged of all bonds, debts, and demands, is in judgment of law a good releaſe. 9 Co. 52. Show. 331.

So it hath been held, that a pardon by act of parliament of all debts and judgments amounts to a releaſe of the debt, the word *pardon* including a releaſe.

Co. Lit. 264. b. Rol. Rep. 43. 2 Leon. 76. 213. 2 Rol. Abr. 408. 2 Saund. 48. Moor, 573. pl. 787.

An expreſs releaſe muſt regularly be in writing and by deed, according to the common rule *eodem modo quo oritur eodem modo diſſolvitur;* ſo that a duty ariſing by record muſt be diſcharged by matter of as high a nature: ſo, of a bond or other deed.

Sid. 177. 2 Sid. 78. Cro. Jac. 483. 620. Cro. Car. 383. Langdon v. Stokes.

But a promiſe by words may before breach be diſcharged or releaſed by words only.

As, where in *aſſumpſit* the plaintiff declared that the defendant for valuable conſideration aſſumed to go a certain voyage in ſuch a ſhip before *Auguſt* following, and alleged a breach in the non-performance; to which the defendant pleaded, that, before any breach, the plaintiff the fourth of *April* at ſuch a place *exoneravit eum* of the ſaid promiſe; on demurrer the plea was held ſufficient, without ſhewing how he diſcharged him, or that ſuch diſcharge was in writing.

Mod. 262. 2 Mod. 259. S.C. Edward v. Weeks.

But, where in *aſſumpſit* for 5*l.* upon exchange of a horſe to be paid upon requeſt, the defendant pleaded that before the action brought the plaintiff did exonerate him of this agreement; this plea was reſolved to be ill; for though a parol agreement may be diſcharged by parol before cauſe of action accrued, yet, after that, it cannot be diſcharged but by deed; and here, the cauſe of action did accrue at leaſt upon requeſt, and therefore he ſhould have pleaded the exoneration before the requeſt.

Sid. 293. Weſtlake v. Perſe.

In treſpaſs for riding the plaintiff's horſe, the defendant pleaded that ſuch a day the plaintiff *exoneravit* him of the treſpaſs; and this was held an ill plea, in not ſhewing that the diſcharge was in writing.

Leon. 283. *per* Anderſon, Ch. J.

A releaſe of a right in chattels cannot be without deed.

2. How far a Covenant or Agreement may operate as a Defeaſance or Releaſe.

A covenant perpetual, as that the covenantor will not ſue, without any limitation of time, is a (*a*) defeaſance or abſolute releaſe. And this conſtruction has been made to avoid circuity of action; for if in ſuch caſe the party ſhould contrary to his covenant ſue, the other party would recover preciſely the ſame damages which he ſuſtained by the other's ſuing. But, if the covenant be, that he will not ſue till ſuch a time, this does not amount to a releaſe, nor is it pleadable in bar as ſuch, but the party hath remedy only on his covenant. Moor, 23; pl. 80. 811. Rol. Abr. 939. Bridg. 118. 2 Bulſ. 95. 290. Hard. 113. 3 Lev. 41. 2 Salk. 573. pl. 1. 575. pl. 4. 2 Ld. Raym 786. Carth. 210. Ld. Raym. 419. 691. (*a*) A defeaſance is only a conditional releaſe, and may be executed as well after as at the time of the original contract. 2 Saund. 48. Cro. Eliz. 623.

As in debt upon an obligation, the defendant pleaded that the plaintiff by indenture, *&c.* did covenant that he would not ſue the bond before *Michaelmas*, intending thereby that this was a ſuſpenſion of the action, and conſequently a releaſe; but, upon demurrer, the court adjudged, that it only amounted to a covenant, and that for breach thereof an action of covenant would lie. Cro. Eliz. 352. And. 307. Rol. Abr. 939. Deux v. Jefferies.

So, if the obligee covenants and grants to and with the obligor, that during ninety-nine years he will not put the bond in ſuit; this is only a covenant on which an action will lie, but it cannot be pleaded in bar of the bond. Carth. 63. Salk. 573. pl. 1. Ailoffe v. Scrimſhire; *& vide* Show. 46. S. C.

If two are jointly and ſeverally bound in an obligation, and the obligee by deed (*b*) covenants and agrees not to ſue one of them; this is no releaſe, and he may notwithſtanding ſue the other. Cro. Car. 551. March, 95. 2 Salk. 575. pl. 3. Ld. Raym. 688. See 12 Mod. 415. 448. 550, 551. (*b*) But, if two are jointly and ſeverally bound in a bond, a releaſe to the one diſcharges the other. Ld. Raym. 420.

*A.* covenants with *B.* to pay him 300*l.* for the uſe of the wife of *A.* only for her life; in covenant brought on this, and breach aſſigned that there was ſo much of the 300*l.* arrear, defendant pleads that there was another indenture between him and the plaintiff ſince the date or delivery of the deed of covenant declared on, reciting the ſaid covenant and agreement for the payment of the 300*l.*, wherein it was covenanted and agreed, that ſo long as *A.* and his wife did cohabit, the payment of the 300*l.* ſhould ceaſe; and avers, that they did cohabit for the time the ſaid arrear became due, and pleads this in bar of the firſt agreement; and though in this caſe there could not have been any great miſchief in conſtruing the deed pleaded a defeaſance or releaſe, there being no other parties to the deed; yet, as this was a ſum in groſs, and the covenant temporary and not perpetual, it was adjudged no bar. 2 Vent. 217. Gawden v. Draper. Ld. Raym. 691. S. C. cited *per* Holt, and admitted to be good law; but he ſaid, that if the 300*l.* had been a rent, he ſhould have been of opinion that the ſecond deed would have amounted to a grant of the rent for the ſaid time; *& vide* Lev. 152.

If the collateral anceſtor of the diſſeiſee releaſe to the diſſeiſor with warranty, and the diſſeiſor make a deed reciting the releaſe with warranty, and covenant though he be empleaded or ouſted, yet he will not take advantage of the deed or warranty, that is a diſfeaſance; and if the diſſeiſor plead the releaſe with warranty in 43 Aſſ. pl. 44. Co. Lit. 265. Ld. Raym. 690. cited.

bar

bar of an action brought by the diſſeiſee, he ſhall be rebutted from the warranty by his own deed. But in this caſe if the diſſeiſor had covenanted only not to bring a *warrantia chartæ*, or not to vouch, there, it would only have been a covenant, becauſe there would have remained a remedy upon the warranty.

Noy, 5. *A.* having a rent-charge iſſuing out of three acres, *B.* purchaſed two acres thereof, and *A.* covenanted and granted to and with *B.* not to diſtrain in thoſe two acres for the rent. By *Glanvil* it was held a releaſe; but *Anderſon contra;* but *per cur.*— If it be a releaſe, the tenant of the other acre may plead it, for thereby the rent was extinct.

Bro. Eſtranger al Fait. pl. 21. If *A.* be bound to *B.* in a certain ſum, and *B.* covenant and grant with *C.* a ſtranger to the bond, that if *A.* do ſuch a thing, the obligation ſhall be void; this does not amount to a releaſe.

Carth. 64. 210. Show. 46. 330. 350. 2 Show. 446. If a letter of licence contain the following words, *viz.* that if the creditor ſue within ſuch a time his debts ſhall be forfeited; ſuch licence is pleadable in bar as a releaſe, for the words, *ſhall be forfeited*, make an abſolute defeaſance upon a ſuit commenced.

2 Salk. 573. pl. 2. Obligee reciting the bond covenants to ſave the obligor harmleſs: it is an abſolute releaſe; and if upon a contingency, it is a conditional releaſe, becauſe it has an expreſs relation to the bond.

2 Mod. 228. Strangford v. Green. An award that all ſuits ſhall ceaſe hath the effect of a releaſe, and the ſubmiſſion and award may be pleaded in diſcharge as well as a releaſe.

3. How far a Diſpoſition by Will may operate as a Releaſe.

Sid. 286. Vent. 39. It ſeems agreed, that a will, though ſealed and delivered, cannot amount to a releaſe, becauſe it is ambulatory and revocable during the teſtator's life; alſo by reaſon of the executors' conſent requiſite to every diſpoſition of a perſonal thing by will, and the injury that might accrue to the teſtator's creditors, were a will allowed to operate as a releaſe.

Sid. 421. Pidgeon v. Harriſon. And therefore where in debt upon an obligation, by the repreſentative of a teſtator, the defendant pleaded that the teſtator by his laſt will in writing releaſed to the defendant; this was adjudged ill, and that no advantage could be taken hereof by plea.

1 P. Wms. 83. pl. 16. Elliot v. Davenport. 2 Vern. 521. S. C. But it hath been held in equity, that though a will cannot enure as a releaſe, yet provided it were expreſſed to be the intention of the teſtator that the debt ſhould be diſcharged, the will would operate accordingly; and Lord *Cowper* ſaid, that in ſuch caſe it would be plainly an abſolute diſcharge of the debt though the teſtator had ſurvived the legatee.

2 P. Wms. 332. pl. 95. Rider v. Wager. [See the caſes of Sibthorp v. Moxom, and So, in another caſe, it was held by Lord *King*, that a releaſe by will can only operate as a legacy, and muſt be aſſets to pay the teſtator's debts; and if a debt ſo releaſed by will be afterwards received by the teſtator himſelf in his lifetime, the legacy is extinct, and ſuch releaſe by will intimates no more than that the executors

executors ſhall not after the teſtator's death trouble or moleſt the debtor. Toplis v. Baker, v. 4. p. 387-8.]

*A.* deviſed to his ſervant *B.* a legacy of 50*l.* and 20*l.* *per ann.* for his life; and by his will acquits, exonerates, and diſcharges *B.* of all debts, accounts, reckonings, and demands whatſoever at the death of the teſtator: *B.* had a trunk of teſtator's in which were medals, jewels, *&c.* and it was made a doubt, and directed to be tried at law, whether by theſe words the trunk, *&c.* paſſed or not. 2Vern. 115. Fiſh v.

*A.* deviſes 100*l.* to *B.*, and by his will releaſes to *B.* all debts and demands, and afterwards *A.* lends *B.* 100*l.* and the queſtion was, Whether the will ſhould diſcharge the 100*l.* lent without any new publication? The court doubted; however, they decreed payment of the 100*l.* legacy, and left the executor to recover the 100*l.* lent, if he could, at law. 2Vent. 136. Roberts v. Bennet.

If a debt is mentioned to be deviſed to the debtor without words of releaſe or diſcharge of the debt, and the debtor die before the teſtator; this will be a lapſed legacy, and the debt will ſubſiſt. 2Vern. 522. admitted.

[In the will of *John Adair* was the following clauſe: "I deviſe "to my brother, the Rev. Mr. *Adair*, 2000*l.* I alſo return him "a bond for 400*l.* with intereſt due thereon, which he owes "me." It appeared by the Maſter's report, that the above bond was a joint bond in the *Scotch* form by the teſtator's brother and his ſon. The queſtion was, Whether this diſpoſition of the bond by the will amounted to a releaſe, or was only a legacy, and therefore lapſed by the death of the teſtator's brother in his life-time, and the bond was ſtill remaining in force againſt the co-obligor and executor of his father? Lord Chancellour—There is not the leaſt doubt as to the bond. It is diſtinctly a legacy to the brother. The inquiry directed, whether it remained in the hands of Mr. *Adair*, ſhews what the court thought at the hearing. There is no foundation therefore for *Thomas Adair*, the ſon, to have the bond delivered up.] Maitland v. Adair, 3 Vez. jun. 231.

## (B) Releaſe by Operation of Law, how created, and the Effect thereof.

RElеaſes by operation of law are created ſometimes by deed, or may be without; as, if the lord diſſeiſe the tenant, and make a feoffment in fee; or, if the diſſeiſee diſſeiſe the diſſeiſor's heir, and make a feoffment in fee; this is a releaſe in law of the ſeignory in the firſt caſe, and both of the right and action of the diſſeiſee in the ſecond. Co. Lit. 264. b.

If a diſſeiſee releaſe to his diſſeiſor's leſſee for life, his right is gone for ever; but, if he diſſeiſe his diſſeiſor's heir, and make a leaſe for life, his right is releaſed but during the leſſee's life, for a releaſe in law is more favourably taken according to the party's intent than an expreſs releaſe in deed. Co. Lit. 264, 265.

If

Co. Lit. 264. Plow. 184-5. Hutt. 128.

If the obligor makes the obligee his executor, and he accepts of the executorſhip, this in law is a releaſe of the action (*a*), but ſtill the debt or duty remains, for which the executor may retain, but ſuch retainer can only be againſt creditors who are in an equal degree with himſelf.

(*a*) But, if there are not aſſets, the action is not ſo much as ſuſpended, and the executor may ſue the heir of the obligor where the heir is bound. Roll. Abr. 940. Salk. 304. ——So, if a creditor is made executor with others, he may ſue the others, eſpecially if he hath not adminiſtered. Cro. Car. 372. Jon. 345. Off. of Exec. 32. [And the bare appointment of a creditor to be executor, if he refuſe to act, will not extinguiſh his legal remedy for the recovery of his debt. Rawlinſon v. Shaw, 3 Term Rep. 557.]

8 Co. 136. Off. of Ex. 31. Salk. 300.

So, if the obligee makes the obligor his executor, who adminiſters ſeveral goods, but dies before probate, this in law is a releaſe. So, an adminiſtrator who is a creditor may retain ſo much of the inteſtate's aſſets as will ſatisfy himſelf. But an executor *de ſon tort* who is a creditor cannot retain, becauſe this would be allowing him to take advantage of his own wrong.

Cro. Car. 372. Jon. 345. Rol. Abr. 934. Dorcheſter v. Webb.

*A.* and *B.* are bound in an obligation jointly and ſeverally to *C.* and after *A.* makes *D.* his executor, and dies, and *D.* takes upon him the execution of the will, and fully adminiſters all the goods of *A.*, and after the obligee makes the ſame *D.* his executor, and dies; and the queſtion was, Whether this was a releaſe or extinguiſhment of the obligation as to *B.*? and adjudged to be no releaſe, becauſe he had it in another's right.

Ld. Raym. 605. Caweth v. Philips.

Debt upon bond by the plaintiff as executor of the obligee; the defendant pleaded that the obligee made the defendant executor during the minority of the plaintiff, and that the plaintiff became executor at his age of ſeventeen: the plaintiff demurred.—*Per cur.*—This cannot be a ſuſpenſion of the action, becauſe the defendant was only executor in truſt for the plaintiff during his minority.

2 Lev. 73. Cock v. Croſs.

If *A.* and *B.* be jointly and ſeverally bound to *C.*, and *A.* make *C.* his executor, or (as the caſe was) make *D.* his executor, who makes *C.* his executor; in this caſe, if *C.* has not received ſatisfaction of the aſſets of *A.* he may ſue *B.*, for being jointly and ſeverally bound, he may ſue which of them he pleaſes.

Sid. 79.

If an obligor adminiſters to the obligee, and makes his executor, and dies, the creditor of the obligee may well bring an action againſt him.

8 Co. 136. Salk. 306.

If the obligee makes the obligor his executor, this is a releaſe in law, in regard it is the proper act of the obligee, who thereby makes the executor the only perſon capable to receive and pay, *&c.*

8 Co. 136. Leon. 90. 2 Mod. 315.

But, if the obligee dies inteſtate, and adminiſtration of the goods of the obligee is by the ordinary granted to the obligor, this does not (*b*) extinguiſh the debt, for he comes into the adminiſtration by the act of law, whereas the other is the act of the party.

(*b*) But, if an adminiſtrator, having no aſſets, pays a debt of the inteſtate to the value of the bond out of his own money, this will amount to a releaſe. Salk. 306.

Plow. 264. Leon. 320.

If the debtee makes the debtor and another co-executors, and one of them makes his executor, and dies, the ſurviving co-executor

executor ſhall not have an action to recover the debt againſt the executor of the debtor, becauſe the debt was once extinct; for it could not be brought but in the names of both the co-executors, notwithſtanding one alone adminiſtered; and it could not be brought in both their names, becauſe the debtor could not ſue himſelf.

If the obligee makes the obligor and others his executors, and the obligor refuſes, but the others adminiſter, and the obligor dies firſt, yet the debt is releaſed, for the obligor notwithſtanding the refuſal might have come in and adminiſtered, and the probate by the others was for his benefit. Salk. 308. *per* Holt.

It is ſaid by Ch. Juſt. *Holt*, that a creditor making his debtor executor does not operate as a legacy, or amount to a bequeſt to him of the ſum due, but to a payment and releaſe; the meaning whereof is, that ſuch executor having aſſets ſufficient to pay the debts and legacies of the teſtator, is diſcharged of the debt due from himſelf, as he by law is entitled to all the reſidue of the teſtator's perſonal eſtate after payment of debts and legacies. But it hath been adjudged, that in caſe of a deficiency of aſſets either for the payment of debts or legacies, ſuch debt is to be deemed aſſets, and the executor accountable therewith as ſo much of the teſtator's perſonal eſtate. Salk. 304. 306. Cro. Car. 373. Off. of Ex. 30. Yelv. 160. Chan. Ca. 292. and the caſe of Selwin v. Browne, which *vide* title Executors, vol. 3. p. 12.

[A teſtator bequeathed to his brother 500*l.* and the like ſum to his nephew, and appointed them his executors. The brother was indebted to the teſtator 7000*l.*, and the nephew was indebted to him 1000*l.* at the time of his deceaſe. A bill being filed by the next of kin, praying an account of the perſonal eſtate of the teſtator, and particularly of the ſums in which the executors were indebted to him, and payment of the ſame to the plaintiffs; it was contended on behalf of the defendants, that the appointment of the brother and nephew executors was an extinguiſhment of the debt: that this was clearly ſo at law; and that there is no caſe, in equity, where it has been holden otherwiſe, except where there has been a direct gift of the reſidue: as in the caſe of *Brown* v. *Selwin*, *ca. temp. Talb.* 240.; and even there, Lord *Talbot* ſpoke of it as an undecided point: but that there was no caſe where it had not been holden an extinguiſhment againſt the next of kin. But Lord *Thurlowe* ſaid, he thought it had been a ſettled point in a court of equity, that the appointment of the debtor executor, was no more than parting with the action; and declared it a truſt for the next of kin.] Carey v. Goodinge, 3 Br. Ch. Rep. 110.

If an infant at the age of ſeventeen make his debtor executor, this in law is a releaſe; for as the law gives him power to make an executor, it gives his executor the ſame advantages with others. Co. Lit. 264.

If a feme obligee marry the obligor, or one of the obligors; or, if there be two feme obligees, and one of them marry the obligor; theſe are releaſes in law. 8 Co. 136. Co. Lit. 264.

But, if a woman, executrix of the obligee, take the debtor to huſband, this is no releaſe in law, becauſe ſhe hath the debt in another 8 Co. 136. Co Lit. 264. Cro. Eliz.

another right; and if this amounted to a releaſe in law, it would be a *devaſtavit*, which is a wrong the law will not ſuffer.

114. S. P. adjudged that it was ſuſpended but not extinguiſhed, for that after the huſband's death an action would lie againſt his executor. Moor, 236. pl. 368. Leon. 320.

2 Roll. Abr. 935. Hob. 10. Moor, 855. Frier v. Gildridge.

If *A.* and *B.* are bound in an obligation jointly and ſeverally to *C.*, and *C.* makes *D.* the wife of *A.* his executrix, and dies, and *D.* adminiſters, and after *A.* the huſband of *D.* makes *D.* his executrix, and dies, leaving ſufficient aſſets to pay the debt, and after *D.* dies, and *E.* takes adminiſtration of the goods of *C.* the obligee not adminiſtered, yet he can have no action upon the obligation againſt *B.* the other obligor, becauſe that when the obligor made the executrix of the obligee his executrix, and left aſſets, the debt was preſently ſatisfied by way of retainer, and then by conſequence no new action could be had for the debt.

Co. Lit. 264. 8 Co. 136. Dyer, 140.

By an intermarriage all contracts between the huſband and wife for debts due *in præſenti* or *in futuro*, or upon a contingency which may become due during the coverture, are releaſed and extinct, becauſe the huſband and wife make but one perſon in law; and it is holden by Juſt. *Gould*, that if there was an expreſs agreement that they ſhould not be releaſed by the intermarriage, it would be void, as inconſiſtent with the ſtate of matrimony.

Hob. 216. 227. Hutt. 17. Noy, 26. Cro. Jac. 571. Palm. 99.

But it is the better opinion, and founded on a great variety of caſes, that promiſes, covenants, and agreements for the performance of a thing which is not to happen during the coverture, as payment of money after the huſband's deceaſe, are not releaſed by the marriage.

Roll. Rep. 343. 2 Roll. Abr. 407. Godb. 271. 2 Roll. Rep. 162. Lit. Rep. 32. Hetl. 122. 2 Sid. 58.

Ld. Raym. 515. Carth. 511. Comb. 242. Lill. Ent. 214. Salk. 325. Holt, 309. pl. 12. Comyn, 67. pl. 42. Freem. 512. pl. 687.

Alſo, it hath been adjudged by two judges againſt *Holt*, Ch. Juſt. that where *A.* entered into a bond to his intended wife, conditioned to leave her at his death 1000*l.* if ſhe ſurvived him, that ſuch bond was not releaſed by the marriage, as nothing would be due during the coverture, and as it would be contrary to the expreſs agreement of the parties. But the Ch. J. inſiſted ſtrenuouſly that a bond differed from a promiſe or covenant, being *debitum in præſenti*, though *ſolvendum in futuro;* and that the rule of law could not be controlled by the intention of the parties.

515. pl. 691. 12 Mod. 288. Gage v. Acton.

2 Vern. 290. 480. Preced. Chan. 237. [It is now ſettled, that ſuch a bond may be enforced *at law* againſt the heirs of the huſband. Milbourne v. Ewart, 5 Term Rep. 381. and Hayes *dim.* Foord v. Foord, there cited.]

Alſo, where a man entered into a bond to his intended wife conditioned to leave her 1000*l.* and the huſband mortgaged his eſtate and died, not leaving perſonal aſſets to diſcharge the bond, it was decreed in equity, that admitting the bond void at law, yet it ought to be made good in equity, and that ſhe ought to redeem and hold the land till ſhe was ſatisfied her debt.

Cannel v. Buckle, 2 P. Wms. 243.

The feme gave a bond to her intended huſband, that in caſe of their marriage ſhe would convey her lands to him in fee: the

married

married; the wife died without iſſue, and then the huſband died: it was adjudged, that the bond, though void in law, yet was good evidence of the agreement in equity; and the heir of the huſband ſhould compel a ſpecifick performance againſt the heir of the wife.

## (C) Releaſes of Lands and Hereditaments how they enure: And herein,

### 1. Of Releaſes that enure by way of *Mitter le Eſtate.*

RElеaſes, ſays my Lord *Coke*, may enure four manner of ways: 1. By way of *mitter le eſtate*. 2. By way of enlargement or creation of eſtate; upon both which a rent may be reſerved. 3. By way of *mitter le droit*. 4. By way of extinguiſhment; upon which two laſt no rent can be reſerved. Co. Lit. 193. b. 273. b.

When two or more become ſeiſed of the ſame eſtate by a joint title, as by a contract or deſcent as joint-tenants or coparceners, and one of them releaſes to the other his or her claim, right, and pretenſions, ſuch releaſe is ſaid to enure by way of *mitter le eſtate*. Co. Lit. 273. b.

For if there be two joint-tenants, and one of them releaſe to the other, the releaſee is in by the original conveyance; and ſuch releaſe is no alienation, nor doth it make (*a*) a degree (*b*); nor can this be any injury to a ſtranger's *præcipe*, for he may bring it againſt them all, and if any of them diſclaim, the reſt muſt defend for the whole, or loſe their intereſt. Co. Lit. 273. b. (*a*) But, if there are three joint-tenants, and one releaſes to another of them, ſuch releaſe makes a degree. Co. Lit. 273. b. Winch, 3.——So does the releaſe of one coparcener to another. Co. Lit. 273. b. (*b*) Booth, 33.

And herein it is to be obſerved, that joint-tenants can only regularly paſs their eſtates by releaſe; and that by reaſon of the privity which muſt neceſſarily be in releaſes which enure by way of *mitter le eſtate*, a fee-ſimple paſſes without the word *heirs*. *Vide* title Joint-tenants.

But, if there be two tenants in common, they cannot releaſe to each other, but they muſt paſs their eſtate by feoffment, &c. becauſe this eſtate being eſtabliſhed by different notorieties, each having paſſed by diſtinct liveries, they muſt paſs to each other by a diſtinguiſhing livery, elſe it cannot be known in whom ſuch parts are as formerly had paſſed by a diſtinct livery. *Vide* title Joint-tenants and Tenants in Common.

As to coparceners, they having in reſpect of the deſcending one diſtinct eſtates, they may paſs the ſame by feoffment, &c. or may releaſe to each other, and ſhall join in an aſſiſe, as each is ſeiſed *per my & per tout*. *Vide* title Coparceners.

If there are two coparceners, and the one enters in the name of both, and the other releaſes to him, this countervails entry and feoffment, and is good cauſe of voucher; but where one enters in his own name only, and claims to him alone, and the other releaſes to him, this is only an extinguiſhment of the right, and no taking of the eſtate. 21 E. 3. 27. Bro. Releaſes, 16. 2 Roll. Abr. 403.

Co Lit. 273. b. Raym. 413. cited.

If there be two parceners of a rent, and one of them marry the tertenant, and the other releaſe to her, this ſhall enure by way of *mitter le eſtate*, and yet the rent was ſuſpended at the time of the releaſe: but if ſhe had releaſed to the huſband, it would have enured by way of extinguiſhment.

2 Roll. Abr. 403. Ley, 167.

One joint-tenant of a reverſion depending on a leaſe for life may releaſe to the other; but, if the rent be arrear, the one cannot releaſe his intereſt in the arrearages to the other.

2 Roll. Abr. 409. 2 Roll. Rep. 398. 485. Euſtace v. Scawen.

If *A.* feme ſole and *B.* are jointenants for life, and *A.* takes *C.* to huſband, and after *A.* and *C.* levy a fine to *B.* by which they grant the land to *B.* & *quicquid habent*, &c. and his aſſigns, with warranty, and after *B.* dies, living *A.*, yet the leſſor may enter into the whole, and there ſhall not be any occupant of any part, becauſe this fine enures as a releaſe, not by *mitter le eſtate*, but by way of extinguiſhment.

Winch, 3. Waſe v. Preſty.

If one joint copyholder releaſe to his companion; this is good without ſurrender or admittance, for the firſt admittance was of them and every of them, and the ability to releaſe was from the firſt conveyance and admittance.

Winch, 3.

If land be given to two upon condition that they ſhall not alien, and one of them releaſe to the other, this is no breach of their condition.

Vaugh. 45.

If two joint-tenants in fee let the land for life, reſerving a rent to them and their heirs; if one releaſe to the other and his heirs, this releaſe is good, and he only, to whom it was made, ſhall have the rent of tenant for life, and a writ of waſte without attornment to ſuch releaſe, for the privity which was once between the tenant for life and them in the reverſion.

2 Jon. 136. Raym. 413. Harriſon v. Beiſey. Vent. 345. S. C. but ſays it was adjudged that the contingent remainders were deſtroyed.—** See Fearne on Contingent Remainders, 3d edit. 259, &c. **

*A.* and *B.* joint-tenants for their lives, remainder to the firſt ſon of *A.* in tail, and ſo to the ſecond, &c. remainder to the right heirs of *B.* Before any iſſue had *A.* releaſes to *B.* and his heirs, and after hath iſſue a ſon; and the queſtion was, If by this releaſe before the birth of a ſon the contingent remainders were deſtroyed? And though it was urged that this uniting of the eſtate for life with the remainder in fee, being by conveyance and act ſubſequent to the limitation of the contingent remainders, and before they came in being had deſtroyed them; yet it was adjudged by three judges againſt *Dolben*, that theſe contingent remainders were not deſtroyed, for that to ſome purpoſes the whole fee was executed in *B.* immediately upon the firſt conveyance, and this releaſe of *A.* gave him no greater eſtate nor in any other degree than he had before, for after ſuch releaſe he is in of the whole eſtate by the leſſor, as he was before, and as he would have been had it come to him by ſurvivorſhip.

2. Releaſes by way of *Mitter le Droit* how they enure.

Co. Lit. 274. 276.

Releaſes are ſaid to enure by way of *mitter le droit* where a perſon is diſſeiſed, and he releaſes to the diſſeiſee, his heir or feoffee, who being in poſſeſſion are therefore capable of taking a releaſe of the right.

If there be two diſſeiſors and the diſſeiſee releaſe to one of them, he ſhall hold out his companion, becauſe the diſſeiſor comes in by no lawful or eſtabliſhed act of notoriety, which ought to be defeated before the manner of poſſeſſing can be altered; and therefore though he poſſeſſed as a joint-tenant before the releaſe, yet, after the releaſe, he ſhall ouſt his companion, becauſe he was poſſeſſed of the whole before by wrong, and now being poſſeſſed by right, it follows, that the poſſeſſion of the other wrong-doer is no poſſeſſion at all. Lit. ſect. 472.

But, if a diſſeiſor had enfeoffed two, the releaſe of the diſſeiſee to one ſhould enure to both (*a*), becauſe coming in by the legal notoriety of a feoffment, that muſt be defeated by an act of equal notoriety before the title can be altered, becauſe the feoffment muſt ſtand good as an act that gives warning to all perſons in whom the freehold ſubſiſts, till by ſome act of equal ſolemnity it appears that the freehold is in another. Co. Lit. 276. a.

(*a*) That the feoffees are in by title, and are preſumed to have a warranty, which is much favoured in law. Co. Lit. 276.

So, where a diſſeiſor makes a leaſe for life, the remainder in fee, and the diſſeiſee releaſes to the tenant for life, or to the remainder-man; this enures to them both, becauſe coming in by a known conveyance, it cannot be altered unleſs it were defeated by an act of equal notoriety. Co. Lit. 274-5.

If a diſſeiſor makes a leaſe for life, and the diſſeiſee releaſes to tenant for life, this ſhall not enure to him in reverſion, becauſe the releaſe cannot alter the eſtate that paſſed by the feoffment without ſome act that deſtroys the feoffment. Co. Lit. 276.

So, if there be two diſſeiſors, and they make a leaſe for life, and the diſſeiſee releaſe to tenant for life, this ſhall enure to them all. Co. Lit. 276.

If there be tenant for life, the remainder in fee, and tenant for life be diſſeiſed by two, and he releaſe to one of them, he ſhall not hold out his companion. So, if the remainder-man had releaſed to one of the diſſeiſors, he ſhould not hold out his companion. Co. Lit. 276.

But, if tenant for life and he in remainder join in a releaſe to the diſſeiſor, he ſhall hold out his companion, becauſe when the poſſeſſion is notoriouſly in them both, each of them are capable of releaſe, and when one has obtained a releaſe, it makes his poſſeſſion rightful, and his holding out his companion makes it immediately notorious that the eſtate is in him alone. Co. Lit. 276.

So alſo, if the diſſeiſors make a leaſe for years, and the diſſeiſee releaſes to one of them, this ſhall enure to them both, becauſe he cannot make it notorious that the eſtate is in him alone, becauſe he cannot hold out his companion during the continuance of the leaſe for years. Co. Lit. 276.

So, if two joint-tenants are diſſeiſed by two, and one releaſes to one of them, he ſhall not hold out his companion, becauſe he cannot hold him out of the whole, becauſe he has not the whole right, and ſo there can be no act of notoriety whereby the eſtate may appear to be in one diſſeiſor. Co. Lit. 276.

Co.Lit.277. * There is not any ſuch poſition in ſo. 277. either a or b. If the king's tenant for life be diſſeiſed by two, and he releaſe to one of them, this enures to both, becauſe he can only be diſſeiſed of an eſtate for life ſince the reverſion in the king cannot be diveſted *.

—— In 276. a. it is ſaid, if the king's tenant for life be diſſeiſed by two, and he releaſe to one of them, he ſhall hold out his companion, for the diſſeiſor gained but the eſtate for life.

Co.Lit.276. If there be tenant for life, remainder in fee, and they be diſſeiſed, tenant for life cannot releaſe to him in remainder, becauſe the naked right cannot be transferred.

Co.Lit. 276. & Co. 152. If the heir of the diſſeiſor be diſſeiſed, and the diſſeiſee releaſe to ſuch diſſeiſor, and after the heir recover againſt ſuch diſſeiſor, the right of propriety goes along with it, becauſe, when the heir recovers, he defeats the poſſeſſion of the diſſeiſor as if it had never been, ſo that the diſſeiſor can never recover in any action; for in the writ of right he muſt lay the poſſeſſion in himſelf or ſome of his anceſtors; and this he cannot do in this caſe, for here there never was any poſſeſſion in him but what was totally defeated and deſtroyed; and he cannot recover by the old poſſeſſion of the diſſeiſee, for that was turned into a naked right, which could not be transferred but to a true and real poſſeſſion; and here being no poſſeſſion but ſuch as ſtands defeated, it is the conveyance of a naked right, which the law will not allow.

Co.Lit.277. If the heir of the diſſeiſor be diſſeiſed, and the diſſeiſee releaſe to the diſſeiſor upon condition, and the condition be broken, this reveſts the naked right in the diſſeiſee, becauſe when the condition is broken the releaſe is as if it had never been, and therefore the diſſeiſee may recover by virtue of his ancient ſeiſin.

Co.Lit. 276. If two men gain an advowſon by uſurpation, and the right patron releaſes to one of them, he ſhall not hold out his companion, but it ſhall enure to them, for their clerk came in by admiſſion and inſtitution, which are judicial and notorious acts.

### 3. Releaſes that enure by way of Extinguiſhment.

Co.Lit.279. b. 280. In ſome caſes where the releaſee cannot have the thing releaſed by way of *mitter le droit*, &c. yet the releaſe ſhall enure by way of extinguiſhment againſt all manner of perſons: as, when the lord releaſes his ſeignory to his tenant of the land, or, when the grantee of a rent-charge or common releaſes to the tenant. All ſuch releaſes abſolutely extinguiſh the rent, &c. although the leaſee be only tenant for life.

Lit. ſect. 456. If a leaſe be made to one for life, reſerving rent to the lessor and his heirs; if the leſſee be diſſeiſed, and after the leſſor releaſe to the leſſee and his heirs all his right in the land, and after the leſſee enter; in this caſe, the rent is extinct, but the right of the reverſion doth not paſs.

Lit. ſect. 454. If there be lord and tenant, and the tenant be diſſeiſed, and the lord releaſe to the diſſeiſee all the right which he has to the ſeignory or in the land, this releaſe is good, and the ſeignory extinct.

But yet, if the tenant, notwithſtanding he is diſſeiſed, puts his beaſts on the land, and the lord takes them for rent arrear, the diſſeiſee ſhall compel * him to avow on him; and if the lord avows upon the diſſeiſor as his tenant, and the diſſeiſee reply and ſhew the ſpecial matter how he was tenant and was diſſeiſed, this ſhall abate the lord's avowry †. Co. Lit. 268. Lit. ſect. 454.

* See the ſtat. 21 H. 8. c. 19. & Co. Lit. 268. b.

† For the diſſeiſee is tenant to him in right and in law.

But, if the tenant be diſſeiſed, and the lord accept rent from the diſſeiſor, and then the lord diſtrain his beaſts for rent in arrear, he may compel the lord to avow on him, and the lord cannot traverſe the diſſeiſor's title, having once admitted it by acceptance of the rent from him. Co. Lit. 268.

And according to my Lord *Coke*, if after ſuch acceptance the diſſeiſee ſhould put in his beaſts, and the lord ſhould diſtrain them, the diſſeiſee cannot compel the lord to avow on him, becauſe it was his own laches to let the diſſeiſor continue till rent was due and accepted. Co. Lit. 268. b. [But 48 E. 3. 9. ſeems to the contrary, becauſe when the tenant pleads the diſſeiſin to compel the lord to avow upon him, it is ſtrange, that the lord, by his own act of acceptance, ſhould maintain his avowry, and deſtroy the feudal contract. Gilb. Ten. 64, 65.]

So, if the diſſeiſor dies ſeiſed, the heir of the diſſeiſor comes in by title, and then the diſſeiſee cannot compel him to avow upon him, for he has loſt the right of poſſeſſion; and the diſſeiſee cannot put his beaſts on the ground, and therefore cannot compel the lord to avow on him, and therefore the lord muſt take the heir who has ſuch right of poſſeſſion to be his rightful tenant; but becauſe the diſſeiſee may enter and occupy the land before the deſcent caſt, therefore the lord may releaſe to him and diſcharge the contract, which is to his benefit, and is ſtill ſo far ſubſiſting that he may take advantage of it. Co. Lit. 268.

So, where donee in tail releaſes to the diſſeiſor all his right, yet if he in the reverſion releaſes to him afterwards, it ſhall extinguiſh the rent. Co. Lit. 280.

There is a diverſity between a ſeignory and a bare right to land, for a releaſe of a bare right to land to one who has but a bare right, is void; but a releaſe of a ſeignory to him who has but a right, is good to extinguiſh the ſeignory. Co. Lit. 268.

But, if there be lord and tenant, and the tenant make a feoffment in fee, and afterwards the lord releaſe to the feoffor; this extinguiſhes nothing, for by the feoffment the relationſhip between the lord and tenant is deſtroyed, and the feoffor only of neceſſity becomes tenant in the avowry till the lord procures his arrears. Co. Lit. 269. Lit. ſect. 457.

If a feme meſne marries her tenant, and the lord releaſes to the feme, the ſeignory is extinct; but, if he releaſes to the huſband, both the ſeignory and meſnalty are extinct. Co. Lit. 280.

If the tenancy be given to the lord and a ſtranger, and the heirs of the ſtranger, and the lord releaſe all his right to his companion; this not only paſſes his eſtate in the tenancy, but alſo extinguiſhes his right in the ſeignory. Co. Lit. 280.

Co. Lit. 275. If leſſee for years be ouſted, and he in the reverſion diſſeiſed, and the leſſee releaſe to the diſſeiſor, the diſſeiſee may enter, for the term for years is extinct and determined. But, were it in the caſe of a leſſee for life, it would be otherwiſe, becauſe the diſſeiſor has a freehold whereupon the releaſe of tenant for life may enure.

Jon. 389. Johnſon v. Trumper. Leſſee for years deviſed the term to his wife for life, the remainder of the years to *J. S.* who by deed releaſed all his right, intereſt, term for years, poſſeſſion, and demand in the ſaid land to him who had the reverſion in fee; and by this, it was held, that the poſſeſſion was extinguiſhed in the reverſion, and that the reverſioner may after the death of the wife well enter.

Moor, 56. pl. 161. *per cur.* If the lord releaſes his right in one acre, this extinguiſhes the whole ſeignory.

Dalſ. 60. & v. And. 235.

Bro. Releaſes, pl. 18. So, if a man has a rent-charge out of twenty acres, and he releaſes all his right in one acre, this extinguiſhes all the rent.

Co. Lit. 148. & *vide* Cro. Eliz. 742. But it hath been held, that if the grantee of a rent-charge releaſes part of his rent, ſuch releaſe does not extinguiſh the whole rent.

Dyer, 157. b. pl. 29. If the lord releaſes to his tenant all his right to the land and ſeignory, *ſalvo ſibi dominio ſuo*; this does not extinguiſh the tenure, but only the annual ſervices.

## 4. Releaſes that enure by way of Enlargement: And therein, of the modern Manner of Conveyancing by Leaſe and Releaſe.

Co. Lit. 273. Finch, 44. 5 Co. 124. Dyer, 302. (*a*) Poſſeſſion countervails, and is equal to livery. Releaſes enure by way of enlargement when the poſſeſſion and inheritance are ſeparated for a particular time, and he who hath the reverſion or inheritance releaſeth to the tenant in poſſeſſion all his right or intereſt in the land. Such releaſe is ſaid to enlarge his eſtate, and to be equal to an entry and feoffment, and to amount to a grant and attornment. And herein the law requires privity of eſtate, that the releaſor have a right, and the releaſee ſuch a (*a*) poſſeſſion as will make him capable of taking an eſtate.

Dyer, 269. pl. 20. margin.

Co. Lit. 273. 2 Rol. Abr. 401. And therefore if there be leſſee for life or years in poſſeſſion, the leſſor may enlarge their eſtates by releaſe. So, if they aſſign or grant over, the eſtate or intereſt of grantee or aſſignee may be enlarged by the releaſe of him in reverſion.

44 Aſſ. 35. but *vide* Brownl. 207. So, if there be a leſſee for life, remainder in tail, the remainder in fee; he in remainder in fee may enlarge the eſtate of the leſſee by releaſe notwithſtanding the meſne remainder.

Co. Lit. 272. But, if *A.* makes a leaſe for life, and leſſee for life makes a leaſe for years, and *A.* releaſes to the leſſee for years and his heirs; this is void, becauſe there is not the conſent of the tenant for life, who is immediate tenant to the reverſioner, and ought to attorn to his grants.

Co. Lit. 270. Dyer, 4. pl. 2. Carter, 62. So, if a man leaſes for twenty years, and the leſſee aſſigns for ten years, a releaſe by the reverſioner to the aſſignee is void for wa

want of privity. But a releaſe to the leſſee is good, for he hath the poſſeſſion notwithſtanding the aſſignment; the poſſeſſion of the leſſee being always conſidered the poſſeſſion of the leſſor, and that he holds as his bailiff.

If a man makes a leaſe for years, the remainder for life, and afterwards releaſes to the tenant for years; this is good, becauſe the tenant for years holds of the reverſioner, and pays him the ſervices, and ought to attorn to his grants, and not he in the remainder for life; and therefore where tenant for years accepts a releaſe of the reverſion, it muſt in conſequence be good. And in this caſe a releaſe to him in the remainder for life would be good likewiſe, becauſe the leſſee in the original creation took the eſtate for years, ſubject to ſuch remainder for life, and therefore there needs no conſent from the leſſee for years to enlarge the eſtate. Co.Lit.273.

If tenant by the curteſy grants over his eſtate, he is not afterwards capable of taking a releaſe, for his eſtate is created merely by law, and he remains tenant to the heir, and ſubject to waſte, and is compellable to attorn to the grants of the reverſioner; yet is he not capable of a releaſe, becauſe he has no notorious poſſeſſion *in pais*, which may be enlarged into a fee. Co. Lit. 273. a.

But the grantee of tenant in dower, or by the curteſy, is capable of taking a releaſe, becauſe of the privity and notoriety of poſſeſſion. 2 Roll. Abr. 400-1.

If a feme covert be tenant for life, a releaſe to the huſband and his heirs is good, for there is both privity and an eſtate in the huſband, whereupon the releaſe may ſufficiently enure by way of enlargement, for by the intermarriage he gains a freehold in right of his wife. Co. Lit. 273. b. Keilw. 129. pl. 97.

If an infant makes a leaſe for life, and the leſſee aſſigns it over to another with warranty, the infant at full age brings a *dum fuit infra ætatem* againſt the aſſignee, and he vouches the aſſignor, who enters into the warranty, the demandant cannot releaſe in fee ſo as to enlarge the eſtate, becauſe the vouchee has no poſſeſſion. Co Lit. 273. a. b.

But he who aliens pending the writ may, as long as that writ is pending, accept a releaſe from the demandant. So may a vouchee after he hath entered into the warranty, for though they be not tenants, yet the law and the parties have allowed them as tenants *inter ſe* for that ſuit. Lit. ſect. 490. Co. Lit. 266. 284. b. Hob. 338.

If a man makes a leaſe for life, the remainder for life, and the firſt leſſee dies, a releaſe to him in the remainder, and to his heirs, is good before he enters to enlarge his eſtate, becauſe he hath an eſtate of freehold in law in him, which may be enlarged by releaſe before entry. Co. Lit. 270. b.

But at common law, a releaſe to a leſſee for years before entry is void: yet it is ſaid by my Lord *Coke*, that if a man makes a leaſe for years, the remainder for years, the firſt leſſee enters, a releaſe to him in the remainder for years is good to enlarge his eſtate. Co. Lit. 270.

Co. Lit. 270. b.

And if a leaſe for years be made to two, albeit the leſſor before they enter cannot releaſe to them to enlarge their eſtate, yet one of them may before entry releaſe to the other.

Jon. 19. (a) If a man ſeiſed of a rent in fee grants it for life, he may enlarge it by releaſe.

If an (a) advowſon be granted for years, the patronage for years is in the grantee, and he may accept a releaſe in fee of the patron. But, if one, two, or three avoidances are granted, the patronage is not ſeparated, nor can ſuch grantee accept of a releaſe in fee of the patron in fee who hath the inheritance. 43 Aſſ. 8. 2 Roll. Abr. 400.

8 H. 6. 1. Bro. Releaſes, pl. 62. 2 Rol. Abr. 403.

If *A.* a member of a corporation, diſſeiſe *B.* to his own uſe, or, if a mayor and commonalty diſſeiſe *B.*, and *B.* in the firſt caſe releaſe to the mayor and commonalty, or, in the ſecond, to a particular member of the corporation; nothing paſſes by theſe releaſes, for they are diſtinct perſons, and claim in different rights, conſequently, there is no privity.

31 Aſſ. 13. 2 Rol. Abr. 401. (b) So, of a tenant by ſtatute merchant or ſtaple.

If a man ſues execution upon an (b) *elegit* of the lands of his debtor, and the debtor who hath the inheritance confirms his eſtate, he may afterwards enlarge it by a releaſe, for the confirmation hath created a privity between them. Co. Lit. 270. b.

Co. Lit. 270. Lit. ſect. 460. Dyer, 269. b. pl. 20. Owen, 28, 29. S.P. and that ſuch leſſee ſhall have aid.

A releaſe by a leſſor to his leſſee at will, having entered by force of ſuch leaſe, is good in reſpect of the privity between them, and as it would be a vain thing for the leſſor to make livery and ſeiſin to one already in poſſeſſion of the land by his own agreement.

Cro. Eliz. 830. Shaw v. Barber.

But, if tenant at will makes a leaſe for years, and the leſſee enters, he only is the diſſeiſor, and a releaſe or confirmation to the tenant at will afterwards is void, becauſe the privity is determined.

Co. Lit. 270. b. Dyer, 28. pl. 19.

A releaſe to a tenant at ſufferance, as, where leſſee for years holds over, is void, for though there be a poſſeſſion, yet there is no privity, which is equally requiſite.

Cro. Eliz. 268. 3 Leon. 152. Brownl. 207. Cro. Jac. 170.

Co. Lit. 271. a.

If one enter of his own wrong and takes the profits, his words "to hold it at the owner's will," cannot qualify the wrong, for he is a diſſeiſor, and in ſuch caſe the owner's releaſe to him is good; or, if the owner conſented, he is tenant at will, and in ſuch caſe the releaſe is likewiſe good.

(c) By Sir Francis Moor, 2 Mod. 252. 2 Salk. 678. pl. 5. 2 Ld. Raym. 798. & *vide* 7 Mod. 74.

The ancient manner of conveyancing was by feoffment, but the manner of making livery and ſeiſin begetting many nice queſtions grew troubleſome, which put lawyers upon new devices, and introduced the modern manner of conveyancing by leaſe and releaſe. This method is ſaid to have been firſt (c) invented in King *Charles* the Firſt's reign, and has its validity from the reaſons drawn from the ſtatute of uſes; for, by the bargain and ſale for a year, the bargainee by force of the ſtatute is in poſſeſſion without entry

and when the bargainor releaſes to him in poſſeſſion, the leaſe is merged, and the bargainee hath the inheritance. For, as at common law, if a man granted a leaſe, and the leſſee entered, this divided the eſtate, and left a reverſion in him, and the poſſeſſion in the leſſee; but ſtill, by the common law, the leſſee (*a*) before entry could not accept of a releaſe, having only an *intereſſe termini*; and now though the leſſee does not enter, yet the ſtatute veſting the eſtate or uſe in him for a year, he is deemed to be in the actual poſſeſſion, and ſo capable of a releaſe as much as a leſſee in poſſeſſion was at common law. But yet this leſſee cannot have treſpaſs till an actual entry.

(*a*) Lit. ſect. 459. 5 Co. 124. Plow. 423.

Leſſee for years cannot make a leaſe for years within the ſtatute of uſes, ſo as by this means to give the poſſeſſion, and make his leſſee capable of a releaſe of the reverſion. Lutw. 570. 7 Mod. 73.

In ejectment upon a ſpecial verdict the only queſtion was, whether a leaſe for a year upon no other conſideration than reſerving a pepper-corn, if it be demanded, could operate as a bargain and ſale, and ſo make the leſſee capable of a releaſe? And reſolved that it ſhould, the reſervation making a ſufficient conſideration to raiſe an uſe in the ſame manner as a bargain and ſale does. Mod. 262. 2 Mod. 249. 2 Vent. 35. Barker v. Keate.

A releaſe to *ceſtui que uſe* is good: ſo, to a *ceſtui que truſt*, who being in poſſeſſion, may at leaſt be conſidered as tenant at will. Godb. 299. Hard. 491. Carter, 162.

5. What Eſtate or Intereſt paſſes by the Releaſe: And therein, of the Words requiſite to an Enlargement.

Releaſes, like other conveyances, regularly require words of inheritance; ſo that if the leſſor releaſe to his leſſee for years, without ſaying to him and his heirs, ſuch leſſee hath only an eſtate for his life. Lit. ſect. 465. Co. Lit. 273. b. Jenk. 200. Jon. 328. Cro. Car. 335.

So, if a releaſe be made to tenant by ſtatute ſtaple or merchant or *elegit*, by him in the reverſion of all his right in the land; by this a freehold paſſes for the life of the releaſee, it being the greateſt eſtate that can paſs without apt words of inheritance. Co. Lit. 273. b. 2 Vent. 328.

If a leſſor releaſe to his leſſee *pur auter vie*, he gives him an eſtate for his own life. Co. Lit. 275. b.

A chauntry prieſt incorporate took a leaſe to him and his ſucceſſors for 100 years, and afterwards took a releaſe from the leſſor to him and his ſucceſſors; and it was adjudged, that by the releaſe he had but an eſtate for life, for he had the leaſe at firſt in his natural capacity, for that it could not go in ſucceſſion; and the words *his ſucceſſors* could not give him an eſtate of inheritance in the ſame capacity he had the leaſe, for want of the words *his heirs*. Comp. Incumb. 373.

But, if the lord releaſes all his right to the tenant, the ſeignory is extinct without the word *heirs*; for this inſtrument is to diſcharge the eſtate of the tenant, and therefore has a neceſſary relation to the eſtate which the lord at firſt created, and, conſequently, it refers to thoſe words that in the original of the eſtate gave him a fee-ſimple. Co. Lit. 9. Coke R. on Fines, 7.

So,

Co. Lit. 9. 292. So, in releaſes that enure by way of *mitter le eſtate*, the word *heirs* is not requiſite; as, where there are two coparceners, and one of them releaſes to the other, this gives a fee without the word *heirs*, becauſe it hath a neceſſary relation to the eſtate whereof the other was ſeiſed.

Co. Lit. 9. 200. So, if there be two joint-tenants, and one releaſe to the other, this paſſeth a fee without the word *heirs*, becauſe it refers to the whole fee, which they jointly took and are poſſeſſed of by force of the firſt conveyance. But tenants in common have diſtinct eſtates, and cannot enlarge the eſtates of each other without proper words of inheritance (*a*).

[(*a*) But tenants in common cannot releaſe to each other, the freehold being ſeveral.]

And. 45. If lands be given to baron and feme, and a ſtranger in fee, and the ſtranger releaſe to the (*b*) baron; this gives him the fee without other words of inheritance.

(*b*) *Secus*, had the releaſe been made to the wife. Dyer, 265. a. pl. 34.

Co. Lit. 274. A releaſe by one of a bare right for a day or an hour is as good as if it was made to the other and his heirs; for the diſſeiſee cannot releaſe part of his eſtate in the right, becauſe he has no right to any eſtate, but that whereof he was ſeiſed, therefore he muſt releaſe his right to that, or none at all.

## (D) Who in reſpect of their Right or Intereſt are capable of releaſing.

Co. Lit. 265. b. Roll. Rep. 197. 3 Bulſt. 31. A Bare authority cannot be releaſed; as, where a man by will directs that his executors ſhall ſell his lands; this being a power only, and no matter of intereſt in the executor, he cannot (*c*) releaſe it to the heir.

(*c*) So, if *ceſtui que uſe* had deviſed that his feoffees ſhould ſell the land, and they had made a feoffment over, yet might they have ſold the uſe. Co. Lit. 265. b.

Co. Lit. 237. 265. Co. 110. 4 Leon. 133. But, though theſe powers in ſtrangers cannot be releaſed, yet a power of revocation in the feoffor or party from whom the eſtate moved may be releaſed by deed, or by levying a fine, which is a releaſe in law; for it is in nature of a condition, whereby he may reſtore himſelf to his former eſtate whenever he pleaſes, and conſequently, ſuch power, like other reſervations, may be releaſed.

21 E. 4. 40. 2 Roll. Abr. 401. After one has found ſurety of the peace, all the king's ſubjects have an intereſt in it, and neither the king nor party againſt whom it is found can releaſe it.

18 H. 6. 23. 2 Roll. Abr. 402. In treſpaſs or *detinue* by the villein, the releaſe of the lord is a good bar.

19 H. 6. 64. 2 Roll. Abr. 402. If a commonalty be diſſeiſed, and after every one releaſe for himſelf, it is not good, becauſe it ought to be by their common ſeal.

Noy, 5. Albany v. Manny. A perſon who procures an outlawry in debt may releaſe the party; for the releaſe is a ſatisfaction to him; and the outlawry

in this caſe being pardoned by act of parliament, the party is abſolutely diſcharged.

If *A.* covenants with *B.* that *C.* ſhall pay to *D.* 8 *l.* yearly, and *D.* takes *J. S.* to huſband, who releaſes the payment to *A.*; this releaſe does not diſcharge him, for *J. S.* is a ſtranger to the covenant, and hath no right in him. 3 Bulſt. 29. Roll. Rep. 196. 2 Roll. Abr. 402. Quick v. Ludburrow.

If *A.* has judgment againſt *B.* for debt or damages, and after extends the land of *B.* for this debt, and then aſſigns over the land extended to *C.* for all his eſtate therein, and after *A.* releaſes to *B.* the judgment; this ſhall avoid the extent, ſo that *B.* may have an *audita querela* againſt *C.* the aſſignee, and therein ſhall (*a*) avoid the extent, becauſe *A.* notwithſtanding the aſſignment, continues privy to the judgment, and might after the aſſignment have acknowledged ſatisfaction of the judgment, and ſo defeat the eſtate of the aſſignee. And this releaſe is all one as if he had acknowledged ſatisfaction of the judgment. 2 Roll. Abr. 402. Jon. 238. Cro. Car. 214. Flower v. Elgar. (*a*) Q. If there may not be relief in equity? *Vide* Vern. 50.

If one joint-tenant of a rent in fee releaſes all his right, yet this does not paſs the moiety of his companion (*b*); but in perſonal actions one joint-tenant may releaſe the whole; but, if the perſonalty be mixed with the realty, it is otherwiſe. 21 E. 3. 58. 2 Roll. Abr. 411. (*b*) 2 Co. 68.

A releaſe by the common vouchee is no bar, for he renders nothing, and can be at no loſs. Cro. Eliz. 2, 3.

So, if the plaintiff in ejectment, who is a mere nominal perſon and truſtee for the leſſor, releaſe the action; or, if an action be brought in his name for the meſne profits, and he releaſe it, this in either caſe is no bar; but from the power the courts now exerciſe of regulating all proceedings in theſe actions, is ſuch a contempt for which the party may be committed. Raym. 93. Skin. 247. pl. 1. Comb. 8. Salk. 260. pl. 15.

If a leſſor after aſſignment of the reverſion releaſe to the leſſee all covenants and demands, yet the aſſignee may have an action of covenant for rent due after the aſſignment, for it runs with the reverſion at common law, before the *ſtat.* 32 *H.* 8. (*cap.* 34.) and paſſes by the grant of the reverſion, and therefore the leſſor could not releaſe it after the aſſignment. 2 Jon. 102. 2 Lev. 206. Harper v. Bird. Cro. Car. 503. L. P.—that a creditor after an aſſignment of his debt cannot releaſe the debtor. 2 Chan. Ca. 169.

If by preſcription the inhabitants of ancient meſſuages in a certain vill are entitled to have common within the vill by reaſon of their commorancy, ſuch common cannot be releaſed, for though one inhabitant ſhould releaſe it, a ſucceeding one might claim it *. Cro. Jac. 152. Smith v. Gatewood. * *Vide* Gateward's caſe. 6 Co. 60.

* Where ſuch a claim is pleaded as a cuſtom, and adjudged bad in law, for the reaſon in the text, among other reaſons.

If by the cuſtom of a manor the tenants thereof are to chooſe among themſelves one to collect the lord's rents for a year, and ſo on annually; the lord may diſcharge or releaſe a tenant of this burden, but then the others ſhall not be further charged than before, for when it comes to his courſe who is diſcharged, the lord himſelf muſt collect it. 21 E. 4. 45. 47. 2 Roll. Abr. 401-2.

If two churchwardens ſue in the ſpiritual court for a levy towards the reparation of their church, and have ſentence to recover, and coſts aſſeſſed, and after one of them releaſes, yet the other March, 73. Jenk. 305. Cro. Jac. 235.

Yelv. 173. 2 Brownl. 215.

may proceed for the coſts, &c. for churchwardens have nothing but to the uſe of the pariſh, and the corporation conſiſts of both, and one only cannot releaſe or give away the goods of the church.

(a) 3 Bulſt. 110. Roll. Rep. 246. (b) 4 Mod. 305. Comb. 263. (c) Holt's Rep. 660.

A ſervant who (a) diſtrains in right of his maſter, or one who is (b) robbed of his maſter's money, cannot, on an action brought on him on the ſtatute of *hue and cry*, releaſe to the prejudice of his maſter; nor can the (c) ordinary releaſe an adminiſtration bond.

Cro. Eliz. 808.

But a ſheriff may releaſe an obligation taken by him for the appearance of a perſon whom he arreſts.

Lev. 235. Offley v. Ward. Lit. Rep. 149. L. P.

In debt on a ſingle bill made to *A.* to the uſe of him and *B.* the defendant pleads a releaſe made to him by *B.*, on which the plaintiff demurs; and without difficulty it was adjudged for the plaintiff; for *B.* is no party to the deed, and therefore can neither ſue nor releaſe it; but it is an equitable truſt for him, and ſuable in Chancery if *A.* will not let him have part of the money; and the book of *E.* IV. cited to prove that he might releaſe in ſuch a caſe, was denied to be law.

## (E) Of Releaſes by Executors and Adminiſtrators.

5 Co. 28. Off. Exec. 33. Plow. 281.

AN executor may, before probate of the will, releaſe a debt due to the teſtator, for he derives his authority from the teſtator, and not from the act of the ordinary; in like manner may he pay debts, and take releaſes, &c.

39 E. 3. 26.

And it hath been held, that if an executor releaſes all actions, this will extend as well to actions which he hath in his own right, as to thoſe which he hath as executor (d); but yet in ſome caſes ſuch general words may, according to the intention of the parties, be reſtrained.

(d) *Vide infra.*

*Vide* title Executors and Adminiſtrators.

If there be two executors, and one of them releaſe a debt due to the teſtator, this ſhall bind both, for each hath an entire authority and intereſt different from other joint-tenants; and hence it is held, that, if one executor releaſe to his companion, nothing paſſes thereby, becauſe each was poſſeſſed of the whole before.

Dyer, 319. pl. 15. Cro. Car. 420.

But, if there be two executors, and one of them refuſe to join in action, upon which he is ſevered, after ſuch ſeverance he cannot releaſe the action.

Paſ. 11 G. 2. in B. R. Williams v. Pen. —— In the caſe of Hudſon v. Hudſon, M. 1737. in Canc. Lord Hardwicke

In the caſe of *Williams* v. *Pen*, it was adjudged in *B. R.* that if there be two adminiſtrators, and one of them releaſe a bond due to the inteſtate, that this ſhall bind his companion, and be a good diſcharge to the obligor; as the ſtatute 31 *E.* 3. *cap.* 11. gives an adminiſtrator the ſame power over debts due to an inteſtate as an executor had, and as an adminiſtrator by releaſing without conſideration is equally liable to a *devaſtavit* with an executor.

was of a contrary opinion, on the difference the law makes between an executor and an adminiſtrator, the former coming in not by the act of the ordinary, but by the will of the teſtator, conſequently, has authority and intereſt in the aſſets greater, &c. [The law, however, is as ſtated in the text; the opinion of Lord Hardwicke in Hudſon v. Hudſon was applicable only to the particular circumſtances of the caſe. Jacomb v. Harwood, 2 Ver. 265.]

An infant executor, upon an actual payment and full ſatisfaction made to him, may releaſe a debt due to his teſtator, but cannot without, for that this would be a *devaſtavit* in him. 5 Co. 27. Co. Lit. 172. And. 177. Moor, 146.

As, if a bond be forfeited, and the infant executor only receive the principal ſum without the penalty, and give a general releaſe of all the debt; this releaſe at law is no bar of the penalty *. Cro. Car. 490. Kniveton v. Latham.

* But now, ſince ſtat. 4 Ann. c. 16. whereby the penalty is ſaved on payment of principal and intereſt, qu. if principal and all intereſt be paid to ſuch infant executor, if his releaſe will not operate as in the preceding caſe?

If an executor releaſe a debt due to the teſtator, this ſhall charge him to the value of the debt, though perhaps he did not receive near ſo much as was due; but, if he releaſe an account, this reſting in uncertainty, he cannot be charged with more than he actually receives. Hob. 66. Cro. Eliz. 43. And. 138.

If an executor voluntarily releaſe a debt, he ſhall not be relieved againſt it in equity, although a creditor may. Vern. 455.

It hath been held in Chancery, that if there are two executors, and they join in a receipt, and one only receives the money, that as to creditors, who are to have the utmoſt benefit of the law, each is liable for the whole though one executor alone might releaſe, and the joining the other was unneceſſary; but as to legatees, and thoſe claiming diſtribution, who have no remedy but in equity, the receipt of one executor ſhall not charge the other, for the joining in the receipt is only matter of form; the ſubſtantial part is the actual receiving, and this only is regarded in conſcience. Salk. 318. pl. 26. *per* Lord Harcourt.

## (F) How far the Huſband's Releaſe ſhall bind the Wife.

BY the intermarriage the huſband acquires ſuch an intereſt in all debts due to the wife, that he may releaſe them, and ſuch releaſe ſhall bind the wife. 17 E. 3. 66. 2 Roll. Abr. 410.

Baron alone may releaſe waſte done by leſſee for life before coverture, upon a leaſe made by the feme. 42 E. 3. 18. 2 Roll. Abr. 402.

So, all rights accruing to the wife during coverture may be releaſed by the huſband. Salk. 115. pl. 4. Ld. Raym. 73.

The huſband may releaſe the wife's right under the ſtatute of diſtributions. Lucas, 63.

If a huſband and wife are divorced *a menſa & thoro*, and a legacy is left to her, the huſband may releaſe it. Moor, 665. Cro. Eliz. 908. Noy, 45.

So, where a legacy was given to a feme covert who lived ſeparate from her huſband, and the executor paid it to the feme, and took her receipt for it; yet, on a bill brought by the huſband againſt the executor, he was decreed to pay it over again with intereſt. Vern. 261.

If a feme covert ſues a woman in the ſpiritual court for adultery with her huſband, and obtains a ſentence againſt her and coſts, the huſband may releaſe thoſe coſts, for the marriage continues, Salk. 115. pl. 4. *per* Holt, C. J. Ld. Raym. 73.

tinues, and whatever accrues to the wife during coverture belongs to the huſband.

Roll. Rep. 426. Roll. Abr. 343. 3 Bulſ. 264.

But, if the huſband and wife be divorced *a menſa & thoro*, and the wife have her alimony, and ſue for defamation or other injury, and there have coſts, and the huſband releaſe them, this ſhall not bar the wife, for theſe coſts come in lieu of what ſhe hath ſpent out of her alimony, which is a ſeparate maintenance, and not in the power of her huſband.

[See vol. I. p. 476, 7, 8, 9, 10.]

## (G) To whoſe Benefit a Releaſe ſhall enure; and who ſhall be bound thereby though not a Party to the Releaſe.

Co. Lit. 232. Moor, 856. 2 Roll. Abr. 410. Hob. 10. 2 Sid. 41. 2 Salk. 574.

IF two or more are jointly and ſeverally bound in a bond, a releaſe to one diſcharges the others; and in ſuch caſe the joint remedy being gone, the ſeveral is ſo likewiſe.

2 Roll. Abr. 411.

So, if there are two conuſees of a ſtatute, and one of them releaſes to the conuſor; this ſhall extinguiſh the ſtatute as to the other alſo.

17 E. 3. 66. 2 Roll. Abr. 411.

So, if two executors ſell the goods of the teſtator for a certain ſum of money, and take an obligation for the money, the releaſe of one of them ſhall bar both.

Bro. Releaſe, 26.

So, where there are two executors, and one only has the poſſeſſion of the goods which are taken away by a ſtranger; though he only in whoſe poſſeſſion the goods were may bring an action, yet the releaſe of his companion ſhall bar him.

Lit. Rep. 190.

Alſo, if two are bound in an obligation, and the obligee releaſes to one of them, proviſo that the other ſhall not take advantage of it; this proviſo is void.

Moor, 64.

But, if *A.* be bound to *B.* and *C. ſolvend.* the moiety to *B.* and the other to *C.* this is a ſeveral obligation, and the releaſe of one ſhall not prejudice the other.

Cro. Eliz. 408. 470. 2 Salk. 574.

So, where ſeveral enter into ſeveral covenants in the ſame deed, a releaſe to one of the covenantors will not diſcharge the others.

5 Co. 56.

So, if two are bound to the king, and he releaſes to one of them; this will not diſcharge the other.

2 Roll. Abr. 412. Cro. Eliz. 161.

If *A.* and *B.* are named obligors jointly and ſeverally, and *A.* only ſeals the bond, and then the obligee releaſes to *A.*, and after *B.* ſeals the deed; this releaſe ſhall enure to the benefit of *B.* though it was not his deed at the time of the releaſe; for the releaſe does not defeat the deed, but is only a bar by plea, and both were bound for one and the ſame debt, which is ſatisfied by the releaſe.

Co. Lit. 232. Hob. 66. Noy, 62. 5 Co. 97. Brownl. 189. Cro. Jac. 444.

If divers commit a treſpaſs, though this be joint or ſeveral at the election of him to whom the wrong is done, yet, if he releaſes to one of them, all are diſcharged, becauſe his own deed ſhall be taken moſt ſtrongly againſt himſelf. Alſo, ſuch releaſe is a ſatisfaction in law, which is equal to a ſatisfaction in fact. But he who

who would take advantage of ſuch releaſe muſt have the ſame to produce.

If treſpaſs be brought againſt three, and judgment be given againſt one, and the plaintiff enter a *noli proſequi* againſt the other two, if the *noli proſequi* be before judgment, it will diſcharge the whole action. So, if judgment had been againſt all three, and the plaintiff had entered a *noli proſequi* againſt the two, for nonſuit or releaſe, or other diſcharge of one, diſcharges the reſt. Hob. 70. Parker v. Laurence.

In trover againſt two, one pleaded not guilty, and a verdict againſt him; the other pleaded a releaſe, and verdict for him: on motion for judgment againſt him who was found guilty it was denied, becauſe the trover being joint, a releaſe of all actions diſcharged both. 4 Mod. 379. Kiffin v. Willis.

In replevin by *A.* againſt *B.*, *B.* makes conuſance in right of *C.* for *damage-feaſant* to the freehold of *C.*, which is adjudged againſt *A.*, and judgment that *B.* ſhall have return irreplegiable with coſts and damages. In a *ſcire facias* brought by *B.* to have execution of the coſts and damages, if *A.* pleads the releaſe of *C.* in whoſe right conuſance was made of all demands, this is no bar, inaſmuch as *C.* was not party to the ſuit, nor liable to any coſts or damages, had the matter been adjudged againſt *B.*, and therefore *B.* was entitled to the coſts and damages, which *C.* could not releaſe. 2 Roll. Abr. 412. Sibley v. Rawlins. 2 Lutw. S. C. cited, and ſaid, that if *C.* had been party to the original ſuit, it would have been otherwiſe.

*A.* and *B.* took an obligation from *J. S.* for the payment to them of a ſum of money, and this was done by them as truſtees, and for ſecuring the payment of legacies to younger children; *A.* brought an action on this bond, to which *J. S.* pleaded a releaſe from *B.*, but upon *oyer* it appeared that the releaſe was of all actions which *B.* had on his own account; and in truth *B.* did not know of the taking the bond, nor was he privy to the ſuit; and though it was objected that the releaſe of one obligee diſcharged the bond, and that it muſt be on his own account, yet it was adjudged, that the releaſe did not bar, for that the words, *on his own account*, muſt have been put in for ſome purpoſe, and could not in this caſe be for any other, but to diſtinguiſh demands which *B.* had in his own right from thoſe he had in right of or in truſt for others. Vent. 35. Lev. 272. 2 Keb. 530. Stokes v. Stokes. 3 Mod. 279. S. C. cited.

Where divers are to recover in the perſonalty, the releaſe of one is a bar to all, but it is not ſo in point of diſcharge. 6 Co. 25. a. Ruddock's caſe. Cro. Eliz. 648. Jenk. 263. Palm. 319. Owen, 22. Hutton, 40.

As, if there are two plaintiffs who are barred by an erroneous judgment, and they afterwards bring a writ of error, the releaſe of one ſhall bar the other, becauſe they are both actors in a perſonal thing to charge another, and it ſhall be preſumed a folly in him to join with another who might releaſe all. 3 Mod. 135.

But, if an action be brought againſt four, and judgment againſt them, on which they bring a writ of error, and the defendant in error plead the releaſe of one of them; this is no bar; for it being brought to diſcharge themſelves of a judgment, the releaſe of one cannot 3 Mod. 109.

cannot bar the other, becauſe they have not a joint intereſt but a joint burden, and by law are compelled to join in a writ of error.

## (H) How far a Poſſibility or Contingent Intereſt may be releaſed.

10 Co. 48. a. Cro. Eliz. 552.

IT is a general rule in our books that a mere poſſibility cannot be releaſed, and the reaſon hereof is, that a releaſe ſuppoſeth a right in being, and it was thought to countenance maintenance to transfer choſes in action, poſſibilities and contingent intereſts.

Lit. ſect. 446. Co. Lit. 265. a. 10 Co. 51. Bridgm. 76. S. P. though

Hence it is held, that an heir at law cannot releaſe to his father's diſſeiſor in the lifetime of the father; for the heirſhip of the heir is a contingent thing, for he may die in the lifetime of the father, or the father may alien the lands.

the words *quæ quovismodo in futuro habere potero* are inſerted in the releaſe.——But, if the heir releaſe with warranty, it bars him when the right deſcends. 2 Leon, 20. Hob. 130.

And. 133. Co. Lit. 265. Cro. Eliz. 552. 2 Roll. Abr. 405.

So, if the conuſee of a ſtatute releaſes to the conuſor all his right to the land, yet he may afterwards ſue execution, for he has no right to the land but only a poſſibility.

2 Mod. 281. 2 Lev. 215.

So, if a creditor releaſes to his debtor all the right and title which he hath to his lands, and afterwards gets judgment againſt him, he may extend a moiety of the ſame land, for he had no right to the land at the time of the releaſe, and the land is not bound but in reſpect of the perſon.

5 Co. 70. Hoe's caſe. Co. Lit. 265. Moor, 469. Cro. Eliz. 579.

So, if the plaintiff releaſe all demands to the bail in the King's Bench, and afterwards judgment be given againſt the principal, execution may be ſued againſt the bail, for that at the time of the releaſe there was only a poſſibility of the bail becoming chargeable.

Moor, 469. releaſe was on conſideration, and intended to diſcharge them as bail, if the court, on motion, would not ſtay proceedings againſt them?** Hutt. 17. & *vide* the caſe of Harriſon v. Huxley, Moor. 852.—— ** *Sed qu.* if the

2 Rol. Abr. 404. Cro. Jac. 337. Roll. Rep. 11. Child v. Durant.

So, if *A.* recovers in treſpaſs againſt *B.* in *B. R.*, and *B.* brings a writ of error, pending which *A.* releaſes to *B.* all executions and after the judgment is affirmed and new damages given to *A.* for the delay upon the ſtatute of 3 *H.* 7. [*cap.* 10. and *vide* 19 *H.* 7. *cap.* 20.] this releaſe ſhall not bar *A.* to have execution of the damages, becauſe he had not any right to have execution, nor any duty at the time the releaſe was made.

Poph. 5. 10 Co. 51. Hutt. 17. Raym. 146.

A leaſe to the huſband and wife for life, the remainder to the ſurvivor of them for twenty-one years; the huſband grants over, and though he ſurvived, yet the grant was held void becauſe it was contingent.

Cro. Eliz. 173. 600. Owen, 85. Leon. 167. 3 Leon. 256. and Dyer, 244.

If the next preſentation to a church be granted to *A.* and and living the incumbent, *A.* releaſe all his eſtate, title, and intereſt to *B.* this releaſe is void, it being of a choſe in action *ſecùs*, had the releaſe been made after the avoidance, at which time the intereſt would have been veſted in *A.*

10 Co. 48. Like point.

From the reaſons herein it was held, that if, at common law, a woman before marriage had accepted of a jointure in bar and ſatisfaction of dower, this would not have bound her, becauſe at the time ſhe had no right to dower. 4 Co. 1. Vernon's caſe.—If a huſband makes a leaſe for life and &c., the wife may releaſe her right of dower to him in reverſion, though ſhe has no preſent cauſe of action againſt him. Co. Lit. 265.

A city orphan cannot at law releaſe her orphanage part to her father, for ſhe hath no right in her during the lifetime of her father. But it hath been held in equity, that ſuch releaſe being for a valuable conſideration, as upon the marriage of a daughter, and a portion given her by the father, it may operate as an agreement to waive the orphanage, and hath accordingly been ſo decreed. Blanden v. Barker, 1 P. Wms. 638. Preced. Chan. 545. [See acc. Cox v. Belitha, 2 P. Wms. 273. Lockyer v. Savage, 2 Str. 947. Medcalfe v. Ives, 1 Atk. 63. *Secus*, if a mere *voluntary* releaſe, Morris v. Burroughs, 1 Atk. 401.]

If there be a deviſe of a term for years to *A.* for life, remainder to *B.*; *B.* may releaſe his right to *A.*, and ſuch releaſe ſhall extinguiſh his intereſt, though it was objected that *B.* had only a poſſibility at the time of the releaſe made. 10 Co. 47. Lampet's caſe.

But it was held in the above-mentioned caſe of *Lampet*, and hath in like manner been held in other caſes, that *B.* could not aſſign over his intereſt to a ſtranger in the lifetime of *A.*, the ſame being only a choſe in action, and a mere poſſibility, inaſmuch as an eſtate for life is in ſuppoſition of law a larger eſtate than for any number of years. 10 Co. 47. 4 Co. 66. Sid. 188. Raym. 146.

But later reſolutions, eſpecially thoſe which have been in courts of equity, have made a great alteration in this doctrine. 2 Vern. 563.

As in the caſe of *Cole* v. *Moore*, where one poſſeſſed of a term deviſed it to *A.* for life, remainder to *B.*, and made *A.* executor; *B.* deviſed this remainder to *C.* and died in the lifetime of *A.*, and in order to defeat *C.* of his intereſt, *A.* aſſigned his term to a third perſon: it was decreed by Lord Chancellour *Elleſmere*, that *A.* the executor and deviſee for life, was a truſtee for *B.*, and ſhould not be at liberty to deſtroy this remainder, but that the executor ſhould preſerve the leaſe, ſo as it might go according to the will with the performance whereof the executor was intruſted. Moor, 806.

So, in the caſe of *Goring* v. *Bickerſtaff*, where the truſt of a term was deviſed to *A.* for life, remainder to *B.*, it was agreed by all that *B.* might aſſign over this truſt, which ſhews that a truſt of a term in remainder may be transferred over by deed. Chan. Ca. 4.

One poſſeſſed of a term for years deviſed it to *A.* for life, remainder to *B.* *B.* in the lifetime of *A.* deviſed his remainder to *J. S.*, who deviſed it over; and the queſtion was, whether *A.* (the deviſee for life) being dead, the deviſee of *J. S.* ſhould have the term, or whether it ſhould go to the adminiſtrator *de bonis non?* and it was decreed for the deviſee of *J. S.*, and the adminiſtrator *de bonis non* of *B.* was directed to aſſign over the term to him. 1 P. Wms. 572. Wind v. Jekyl.

And in the caſe of *Theobald* v. *Duffay*, in the Houſe of Lords, March 1729-30, it was (*inter alia*) determined, that a poſſibility of a term is aſſignable for a good conſideration.

5 Co. 70. 2 Mod. 281. It is laid down in *Hoe*'s caſe, that a duty uncertain at firſt, which upon a condition precedent is to be made certain afterwards, is but a poſſibility, which cannot be releaſed.

Yelv. 215. Brownl 116. Bridges v. Enion. As a *nomine pœnæ* waiting on a rent, which cannot be releaſed till the rent is behind, as the non-payment of the rent makes the *nomine pœnæ* a duty.

Yelv. 192. Neale v. Sheffield. So, if a man covenants to pay 10 *l.* on the birth of a child, the covenantor cannot be releaſed of the 10 *l.*, it reſting merely in contingency, whether ſuch child will ever be born or not.

Yelv. 215. So, if an award be, that upon the plaintiff's delivering the defendant by a certain day a load of hay, the defendant ſhall pay him 10 *l.*; in this caſe the 10 *l.* cannot be releaſed before the day, for it reſts merely in poſſibility and contingency whether the money ſhall ever be paid, for it becomes a duty on the delivery of the hay only, and not before.

2 Salk. 575. pl. 4. 2 Ld. Raym. 786. Topham v. Tallier. In debt upon a bond againſt the defendant as adminiſtrator, &c. the defendant pleaded a releaſe, whereby the plaintiff, reciting there were ſeveral controverſies between the defendant and him about a legacy and the right of adminiſtration, releaſes to the defendant all his right, title, intereſt, and demand of, in, and to the perſonal eſtate of the inteſtate; and on demurrer this was held to be no plea. A difference was taken by Ch. Juſt. *Holt* between a releaſe of all demands to the perſon of the obligor or adminiſtrator, and a releaſe of all demands to the perſonal eſtate of the obligor or adminiſtrator, that the laſt will not diſcharge the bond as the other may, becauſe the bond does not give any right or demand upon the perſonal eſtate, &c. until judgment and execution ſued.

2 Roll. Abr. 407-8. Briſcot v. Aier. If *A.* promiſes *B.* in conſideration that he will ſell to his ſon certain merchandize at ſuch a price, that if his ſon does not pay it at the feaſt of St. *Michael* next enſuing, he himſelf will pay it; and before *Michaelmas*, *B* releaſes all actions and demands to him who made the promiſe; this ſhall not releaſe the *aſſumpſit*; for till *Michaelmas* it cannot be known whether his ſon will pay it or not, and till default of payment by him, the other is not bound to pay it, and ſo it is a mere contingency till *Michaelmas*, which cannot be releaſed.

## (I) How the operative Words in a Releaſe have been conſtrued: And therein of the Words,

### 1. Claims and Demands, what are releaſed thereby.

Lit. ſect. 508. Co. Lit. 291. *Littleton* ſays, that a releaſe of all demands is the beſt releaſe to him to whom it is made; and Lord *Coke* ſays, that the word *demand* is the largeſt word in law except *claim*; and that a releaſe of demands diſcharges all ſorts of actions, rights and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, ſtatutes, commons, &c.

But, notwithſtanding the large import of the word *demands*, yet there are ſeveral inſtances (which *vide infra*) where the generality of the words hath been reſtrained to the particular occaſion for which the releaſe was made.

By a releaſe of all demands, all actions real, perſonal, and mixed, and all actions of appeal, are extinct. 8 Co. 154.

So, a releaſe of all demands extends to (*a*) inheritances, and takes away rights of entry, ſeiſures, &c. Co. Lit. 291.

(*a*) But, if the king releaſeth all demands, yet as to him the inheritance ſhall not be included. Bro. Prerogative, pl. 62. Bridgm. 124.

By a releaſe of all demands made to the tenant of the land, a common of paſture ſhall be extinct. Co. Lit. 291.

A releaſe of all demands will bar a demand of a relief, becauſe the relief is by reaſon of the ſeignory to which it belongs. Cro. Jac. 170.

If *A.* being poſſeſſed of goods loſes them, and they come to the hands of *B.*, who being in poſſeſſion, *A.* by deed releaſes to *B.* all actions and demands perſonal which at any time before *habuit vel habere potuit* againſt *B.* for any cauſe, matter, or thing whatſoever; this ſhall bar *A.* of the property of the goods, ſo that *B.* has the abſolute right in him by this releaſe. 2 Roll. Abr. 407. Jordan v. Sanders.

By a releaſe of all demands, all manner of executions are gone, for the recoveror cannot ſue out a *fieri facias*, *capias*, or *elegit*, without a demand. Lit. ſect. 508. 2 Roll. Abr. 407.

By a releaſe of all demands to the conuſor of a ſtatute merchant before the day of payment, the conuſee ſhall be barred of his action, becauſe that the duty is always in demand; yet, if he releaſes all his right in the land, it is no bar. Co. Lit. 291. Bridgm. 124.

So, a bond conditioned to pay money at a day to come, is a debt and duty preſently, and may be diſcharged by a releaſe of all actions and demands before the day of payment. Cro. Jac. 300.

But in an action of debt for non-performance of an award made for the payment of money at a day to come; there is no preſent debt, nor any duty before the day of payment is come, and therefore it cannot be diſcharged before the day, by a releaſe of all actions and demands. Yelv. 214. Cro. Jac. 300.

So, if a man deviſes a legacy of 20*l.* to *J. S.* at the age of twenty-three, though the legatee, after he attains the age of twenty-one, and before the day of payment, may releaſe it, yet by the word *demands* it is not releaſed, but there muſt be ſpecial words for the purpoſe. 10 Co. 51. in Lampet's caſe.

A releaſe of all demands does not diſcharge a covenant not (*b*) broken at the time; as, where a leſſor, on payment of 60*l.* to him by the leſſee due on a judgment, releaſed to him all demands; it was adjudged, that this did not releaſe a covenant for repairs not then broken. But it was held, that a releaſe of all covenants would have releaſed the covenant. Hancock v. Field, Cro. Jac. 170. 2 Roll. Abr. 407. Noy, 123.

(*b*) For the difference when broken or not, *vide* Dyer, 217. Lit. Rep. 86. Moor, 34. 3 Leon. 69. 10 Co. 51. 5 Co. 71. Hoe's caſe. Co. Lit. 292. 8 Co. 153. And. 8. 64.

If leſſee for life grants over his eſtate by indenture reſerving rent during the continuance of the eſtate, and afterwards releaſes Witton v. Bie, 2 Roll. Abr. 408.

Cro. Jac. 486. Bridgm. 123. 2 Roll. Rep. 20. Poph. 156.

to the aſſignee all demands; this ſhall diſcharge the rent, for he had the freehold of the rent in him at the time.

2 Roll. Abr. 408. in the caſe of Witton v. Bie.

So, if leſſee for years grants over by indenture all his eſtate, reſerving a rent during the term, and after releaſes to the aſſignee all demands; this ſhall releaſe the rent; for though he cannot have an action to demand all the eſtate, yet this is an eſtate in him of the rent, and aſſignable over; and in an action of debt for any arrearages after, he ſhall claim it as a duty accrued from the ſaid eſtate; and it ſhall not be ſaid that the duty ariſes annually upon the taking of the profits, but this had its commencement and creation by the reſervation and contract, which was before.

Collins v. Harding, 2 Roll. Abr. 408. Moor, 644. Cro. Eliz. 606.

If there be leſſee for years rendering rent, and the leſſor grant over the reverſion, and the leſſee attorn, and after leſſee aſſign over his eſtate, and after the aſſignee of the reverſion releaſe all demands to the firſt leſſee, yet this ſhall not releaſe the rent, for that there is neither privity of eſtate or contract between them after the aſſignment. But, if the releaſe had been made to the aſſignee, it had extinguiſhed the rent.

20 Aſſ. pl. 5. 2 Roll. Abr. 408.

If he, who has a rent-charge in fee, releaſes to the tenant of the land all demands from the beginning of the world till the making of the deed of releaſe; this ſhall diſcharge all the rent, as well that to come as what is paſt.

Lit ſect. 510. Co. Lit. 291.

It is ſaid by *Littleton* and Lord *Coke*, that by a releaſe of all demands a rent-ſervice ſhall be releaſed; but this it is ſaid is to be intended of a rent-ſervice in groſs as a ſeignory; and therefore in the caſe of

Lev. 99, 100. Sid. 141. Keb. 499, 510. Hen v. Hanſon.

*Hen* v. *Hanſon*, where, in covenant brought on a covenant in a leaſe for years to pay the rent reſerved, the defendant pleaded a releaſe by the plaintiff of all demands at a day before the rent in queſtion became due; the plaintiff replied, that the releaſe was in performance of an award of all matters in controverſy between the plaintiff and defendant; upon demurrer, it was adjudged by *Foſter*, *Mallet*, and *Windham*, that the rent was not diſcharged by this releaſe as it became due by the perception of the profits, and was not like to a rent-charge, or a rent parcel of the ſeignory; and they held that this rent being incident to the reverſion, and part thereof, was no more releaſed hereby than the reverſion itſelf was; and that this conſtruction ſhould the rather prevail, as it was not the intention of the party to releaſe this rent. But *Twiſden contrà*—he ſaid, that in releaſes and deeds when words are heaped up, the party that is to take the advantage may take the ſtrongeſt word and in the ſtrongeſt ſenſe, and that is the reaſon they are put in; and as to the intent, that muſt be gathered from the words; and men muſt take care what words they uſe. *oportet politiam obedire legibus non leges politiæ:* and he ſaid, he could ſee no difference between this rent and a rent in fee: both are rent-ſervices, and neither demandable before they become due otherwiſe than as in 40 *E.* 3. 47. it is ſaid, there is a continual demand.

demand betwixt lord and tenant; and in this caſe there is a tenure between the leſſee and him in reverſion; and the reaſon why the reverſion is not touched by this releaſe is, becauſe it can work only by way of extinguiſhment, and not by way of paſſing an intereſt. But it was adjudged *ut ſupra.*

The plaintiff declared upon a leaſe for years, *reddendum* 30 *s.* at *Lady-day* and *Michaelmas*, and aſſigned for breach non-payment of a year's rent due and ending at *Lady-day* 1689, the defendant pleaded a releaſe, dated the 18th day of *November* 1688, of all demands; and upon demurrer, judgment was given for the plaintiff; for the growing rent not due, which is incident to the reverſion, is not diſcharged, though the firſt half-year's rent, which was a duty demandable, was releaſed; but here the releaſe being pleaded as a bar to all, which it is not, the plea is naught, and judgment muſt be given for the plaintiff. 2 Salk. 578. pl. 1. Stephens v. Snow.

## 2. By a Releaſe of all Actions and Suits.

A releaſe of all actions diſcharges a bond to pay money on a day to come; for it is *debitum in præſenti, quamvis ſit ſolvendum in futuro;* and it is a thing merely in action, and the right of action is in him that releaſes, though no action will lie when the releaſe is made. Co. Lit. 292.

But a releaſe of actions does not diſcharge a debt before the day of payment, for it is neither *debitum* nor *ſolvendum* at the time of the releaſe; nor is it merely a thing in action, for it is grantable over. Co. Lit. 292.

So, if a man has an annuity for term of years, for life or in fee, and he, before it be (*a*) behind, releaſes all actions; this ſhall not releaſe the annuity, for it is not merely in action, becauſe it may be granted over. Co. Lit. 292. Bulſ. 178. Cro. Eliz. 897. Moor, 133.

releaſe ſhall releaſe the arrearages incurred before. 39 H. 6. 43. 2 Roll. Abr. 404.

(*a*) But ſuch

If one releaſes *omnes querelas aut loquelas;* this is as large as a releaſe of all actions, and releaſes all cauſes of action, though no action be then depending. Co. Lit. 292.

By a releaſe of all manner of actions, all actions as well criminal as real, perſonal as mixed, are releaſed. Co. Lit. 287.

A releaſe of actions real is a good bar in actions mixed; as aſſiſe of *novel diſſeiſin*, waſte, *quare impedit*, (*b*) annuity; and ſo is a releaſe of actions perſonal. Co. Lit. 284.

grantee has made his election. (*b*) But not after the Jones, 215.

In an appeal of robbery or felony, a releaſe of all actions perſonal will not bar, becauſe an appeal, in which the appellee is to have judgment of death, is higher than a perſonal action. But a releaſe of all manner of actions, or of all actions criminal, or of all actions mortal, or of all actions concerning pleas of the crown, or of all appeals, or of all demands, will be a good bar of any ſuch appeal. Co. Lit. 287. 2 Hawk. P. C. c. 23. ſ. 137.

And in an appeal of *maihem* a releaſe of actions perſonal may be pleaded, becauſe damages only are recovered, Co. Lit. 288.

Co. Lit. 289. 8 Co. 153. A releaſe of all actions is regularly no bar of an execution, for execution is no action, but begins when the action ends.

2 Inſt. 40. Yelv. 209. Co. Lit. 288. Alſo, a releaſe of all actions does not regularly releaſe a writ of error, for it is no action, but a commiſſion to the juſtices to examine the record; but, if therein the plaintiff may recover, or be reſtored to any thing, it may be releaſed by the name of action.

Co. Lit. 290. Comb. 455. But a releaſe of all actions is a good bar to a *ſcire facias*, though it be a judicial writ, for the defendant may plead to it, and it is in nature of a new original given by the ſtatute.

2 Roll. Rep. 75. So, in replevin, a releaſe of all actions is a good bar, for the avowant is defendant, though in ſome reſpects he is plaintiff.

Latch, 110. By a releaſe of all ſuits, a man is barred of a writ of error.

Co. Lit. 291. 8 Co. 153. So, by a releaſe of all ſuits, a man is barred of execution, becauſe it cannot be had without application to the court, and prayer of the party, which is his ſuit.

Co. Lit. 28. b. 8 Co. 151. If a diſſeiſee releaſes to the diſſeiſor all actions; this is no releaſe of his right of entry, for when a man has ſeveral means to come at his right, he may releaſe one of them, and yet take benefit of the other.

Co. Lit. 286. Skin. 57. pl. 1. So, if a man by wrong takes away my goods; if I releaſe to him all actions perſonal, yet by law I may take the goods out of his poſſeſſion.

39 E. 3. 26. 2 Roll. Abr. 404. If a man releaſes all actions, by this he ſhall releaſe as well actions which he has as executor, as thoſe in his own right.

2 Ld. Raym. 1307. S. C. cited by Powell, and ſaid by him to be clearly ſo, unleſs there was an action of his own for the releaſe to work upon.

Co. Lit. 292. If a man releaſes all quarrels; a man's deed being taken moſt ſtrongly againſt himſelf, it is as beneficial as all actions, for by it all actions real, perſonal, and mixed, are releaſed.

Co. Lit. 292. So, if a man releaſes *omnes loquelas*, it is as large as *omnes actiones*, and extends as well to actions in courts of record as baſe courts.

Co. Lit. 292. So, a releaſe of *omnes exactiones* *, is equal to a releaſe of all actions.

* For *exactio derivatur ab exigendo*, and *exigere* ſignifieth to require or demand. Co. Lit. 292. a.

## (K) Releaſe, in what Caſes reſtrained to the ſpecial Purpoſe for which it was given.

Plow. 289. 11 H. 6. 42. (a) 8 Co. 148. ON the rule of law, that every man's deed ſhall be taken ſtrongeſt againſt himſelf, and on what is laid down in (a) *Altham*'s caſe, *generalis clauſula*, &c. it hath been inſiſted, that general words in a releaſe are to be taken ſtrongeſt againſt the releaſor, and are not to be qualified or reſtrained by any ſpecial recital.

And. 64. Hob 74. Dyer, 240. Mod. 99. 3 Mod. 277. Ld. Raym. [2 Vez. 310.] But herein the ſure rule and diſtinction ſeems to be, that where there are general words all alone in a deed of releaſe, they ſhall be taken moſt ſtrongly againſt the releaſor; but, where there is a particular recital in a deed, and then general words follow, the general words ſhall be qualified by the particular recital. Indeed

Indeed in the caſe of *Rotherham* v. *Crawley*, where, upon a reference to arbitration of ſome controverſies relating to relief and heriot claimed by the lord of his tenant, a releaſe was awarded, which was drawn up *of all reliefs, duties, and amercements*, and this releaſe being pleaded to an action of debt on an obligation, it was inſiſted, though the word *duty* might in ſtrictneſs extend to a bond debt, that yet it ought not to have this conſtruction in the preſent caſe, it being placed between the words *relief* and *amercements*, which ſhewed that the parties intended duties of the ſame nature; but it was adjudged otherwiſe; and that the word *duty* working an extinguiſhment of the bond at law, the force of the word was not to be controuled by the intention of the party.

Cro. Eliz. 370. Owen, 71. S. C. Raym. 209. S. C. cited.

But in the following caſes the intention of the party has been principally regarded:

As where in debt upon an obligation the defendant pleaded a releaſe of all errors, and all actions, ſuits, and writs of error whatſoever; it was adjudged, that the releaſe extended only to writs of error, and did not releaſe the obligation, though the word *actions*, had it ſtood ſingly, would have done it.

Hetl. 9. 15. Abiee v. Page.

If a man receives 10*l.* of another, and by his deed acknowledges the receipt thereof, and thereof releaſes, acquits, and diſcharges him, and of all actions, ſuits, debts, duties, and demands; by this releaſe nothing is diſcharged but the 10*l.* and the action and demands thereof, for the laſt words have reference to the firſt, and ſo are limited by them.

2 Roll. Abr. 409. cited by Tanfield, to have been adjudged Trin. 5 Jac. 1. in B. R.

3 Mod. 277. Carth. 119. Show. 155. S. C. cited, and doubted of by Holt, Ch. J. who ſaid, that no ſuch caſe was to be found.

In the caſe of *Hen* v. *Hanſon* it was held, that a releaſe, made in performance of an award, did not diſcharge a growing rent, though the releaſe contained general words, for this reaſon (*inter alia*) that it was not the intention of the parties.

Lev. 99. Sid. 141.

So, in the caſe of *Morris* v. *Wilford*, a releaſe of the wife's cuſtomary part, with general words, was held only to extend to the ſpecial matter recited.

2 Jon. 104. 2 Lev. 214. 2 Show. 46. pl. 32. 3 Keb. 814. 840.

So, where the plaintiff releaſed all demands on his own proper account; it was adjudged by the whole court that an obligation taken by the plaintiff in his own name in truſt for the children of *J. S.* was not diſcharged thereby.

2 Lev. 272. Stokes v. Stokes. Vent. 35. S. C. by the name of Nokes v. Stokes.

So, where in covenant to pay an heriot *poſt mortem* J. S. or 40*s.* at the election of the plaintiff, the death of *J. S.* was ſet forth, and that afterwards the plaintiff choſe to have the 40*s.* for which he brought his action, and aſſigned the breach in the non-payment; the defendant pleaded, that the plaintiff releaſed to him all actions and demands, *&c.*, but this releaſe was made in the lifetime of *J. S.*, and there was an exception in it of heriots; upon demurrer, it appearing that neither the heriot nor 40*s.* were in demand at the time of the releaſe given, and it appearing plainly by the exception in the releaſe not to be the intention of the parties to releaſe the heriots, judgment was given for the plaintiff.

2 Mod. 281 2 Lev. 210. Vent. 314. Trevil v. Ingram.

3 Mod. 277. 3 Lev. 269. Show. 150. Carth. 119. Cole v. Knight.

*A.* recovered againſt *B.* a judgment for 600*l.* and made *J. S.* and *J. D.* his executors, and died; *B.* made *C.* his executor, and deviſed a legacy of 5*l.* to *J. D.* and died; *J. D.* by deed acknowledged the receipt of the 5*l.* of *C.* and thereby releaſed the ſaid legacy, and all actions, ſuits, and demands which he had againſt *C.* as executor to *B.*, and after argument in *B. R.* it was adjudged, that nothing was releaſed but the 5*l.*

Ld. Raym. 235. Thorpe v. Thorpe. (*a*) *Vide* the arguments in this caſe in B. R. as reported. Salk. 171. pl. 3. Lutw. 245. Ld. Raym. 664.

In *aſſumpſit* againſt the defendant for 7*l.* the plaintiff declares, that whereas he had mortgaged to the defendant certain copyhold lands redeemable upon payment of ſuch a ſum of money, the defendant in conſideration that the plaintiff would releaſe to the defendant his equity of redemption, aſſumed to pay to the plaintiff 7*l.* The plaintiff avers, that he did releaſe his equity of redemption, but that the defendant has not paid the 7*l.* The defendant pleads this releaſe in bar of the action, becauſe, after the words *equity of redemption*, the ſcrivener had added, *and all actions, duties, and demands*; and on demurrer the queſtion in (*a*) *C. B.* was, whether this 7*l.* was releaſed by thoſe general words? and adjudged that it was not.

2 Roll. Abr. 410. *Vide* Dyer, 56. 307. 2 Roll. Rep. 255. Palm. 218. 2 Brownl. 300. Cro. Eliz. 14. 2 Mod. 280.

If an obligation be dated and delivered the 23d of *January* 5 *Jac.*, and obligee make a releaſe, which is dated 22d of *January* 5 *Jac.*, but delivered after 23d of *January*, and by this deed he releaſes to the obligor all actions *uſque diem hujus præſentis temporis*; this releaſe ſhall not diſcharge the obligation, for *hujus præſentis temporis* ſhall be taken the preſent time when the deed was dated.

3 Mod. 182. Dixon v. Terry.

In treſpaſs, aſſault and battery, the defendant pleaded a general releaſe of all actions, *&c.* from the beginning of the world *uſque ad diem datûs* of the ſaid releaſe; and it happened that the battery was done upon that very day in which the releaſe is dated; ſo that it was held that this action was not diſcharged, for the releaſe did not include that day, and the defendant ſhould have traverſed all, *&c.* after the date of the day of the releaſe.

## (L) What Right or Intereſt ſhall be ſaid to be releaſed; and herein, of Miſrecitals and Exceptions in Releaſes.

Co. Lit. 274. A Releaſe of a bare right for a day or an hour, *&c.* is as good as if it was made to the other and his heirs.

Co. Lit. 274. A releaſe may be on condition, but a condition cannot be releaſed on condition.

Lutw. 638. *per* Treby, Ch. Juſt. But a releaſe on condition that releaſee ſhall pay releaſor ſo much money, is not good; but if the releaſe be worded in this manner, that if the releaſee pay ſo much at a day to come, then he releaſes, *&c.* this is a good releaſe.

2 Roll. Abr. 407. (*b*) Leon. 283. If one man finds the goods of another, and the owner releaſes to him who is in poſſeſſion; this veſts the property in him, (*b*) but ſuch releaſe muſt be by deed.

If

If one makes a leaſe for ten years, remainder for twenty years, and he in the remainder releaſes to the firſt leſſee, the releaſee ſhall have thirty years for his term, for ten years ſhall not be drowned, becauſe a chattel cannot be drowned in a chattel. Co. Lit. 273.

The lord *paramount* cannot releaſe to the tenant *paravaile*, ſaving to him part of the ſervices, but the ſaving in that caſe is void. But, if there be lord and tenant by fealty, and 20*s.* rent, the lord may releaſe all his right in the ſeignory, ſaving fealty and 10*s.* rent; but the lord, upon his releaſe to the tenant, cannot reſerve a new kind of ſervice. Co. Lit. 305. b.

A releaſe of common in one acre is an extinguiſhment of the whole common. And. 235. Show. 350.

An (*a*) entire thing cannot be releaſed as to part; but, if a man be bound to perform two things, the obligee may diſcharge the party of one of them. 3 Bulſt. 232. (*a*) What ſhall be ſaid an entire thing, *vide* Palm. 247. Owen, 21. Moor, 413.

A releaſe of covenants ſhall releaſe the bond for performance of covenants. So, in the caſe of (*b*) *Hen* v. *Hanſon* it was agreed, that if the rent was releaſed, the covenant for payment of it was releaſed likewiſe. Dyer, 356. (*b*) Lev. 99. Sid. 141.

If a man brings an appeal of *maihem*, and after releaſes the action, the releaſe ſhall bar him to have an action of battery of the ſame battery. 43 Aſſ. 39. 2 Roll. Abr. 413.

If a rent-charge iſſues out of three acres of land, and he, who has the rent, releaſes all his right in one acre, the rent is all extinct, becauſe all iſſues out of every part, and it cannot be apportioned. 2 Roll. Abr. 414.

When execution is had of twenty acres, by a releaſe of one acre, the execution is gone, and is a diſcharge of land and body. And. 266. Owen, 21. Hetl. 79.

A releaſe of all advantages of account, is a good bar to an action of debt upon that account. 8 Co. 152.

If I releaſe to *A.* all actions which *J. S.* has againſt him, the releaſe to *A.* is good, and the laſt words ſhall be (*c*) rejected; for a deed may be qualified and abridged by latter words, but not totally deſtroyed. Dyer, 56. pl. 21. (*c*) If a releaſe be limited as to one obligee, proviſo that the other ſhall not take advantage of it, the proviſo is void. Lit. Rep. 191.

A releaſe to *A.* and *B.* of all actions, is a releaſe of all ſeveral actions which the releaſor has againſt them, as well as all joint actions. Ld. Raym. 235.

A releaſe excepting one bond, excepts ſuits and actions for that bond. Cro. Eliz. 726.

If *A.* recite that he had recovered judgment againſt *B.* before the juſtices in *Derby*, whereas in truth the judgment was had in *B. R.*, this miſrecital, it is ſaid, will make the releaſe void. Dyer, 5*c*. 87. & *vide* Plow. 191. 395.

*THE Profeſſion have already been appriſed by Mr.* FEARNE, *that the former collection in this Abridgment under the title* "REMAINDER," *ſeems to be an extract from a Manuſcript Treatiſe, apparently of the Lord Chief Baron* GILBERT, *upon that ſubject. In the following pages of this volume they will find the whole of that Treatiſe, which I am enabled to lay before them, by the unſolicited kindneſs of Mr.* HARGRAVE, *who, as ſoon as he was informed I was engaged in the editing of this work, was pleaſed to communicate the Manuſcript to me, with a permiſſion to print it at length. Such a favour, ſo conferred, I acknowledge with gratitude and with pride: whilſt it adds to the value of the Work, it does honour to the Editor. The parts of the Treatiſe which never before appeared in print, I have diſtinguiſhed by including them between inverted commas: the other parts I have marked with a ſingle inverted comma. The additional collections of the Compiler of the Abridgment are left without any diſtinguiſhing mark; and the paſſages for which I am reſponſible are, as uſual, inſerted between crotchets.*

HENRY GWILLIM

# Remainder and Reverſion.

"ALL that it ſeems neceſſary to obſerve by way of introduction to the enſuing head, is, that after ſuch time as the feudal property came to be extended and enlarged to a perpetual and durable eſtate, and that donations were frequently made to the feudary and his heirs; this gave him the abſolute ownerſhip and property in the feud, and, conſequently, as abſolute a power of diſpoſing thereof to ſuch perſons, and upon ſuch terms, as he thought fit; ſo that if he aliened the eſtate to any perſon for life, or years, or any like intereſt, as the whole benefit he intended the perſon ſhould be capable of, yet he left a reverſion in himſelf, which being alienable, he might at the ſame time limit it to go over to any other perſon after the firſt intereſt determined. And this he might likewiſe limit and circumſcribe as he thought fit, and make a further limitation over to any third perſon, and ſo on till he gave it out in as large a manner as he himſelf enjoyed it. All the limitations after the firſt were called 'Remainders,' either from their being a part of what remained and was left in the donor; or, from the nature and manner of their exiſtence, as not being to come to the perſon intended, till after the preceding eſtates ſpent. But, becauſe upon ſuch donations made, the donors either reſerved particular ſervices to themſelves, or in default of ſuch reſervation the law created and raiſed to them certain duties and ſervices to be done by the tenant, as a recompence and conſideration for his enjoying the feud; therefore the tenant could in no caſe alien or diſpoſe of the feud without a particular licence of his lord for that purpoſe, ſince this would have been a breach of that truſt the law had inveſted him with, and might have endangered the peace and ſecurity of the lord by ſubjecting him to the perſon of his greateſt enemy. And as the tenant in ſuch caſe had no power to alien without his lord's licence, ſo neither could he alien in ſuch a manner as to leave his lord for any time, though never ſo ſmall and inconſiderable, without a tenant to do his ſervices, which the lord could in no ſort be ſuppoſed to diſpenſe with by his licence. For beſides the danger that might poſſibly happen in that interval, the ſervices being created at the ſame time with the feud, and coming to the lord in lieu thereof, were to be as perpetual and unalienable as the enjoyment of that was to be. And ſince the ſervices to be performed were ſuch as none who were uncertain of enjoying the feud during their lives, would either undertake or think themſelves under a ſufficient encouragement to perform as they ought, becauſe, if they held the feud but for years, and ſhould happen to ſurvive thoſe years,

Cowell; and Terms of the Law, tit. "Remainder." Co. Lit. 49. a. 143. a. 26. 51. Moor, 344. Vaugh. 269.

Co. Litt. 43. a. b. 2 Inſt. 65, 66. 501.

"they

" they would then become deſtitute of a proviſion and ſupport for
" their lives, notwithſtanding all their former labours and ſervices
" to the lord; and, conſequently, from ſuch tenants the lord could
" not expect a faithful and zealous diſcharge of their duties;
" therefore the ſervices were always to be performed by ſuch as
" held the feud for life, at leaſt; and, conſequently, the tenant
9 Co. 135. " could not by his alienation leave the lord without ſuch a one.
Co. Lit. 269. a. b. " For this reaſon it was, that if a leaſe was made for years, re-
" mainder to the right heirs of *J. S.* there would be no tenant of
" the freehold to do the ſervices. So, if a leaſe were made for
" life, or a gift in tail, to begin at a future day or time, ſuch leaſe
" or gift were made void; for until the commencement, the leſ-
" ſee or donee would have nothing, and, conſequently, be under
" no obligation to do the ſervices; and the leſſor or donor in the
" mean time having parted with their intereſt *pro tanto* would be re-
" gardleſs of the ſervices. To prevent, therefore, this inconveni-
" ence and danger to the lord, the law adjudged ſuch leaſe, gift, or
" remainder to be void; and, conſequently, the firſt tenant continued
" tenant ſtill to the lord, and as ſuch was obliged to a performance
" of the ſervices. Theſe reaſons, though they now ſeem antiquated,
" may perhaps be of equal force with the reaſon now commonly
" urged from the danger of ſuffering the freehold to be at any
" time in abeyance, expectancy, or ſuſpenſe, becauſe the rights of
" ſtrangers would ſuffer thereby for want of a perſon in the mean
" time to charge with a præcipe for recovery thereof. But yet it
" was not abſolutely neceſſary, that the eſtate of freehold or inherit-
" ance ſhould be the preſent and only ſubſiſting intereſt: for if a
" leaſe were made for years, remainder for life, or in tail, and
" livery thereupon, this remainder was good; for here was no
" time wherein the lord was without a tenant of the freehold,
" and his being obliged to all the feudal ſervices might perhaps
" be one reaſon why ſo little regard was had to the intereſt of the
6 Co. 57, 8. " leſſee for years, he being no ways able to controul or impeach
" the acts or diſpoſition of the freeholder.

" Another thing obſervable is, that as the tenant could in no
" ſort alien without his lord's licence, nor could that licence be ſo
" interpreted as to deprive the lord of a tenant qualified to do his
" ſervices, ſo, when he had, by a ſufficient proviſion, taken care
" of his lord, he might then carry over the diſpoſition to any other
" perſon as far as he pleaſed. For it would have been unreaſon-
" able to compel him to aſſign over the whole fee to any other
" perſon, when no exigencies of the tenure required it, and
" would alſo have taken away his power of providing for others
" whom he might lie under equal obligations to take care of.
" Hence came the notion of remainders; and the reaſon why they
" were to be limited and paſs out of the grantor at the ſame time
" with the particular eſtate, ſeems to ariſe from the nature of the
1 Weſt. pl. 567. " licence formerly given for alienation. For as the tenant could
" not alien at all without his lord's licence, ſo neither could he
" alien for any longer time, or to any other perſon, than ſuch
" licence warranted. Therefore, if he had a mind to diſpoſe of
" the feud to ſeveral perſons in ſucceſſion, he was to procure
" licence

" licence for that purpoſe, and by proper limitations to let in all " perſons within the benefit of it at the ſame time, leſt by death " or otherwiſe he might be afterwards prevented from purſuing it. " And theſe remainders are now limited of ſuch ſorts of inheritance as will not come within the rules of this reaſoning. " And though licences for alienation are ceaſed, yet it has been " thought fit to obſerve the rules deducible therefrom in the limiting and ſettling of ſuch remainders. But, before we enter " into a particular diviſion of this head, it will be neceſſary to obſerve further, that anciently the tenant being poſſeſſed of the " entire property in the feud, might, upon his alienation in fee, " have erected a ſeignory to himſelf, to ariſe out of the tenancy. " And this practice was encouraged, becauſe it multiplied feudal " tenants, and brought greater force into the field. But, though " theſe ſeignories were ſo far in the nature of reverſions, that " upon determination of the tenancy in fee by eſcheat or forfeiture, " the tenancy came back again to the firſt tenant, and he became ſeiſed thereof in fee as he was before; and though the " ſeignories themſelves were then alienable, as the reverſion now " is, and carried with them the rents and ſervices, as a grant of " the reverſion now does; yet, whether they might have then limited a remainder over upon a tenancy in fee, as they may now " do, where the reverſion would otherwiſe veſt in themſelves, is " uncertain, ſince there was no reaſon of convenience to multiply " ſuch remainders, though they found it convenient to multiply " ſuch ſeignories. But, however it happened before the ſtatute " of *quia emptores*, yet, after that ſtatute, no one could have diſpoſed of the fee without a remainder upon it. For the fee in " all caſes by that ſtatute was to be holden of the firſt feudal " lord; and, conſequently, the tenant, who made the alienation, " had nothing further to expect in the tenancy either as a ſeignory, reverſion, or eſcheat; but theſe now belonged to the firſt " feudal lord, and therefore the tenant could not diſpoſe of what " belonged to another: for the reaſon of making that ſtatute was, " that the tenant might not erect ſeignories to himſelf to prevent " the eſcheat to his lord: hence it plainly followed, that every remainder muſt depend upon a particular and leſs intereſt than the fee, and therefore was confined to three caſes, *viz.* to eſtates for years, which is the leaſt certain intereſt the law knows, to eſtates for life, and to eſtates-tail. The eſtates for years and for life were the ancient ones at common law, and were the terms for which people uſually diſpoſed of the feudal intereſt: the eſtate-tail came in upon the conſtruction of the ſtatute *de donis*, which made the inheritance to be certainly deſcendible. And when the ſtatute *quia emptores* followed it ſo near, they then conſtrued the fee conditional in the donee to be an eſtail-tail, and the ancient ſeignory in the donor to be a reverſion. If they had not made ſuch conſtruction, the ſtatute of *quia emptores* had ſhut out the donor, which had been to carry the matter farther than either ſtatute intended; and therefore to preſerve the force of both ſtatutes, that which was before called a ſeignory, was

Co. Litt. 22, 2 a. 2 Inſt. 335.

" now

" now called a reverſion, that the donor might have his own in-
" tereſt preſerved, and yet not be ſaid to erect an intermediate
" ſeignory between him and his lord, which the ſtatute of *quia*
" *emptores* had forbidden. And all this plainly ſhews, that a ſeig-
" nory and reverſion are in their own nature much the ſame.

" But for the better underſtanding of this head, we ſhall conſider

(A) Of what Things a Remainder may be made.

(B) What Words are ſufficient to create a Re-mainder.

1. Of the Propriety of the Words made uſe of to paſs th Remainder.
2. Of the Deſcription or Deſignation of the Perſon who to take the Remainder.

(C) Of the ſeveral Kinds of Remainders as diſtin guiſhed into Remainders veſted, or in Contingenc or Abeyance.

(D) Of Remainders in Abeyance or Contingency what Eſtate is ſufficient to ſupport them; whe they are to take Effect; and by what Means the may be deſtroyed or prevented from coming *eſſe*; and therein, of Remainders by Way of ex cutory Deviſe or future Intereſt.

(E) Of Remainders that ariſe on Conditions Prec dent or Subſequent.

1. Of the Difference between a Condition and a Limitati and in caſe of the Condition when it precedes the veſt of the Remainder as the Cauſe thereof, and is annexed the firſt Eſtate, and when it is annexed to the firſt Eſt abſolutely without any Regard to the Remainder.
2. Between a Deed and a Will, when in both the ſa Words of Condition are made uſe of for veſting the R mainder.
3. Between a Limitation over in ſuch Caſe of a Will, where no Limitation is made over.
4. Between Remainders that are to ariſe upon Conditi agreeable to the Rules of Law, and ſuch as are to a upon Conditions repugnant and againſt the Rules of Law.
5. Between ſuch Words as actually make a Condition, ſuch as are only deſcriptive of the Manner when and the Remainders are to ariſe and take place.

(F)

(F) Of Croſs Remainders, or thoſe ariſing by Implication and Conſtruction of Law.

(G) Of veſted Remainders, and of the particular Eſtate to ſupport them in their Creation; how long it muſt continue; and when by Determination, Grant, or Refuſal thereof, the Remainder is diſcontinued, barred, or deſtroyed, and when not.

(H) In what Caſes a Remainder or Reverſion ſhall be ſubject to the Acts or Charges of the particular Tenant; and therein, of the Remedies for him in the Reverſion or Remainder by Entry, Action, or Receipt.

(I) To what Purpoſes the Remainder is accounted but as one with the particular Eſtate, and where they are regarded as ſeveral Eſtates.

## (A) Of what Things a Remainder may be made.

"All that it ſeems neceſſary to obſerve for explaining and clearing this point will be reſolved by putting a caſe or two, wherein it has been holden doubtful if the remainder were good.

"A man ſeiſed of lands in fee grants thereout a rent-charge to one for life or years, remainder over to another in fee or in tail, &c. It was doubted, whether this remainder were good, becauſe this rent had no exiſtence at all before the grant; and the grantor cannot be ſaid to have any part of the rent left in him, as he would of land, becauſe he firſt gave being to the rent, and bounded the time of its exiſtence, which being run out, nothing thereof remains to grant over to another; and a remainder is to be granted out of that which would otherwiſe be a reverſion in the grantor, which here this rent cannot be, being newly created. But in this caſe, by the better opinion of the books, and a judgment lately in point (*a*), ſuch remainder of a rent newly created has been holden good. For, as the grantor might at firſt have granted it in fee or for ever, having ſuch perpetual and durable intereſt in the fund out of which it was to ariſe, ſo he may ſhare and divide the grant, and give part thereof to one, and part to another in ſucceſſion; and the rather, becauſe the particular eſtate and remainders are but as one eſtate, as to the grantor, being limited to paſs out of him all at the ſame time. And as to him, it makes no difference, whether one or more take benefit jointly, or in ſucceſſion one after another. But (*b*), if he grant ſuch rent for life or years, without going further, he cannot after grant the reverſion thereof to another, becauſe he has no reverſion in him for the reaſons before given. The reaſon of this caſe will go likewiſe to commons, eſtovers, &c. newly created."

Plowd. 35. a.

1 Brook, 252. pl. 8. 254. pl. 54. 58. 2 Ro. Abr. 415. pl. 2. 26. 70. 76. 78. (*a*) 1 Lev. 144. 1 Sid. 285. 2 Keb. 29. (*b*) Mo. pl. 100.

In

4 Mod. 275. 280. Ld. Raym. 49. Skin. 446. pl. 4. See 2 Salk. 465. pl. 2. Carth. 252. 350. 2 Salk. 465. pl. 2. Comb. 334.

In the caſe of *The King* v. *Kemp*, it was held, that the king may grant an eſtate in an office to commence *in futuro*, or upon a contingency, for he hath no inheritance in the office, or the execution of it, but in point of intereſt only to grant. And it was ſaid, there was a diverſity between offices in fee exiſting, and ſuch as were granted only for life, which being as a new thing created, might, as a rent *de novo*, be granted to commence *in futuro*. Rex v. Kemp.

Show. P. C. 5. 11.

'If one be created baron, viſcount, earl, &c. by patent, and after, in the ſame patent, the ſame honour be granted to another in remainder, yet this operates as a new grant, and not as a remainder; for the king had no reverſion of that honour in him though he had ſtill the ſame power of appointing one in ſucceſſion to take it, as he had of granting it to the firſt.

9 Co. 48. And. pl. 201.

'So, if one hath the office of park-keeper, foreſter, gaoler, ſheriff, &c. to him and his heirs, he may grant theſe offices to one for life, remainder to another for life, &c. for *omne majus continet in ſe minus*, and as they are grantable over in fee, ſo may they be granted in ſucceſſion to one for life, with remainder over, &c.'

Lev. 220. Bridg. Rep. 113.

A licence to ſell wine may be granted to one for life, remainder to another for life; becauſe by ſuch licence not only authority paſſeth, but an intereſt, by way of reſtitution to that which was the ſubject's right before it was prohibited by ſtatute.

"But before we leave this head, it may be proper to inquire "into the reaſons and practice of limiting remainders in perſonal "goods or chattels; for theſe in their own nature ſeem incapable "of ſuch a limitation, becauſe, being things tranſitory and of "many accidents liable to be loſt, deſtroyed, or otherwiſe im"paired: beſides, the exigencies of trade and commerce require "a frequent circulation thereof, it would put a ſtop to all trading, and occaſion perpetual ſuits and quarrels, if ſuch limitations were generally tolerated and allowed. But yet in 37 H. 6. 30. a. Dy. 7. pl. 8. 359. pl. 52. Cro. Car. 347. Plowd. 521. b. 542. b. Br. tit. Deviſe, pl. 13. 5 Co. 16, 17. 1 Ro. Abr. 610. pl. 4. Godolph. Abr. 356. Swinb. 137. 1 Bulſtr. 192. 8 Co. 95. 2 Benl. pl. 57. "wills and teſtaments, ſuch limitations over of perſonal goods "chattels have ſometimes prevailed; eſpecially, where the firſt "deviſee had only the uſe or occupation thereof deviſed to him "for then it was holden, that the property continued in the executors of the teſtator, and that the firſt deviſee had no power "to alter or take it from them. But in either caſe, if the firſt "deviſee did actually give, grant, or ſell ſuch perſonal goods or "chattels, the judges would very rarely allow of actions to be "brought by thoſe in remainder for the recovery thereof. Hence "it came to paſs, that it was a long while before the judges of the "common law could be prevailed with to have any regard for a "deviſe over even of a chattel real or a term for years, after an "eſtate for life limited therein, becauſe the eſtate for life being "in the eye of the law of greater regard and conſideration than "an eſtate for years, they thought, he who had it deviſed to him

" for life; had therein included all that the deviſor had a power to " diſpoſe of. And though they have now gained that point upon " the ancient common law, by eſtabliſhing ſuch remainders, and " have thereby brought that branch out of the Chancery, (which " court frequently helped the remainder-man by allowing bills to " compel the firſt deviſee to give ſecurity, *&c.*) yet it was at firſt " introduced into the common law under a new name, and took " all the ſanction it has ſince received from thence; an account " whereof, and how far it has been carried, may be ſeen at large " in the Duke of *Norfolk*'s caſe. But, as to perſonal goods and " chattels, the common law has provided no ſufficient remedy for " the deviſee in remainder of them, either during the life of the " firſt deviſee, or after his death; therefore the court of Chan- " cery ſeem to have taken that branch to themſelves, in lieu of " the other which they loſt, and to allow of the ſame remedy for " ſuch deviſee in remainder of perſonal goods and chattels, as " they before did to the deviſee in remainder of chattels real or " terms for years. 3 Ch. Ca. 1.

" Therefore, where a man deviſed 600 *l.* a-piece to two daugh- " ters, and the reſidue of his perſonal eſtate to his ſon, and if " either of his children died during their minority, the ſurvivors to " be heirs to the deceaſed by equal portions; the ſon died, and " the one ſiſter brought a bill againſt the executors and the other " ſiſter to have her own 600 *l.* and the half of the brother's per- " ſonal eſtate; ſhe had a decree accordingly; but was forced to " give ſecurity to pay back her own 600 *l.* in caſe ſhe died during " her minority; though it was ſaid, if ſhe died during minority " leaving iſſue, it would be a hard caſe. 1 Ch. Ca. 199.

" A deviſe was made of the uſe of goods, plate, and houſehold " ſtuff to one for eleven years, and after to another, and held a " good deviſe, and a decree to deliver them accordingly after the " eleven years. 2 Ch. Rep. 137. Jolly v. Wills.

" So, upon a deviſe of the uſe of certain books, jewels, and " rarities, to one for life, and after of the things themſelves to " another; he in the remainder brought a bill in the lifetime of " the firſt deviſee to have ſecurity for their forthcoming after the " death of the firſt deviſees; and the court, being aſſiſted by two " judges, held the remainder good; but ordered them to move " for the ſecurity another time." 1 Ch. Ca. 130. Vauchell v. Lemon.

A farmer deviſed his ſtock (which conſiſted of corn, hay, cattle, *&c.*) to his wife for life, and after her death to the plaintiff. It was " objected, that no remainder can be limited over of ſuch chattels as " theſe, becauſe the uſe of them is to ſpend and conſume them: but " the Maſter of the Rolls ſaid, the deviſe over was good; but added, " that if any of the cattle were worn out in uſing, the defendant was " not to be anſwerable for them; and if any were ſold as uſeleſs, " the defendant was only to anſwer the value of them at the time of " the ſale. And an account was decreed to be taken accordingly. Abr. Eq. 3 1. Hale v. Burrodale. [Where the things limited over are of a periſhable nature, the modern way, I believe, is to direct them to be ſold, and to allow the tenant for life the intereſt of the produce of the ſale.]

*A.* gives his ſiſter by will 10 *l.*, and directs that ſuch part of " perſonal eſtate, as his wife ſhould leave of her ſubſiſtence, 1 P. Wms. 651. Upwell v. Halſey.

ſhould go to the ſiſter: whatever the wife has not employed in that way, ſhall go over and be accounted for.

2 Ch. Rep. 151. Warner v. Booſley. Swinb. 137. God. Abr. 360. Manning's caſe. 8 Co. 94. *contrà*.

"But, where a man deviſed debts and perſonal eſtate to one, "whom he intended executrix, for life, and after her death to "another; the executrix died, and he in remainder brought a bill "againſt her executor for the ſaid perſonal eſtate; the bill was "diſmiſſed, and the remainder holden void, the firſt deviſee being "executrix, in whom the perſonal eſtate veſted and attached by "a right prior to the deviſe, and ſo belonged to her exe-"cutor."

There, the deviſe is, to the executrix for life, remainder over, and the executory deviſe adjudged good.

Salk. 231. pl. 9. Ld. Raym. 325. Ayres v. Falkland. See Pollex. 32.

*A.* being poſſeſſed of a term for ninety-nine years, deviſes it to *B.* for life, and after to ſix others ſucceſſively, for their lives, if the ſaid term ſhould ſo long continue; and all the ſeven perſons being dead, and the term continuing, it was adjudged, that it ſhould revert to the executors of the teſtator, and that it did not veſt in the ſurvivor of the deviſees ſo as to tranſmit it to his repreſentatives.

1 P. Wms. 686. *Vide* Executory Deviſes, under title "Legacies "and Deviſes."

But a deviſe of a term for years, or perſonal chattel to one for a day or an hour, is a deviſe of the whole term or intereſt, if the limitation over is void, and it appears at the ſame time that the whole was intended to be diſpoſed of from the executors.

1 Ch. Rep. 129. 260. 2 Ch. Rep. 66. 153. 2 Ch. Ca. 94. 2 Vent. 349.

"Where money, goods, or other perſonal chattels, are deviſed "to one and the heirs of his body, or to one, and if he die "without heirs of his body, the remainder over, this re-"mainder is totally void, and the courts will not allow of a bill by "the remainder-man to compel ſecurity to have the money, &c. "after the death of the firſt deviſee; but it ſhall go to his ex-"cutors or adminiſtrators. For the firſt deviſe gives the abſo-"lute property of perſonal eſtate, as a like deviſe of real eſtate "before the ſtatute *de donis* gave a fee, upon which no limitation "could be made further; and as the heirs are the repreſentative "to take a real eſtate, ſo are the executors to take a perſonal "eſtate; and this is not within the ſtatute *de donis*, but remains at "common law."

Saunders v. Saunders, admitted. [See Gregory v. Pelham,

If *A.* deviſe that his goods and furniture ſhall remain in a houſe to be enjoyed according to the limitations of his will, thoſe entitled to the houſe, the firſt that would be tenant in tail, the houſe becomes abſolute owner of the goods.

5 Br. P. C. 435. Duke of Bridgewater v. Egerton, 2 Vez. 122. 1 Br. Ch. Rep. 281. notes. D. of Marlborough v. Spencer. 5 Br. P. C. 592. Foley v. Burnell, 1 Br. Ch. Rep. 274. Dom. P. 27 April 1785. Vaughan v. Burſtem. 3 Br. Ch. Rep. 101.]

2 Ch. Rep.

"But, where a deviſe was of money and goods to one for life, "and if the deviſee died without iſſue, then to go over to an-"ther, this was held a good deviſe over; for the firſt limitation "being expreſsly for life, the words after could not enlarge it by "implication, as they would a real eſtate, and then it falls within "the common rule of other caſes.

"O

" One by will deviſed 1300 *l.* to his daughter *A.*, to be paid at " her age of 21 years, and if ſhe died without iſſue before 21, then " to go over to *B.*, provided if ſhe married before 21 without con- " ſent of certain perſons, then to go over to *C* She did marry " before 21 without ſuch conſent; and upon a bill brought by *B.* " it was decreed, that *A.* ſhould give ſecurity, *&c.* for the money, " if ſhe died before 21 without iſſue; and the Maſter of the Rolls " who heard the cauſe ſaid, the law was now ſettled accordingly. " But there, the decree was ſo ordered as to ſerve both contin- " gencies, *viz.* that upon her marriage before 21 without conſent, " the money ſhould go to *C.*, yet ſo that if ſhe died before 21 " without iſſue, it ſhould go to *B.* according to the deviſe." Pawlett v. Doggett, MSS. Gilb.

## (B) What Words are ſufficient to create a Remainder.

### 1. Of the Propriety of the Words made uſe of to paſs the Remainder.

' THE word *Remainder* is no term of art, nor is it neceſſary to ' create a remainder. For any other words, ſufficient to ' ſhew the intent of the party, will create a remainder; becauſe ' ſuch eſtates take their denomination of remainders more from ' the nature and manner of their exiſtence, after they are limited, ' than from any previous quality inherent in the word *remainder* ' to make them ſuch. Therefore, if a man gives lands to *A.* for ' life, and that after his death the land ſhall revert and deſcend ' to *B.* for life, *&c.* this is a good remainder, and may be ' pleaded as ſuch. Roll. Abr. 416. 1 Brook, 253. Plow. 29. 134. 157. b. 159 170. b. 542. a. Dy. 125. b. 1 Roll. Rep. 319.

' So, if lands be given to one and the heirs male of his body, ' and to him and the heirs female of his body, this limitation ' to the heirs female is a remainder; becauſe it is not to take ' place till the eſtate to the heirs male is ſpent. Co. Lit. 377. a.

' So, if lands are given to a widow, and to the heirs of the body ' of her late huſband on her begotten, this is a remainder to the ' heirs of the body of the huſband; becauſe it cannot take effect ' till after the widow's death, who hath an eſtate for life. Co. Lit. 26. b. 220. a. 2 Mod. 210.

' So, an eſtate limited to *A.* for life, or in tail, *& poſt deceſſum ' ejus*, or *pro defectu talis exitûs*, to *B.* and the heirs of his body, ' is good, though there be not the word *remainder*. So, if a leaſe ' be made to *A.* for life, and that after his death *B.* ſhall have the ' profit, this is a good remainder to *B.*' " And in the common " limitations of ſettlements at this day, the word *remainder* is " ſeldom uſed." Plow. 159. Moor, pl. 54. Dyer, 125. Roll. Rep. 319. Cro. Eliz. 10. 742.

' So, a leaſe to *A.* for life, and that after his death his children " ſhall have it, is a good remainder. 6 Co. 17. b. Raym. 83.

' Nay, though an eſtate be limited expreſsly as a remainder, yet, ' if it be not ſo in conſtruction of law, the word *remainder* ' will have no force to make it ſuch. As, where *A.* was ſeiſed of ' lands in fee, and he and *B.* levied a fine to *C.* in fee, who granted Cro. Eliz. 727. 768. 792. Moor, pl. 795.

Co. Lit. 299. Raym. 142.

' and rendered to *B.* in tail, rendering rent, and if *B.* died without ' iſſue, *tenementa præd. integrè remanerent* to *A.* and his heirs; *B.* ' ſuffered a common recovery; and *A.* diſtrained for his rent: ' this was adjudged a reverſion, and as ſuch the rent paſſed with ' it to *A.*, and was chargeable upon the land in whoſe hands ſo- ' ever it came, by virtue of a contract which cannot be deſtroyed ' by the recovery.

Cro. Eliz. 216. Leon. 218. Co. 153. Dy. 253. 3 Leon. 195. Swinb. 123. God. Abr. 356. 2 Roll. Abr. 415. 1 Bulſtr. 193. Bro. 321. Co. Lit. 45. Plow. 158. Moor, pl. 441.

' But here it may be proper to take notice of a ſet of words ' ſometimes uſed in leaſes for years, which are ſo far a part of the ' limitation and deſcription of the firſt intereſt, that they cannot ' again be made uſe of to paſs any further intereſt in the ſame ' land. As, if one make a leaſe to *A.* for eighty years, if he ſhall ' long live, and if he happen to die within the ſaid term, *then the* ' *lands for the reſidue of the ſaid term, or for ſo many years as ſhall* ' *be then remaining of the ſaid term, to go over to another*; this li- ' mitation over is void; becauſe the time, or term, of eighty years ' was not abſolute to *A.*, but was determinable upon his death ' and by his death the whole term is at an end; as if a leaſe ' had been made to him barely for his life, and then to limit ' the reſidue of a term, when nothing thereof remains, is re- ' pugnant and void. But ſome opinions incline, that a deviſe in ' ſuch a manner would be good, by reaſon of the intent of the ' party and the equivocal ſignification of the word *terminus*, which ' may, though not ſtrictly, ſignify alſo the time or ſpace of eight ' years, as well as the eſtate or intereſt for eighty years determin- ' able as aforeſaid. But now, if a leaſe be made to *A.* for eight ' years, if he ſo long live, and if he die within the ſaid term, ' *then the land to go over to another for the reſidue of the eighty years*

Mod. 195. 520. *contr. vide* 1 Leon. 195. 1 And. 259.

' this is a good remainder; becauſe, though the term or intereſt ' be determined, yet the land, and part of the years, ſtill remain- ' ing, thoſe years may be made the meaſure of the ſucceeding in- ' tereſt, as any other number of years may be.'

Hob. 313. Hutt 87. Windſmore v. Hobart. (*a*) But had it been aſcertained by a clauſe *ſucceſſive ſicut nominantur in charta*, it had been good. Leon. 246. Godb. 220.

*J. S.* ſeiſed of lands in fee by indenture demiſes them to *A.* for life, *habendum* to the ſaid *A.*, *B.*, *C.*, and *D.*, his three ſons, for their lives and the life of the ſurvivor of them ſucceſſively: after the death of *A.* it was adjudged in this caſe, firſt, that if the ſons could take, it muſt be by way of remainder, they not being parties to the deed, and then it muſt be as joint-tenants, which could not be by reaſon of the word *ſucceſſivè*. Secondly, that they could not take in ſucceſſion, for the (*a*) uncertainty whoſe eſtate or intereſt was to commence firſt.

## 2. Of the Deſcription or Deſignation of the Perſon who is to take the Remainder.

" AS to the deſcription or deſignation of the perſon who is to take the remainder, ſo far as it falls within the names of purchaſe allowed of by law, I ſhall not here enter into it, being equally applicable to poſſeſſions as well as remainders

" All that ſeems here proper to come under conſideration is, how
" far a limitation in remainder to a man's own right heirs, or the
" heirs male or female of his own body, or to the right heirs of
" another perſon, ſhall be good as a remainder, and how far not.
" As to the limitation to a man's own right heirs, or the heirs
" male or female of his own body, this is void, becauſe, ſay the Co. Litt. 22
" books, no one can make his own right heir a purchaſer either of
" a fee-ſimple or a fee-tail, without departing with the whole
" eſtate. But this being a reaſon that carries little ſatisfaction or
" inſtruction with it, we muſt therefore ſeek higher, and endea-
" vour to fetch the reaſon of it from the old conſtitution whereon
" all our law ſeems to be founded, that is, from the nature of the
" feudal tenure, and the relation that was at firſt eſtabliſhed be-
" twixt the lord and his tenant. And then clearly the reaſon
" ſeems to be this: when donations came to be made to the feu-
" dary and his heirs, or heirs male, or heirs female of his body,
" under certain duties and ſervices, theſe words, " heirs, *&c.*"
" being words of limitation, and appropriated to meaſure out the
" length or continuance of the eſtate intended to be given, and of
" the preſent tenant only, the lord could have notice how far he
" would be capable of performing the ſervices, but not of the
" heirs, or heirs male or female, *&c.* who were not then *in eſſe*,
" and yet were to be liable to the ſame ſervices, when they came
" into the tenancy: therefore the lord was to have the tuition and
" education of ſuch heirs, *&c.* in caſe they happened by reaſon
" of their minority to be incapable of performing the ſervices,
" that ſo he might by his care and diſcipline ſecure to himſelf
" tenants always capable thereof, either in their own perſons, if
" they happened to be males, or by proper marriages with his
" tenants, if they proved to be females. And this was the more
" reaſonable, becauſe he gave the tenancy to the heirs, or heirs
" male, or heirs female, *&c.* as well as to the tenant himſelf; and
" all who came under that deſcription were equally in his view,
" and within the words of his gift. But now, if the tenant might
" have broken through this proviſion of his lord, and have given
" the tenancy to his heirs, *&c.* by his own immediate gift, then
" all theſe ends of the tenure had been fruſtrated and defeated;
" for they coming to the tenancy, not by the donation of the
" lord, but by the diſpoſition of the tenant, though they would
" have been ſtill liable to the naked ſervices, yet the lord had loſt
" the advantages of wardſhip, marriages, *&c.* which were annexed
" only to thoſe who came in upon the terms of his own donation
" by deſcent; and ſince they as heirs, were equally included in
" the firſt donation, and upon the death of their anceſtor were to
" come in, in virtue thereof, therefore the law conſtrues ſuch gift
" or diſpoſition of the tenant, whether in poſſeſſion or remainder, to
" be totally void; either for that then it came too late, the tenancy
" being veſted in them immediately upon their anceſtor's death,
" and therefore it was fruitleſs to give them what they had al-
" ready; or to prevent the miſchiefs that might accrue to the
" lord by ſettling in ſuch tenants, as for the preſent might not be

" capable of doing the ſervices, and for want of a proper educa-
" tion under the lord, would never after be qualified for them.
" And this ſeems to be the true reaſon of that ſo often *decanta-*
" *tum* in our books, that a man cannot make his own right heir,
" or heir male, or female, a purchaſer, without departing with the
" whole fee. And therefore when the tenants found that this
" would not do to defeat the lord of the wardſhip and marriage
" of their heirs, they then found out the way of making feoff-
" ments and other diſpoſitions to their eldeſt ſon apparent by name
" in their lifetime, and then, though they died leaving him a
2 Inſt. 109, 110, &c Co. Lit. 76. 78. 6 Co. 78. Plowd. 82. a. " minor, and not capable of the ſervices, yet the lord loſt the
" advantages of wardſhip, marriage, &c. But to meet with this
" deviſe, and others of the like kind, the ſtatute of *Marlb. c.* 6.
" and other ſubſequent ſtatutes were made, which have ſecured
" the lords againſt all the evaſions of their tenants to defeat them
" of the advantages of their ſeignory."

Dyer, pl. 20. Moor, 720. ' Therefore, if a man makes a leaſe for life, or a gift in tail by
' deed, remainder to another for life or in tail, remainder to him-
' ſelf and his heirs, or to his own right heirs only, this remainder
' to himſelf or to his heirs is void, becauſe the fee continued ſtill in
' him, and then he cannot give himſelf what he had before, and
' he cannot give to his heirs as ſuch what the law gives them
' by a prior right to veſt at the ſame time with his diſpoſition to
' them.'

Leon. 182. Moor, 284. And. 288. Fenwick v. Mitford. So that if one levies a fine to the uſe of his wife for life, the
remainder to the uſe of his eldeſt ſon, and the heirs male of his
body, and for want of ſuch iſſue, to the uſe of his own right heirs;
this limitation to the uſe of his right heir is merely void, and he
hath a reverſion and not a remainder in him.

Dy. 156. Graſwold's caſe. Hob. 30. 2 Roll. Abr. 415. pl. 1. Co. Litt. 22. b. Bendl. 40. 2 Leon. 25. 2 Mod. 209. 1 Ventr. 378. 3 Roll. Rep. 239. *contrà per* Co. *arguendo.* " So, where *A.* by indenture gave lands to *B.* for life, remain-
" der to the heirs male of the body of *A.*, remainder
" his own right heirs; *A.* died, leaving two ſons; the elde
" had iſſue a daughter, and died; it was adjudged for th
" daughter againſt the uncle; either, becauſe the eſtate to the hei
" male was void, the fee being caſt upon him by the death of th
" anceſtor, in virtue of the firſt donation; or, becauſe, admitti
" it to be good, then it was veſted in the eldeſt ſon by purcha
" being the firſt taker, and conſequently ceaſed upon his dyi
" without iſſue male, and then the daughter is heir of the fe
" ſimple." ' But, if a man makes a feoffment in fee to the u
' of himſelf for life, remainder to the heirs male of his own bo
Co. Litt. 22. Bendl. 49. Hob. 30. ' this is a good eſtate-tail executed in himſelf, for the law co
' joins his eſtate for life and the remainder to the heirs male
' his body, to prevent that remainder's being loſt by forfeiture
' determination of the particular eſtate before it can veſt, and
' limitation is good by way of uſe, becauſe it is (*a*) raiſed out of
' eſtate of the feoffees, as if they had given it to him in ſuch manne

(*a*) So, if one covenants to ſtand ſeiſed to the uſe of his heirs

male on the body of his ſecond wife, he takes an eſtate for life by implication, and ſo it is an eſ
tail executed in himſelf. Pybus v. Mitford, Vent. 372. 2 Lev. 75. Raym. 228. Mod.
222. 159. 3 Keb. 229. S. C. adjudged. [In a ſubſequent caſe, where the uſe was limited to
grantor himſelf for 99 years, remainder to the uſe of the truſtees for 25 years, remainder *to* (the uſe
*the heirs male of his own body*, remainder to his own right heirs; the court held the limitation to

*heirs male* of the body to be void, becauſe there was no preceding freehold limited to ſupport it, and that it ſhould not be implied *contrary to the intent* of the conveyance; that there the eſtate took effect by tranſmutation of poſſeſſion out of the ſeiſin of the truſtees, and not like Fenwick (ſhould be Pybus) and Mitford's caſe, where the owner *covenanted to ſtand ſeiſed* to the uſe of the heirs of his body. And Powell, J. held, that even in that caſe, if there had been an *expreſs eſtate limited to the covenantor*, it had been different. Adams v. Savage, 2 Salk. 679. 2 Ld. Raym. 854. 6 Mod. 124. S. C. So, where *A.* by marriage ſettlement conveyed certain lands to the uſe of himſelf for 99 years, if he ſo long lived, and after to the uſe of truſtees for 200 years, remainder to the uſe *of the heirs male of his own body*, remainder to his own right heirs; upon a caſe referred to the judges of C. B. from the court of Chancery, they held the limitation to the heirs male of the body of *A.* void, no freehold being limited to any perſon precedent to that eſtate; and that no eſtate of freehold could *reſult to* A. for his life *by implication*; becauſe another eſtate, *viz.* for 99 years if, &c. was expreſsly limited to him, which would be inconſiſtent with a freehold by implication. Rawley v. Holland, Vin. Abr. tit. "Uſes," F. pl. 11.]

'So, if a man makes a feoffment in fee to the uſe of *A.* for 'life, or in tail, remainder to the uſe of *B.* for life, or in tail, remainder to the uſe of himſelf and his heirs, or to the uſe of his 'own right heirs, yet the uſe being of the ſame nature with the 'land, comes back to him in the ſame manner as that would have 'done, and then having only diſpoſed of part of the eſtate, the uſe 'returns, and brings with it the land for the reſidue of the eſtate 'undiſpoſed of, as if it had never been out of him, and, conſequently, ſuch reſidue ſhall go to the heirs by deſcent, and not 'veſt in them by purchaſe.' "And therefore a leaſe for 1000 "years made by the feoffor was holden good againſt the heir, "becauſe it took effect out of the reverſion, which the uſe brought "back to the feoffor himſelf." Cro. Eliz. 321. Dyer, 133. Leon. 182. 2 Co. 91. Moor, 284. 744. Co. Litt. 22. b.

'So, where one made a feoffment in fee to the uſe of himſelf 'for years, remainder to the uſe of *A.* his ſon and heir apparent, 'and the heirs male of his body begotten, remainder to the uſe of 'the right heirs of the feoffor for ever, and after *A.* died, leaving 'two daughters only, and then the feoffor conveyed the ſame 'lands to another of his ſons in fee; it was adjudged a good conveyance, and that the daughters of the eldeſt ſon, though they 'were heirs at law, took nothing by purchaſe, for the eldeſt ſon 'dying without iſſue male in the lifetime of the feoffor, if the laſt 'remainder could have taken effect at all, it ought then to have 'ſo done, becauſe the leaſe for years was not ſufficient to ſupport 'it till it came *in eſſe* afterwards, for then there would have wanted 'a tenant of the freehold in the mean time; and upon the death 'of *A.* it could not take effect, becauſe his father was then living, 'and could have no heir during his life; and therefore the remainder was void, and the whole eſtate reveſted in himſelf, by 'the reſulting of the uſe in the ſame manner as if the limitation 'had been at common law without any uſe. Co. 130. 2 Roll. Abr. 418. 791. Poph. 3. Moor, 720. Cro. Eliz. 334.

'So, where the huſband was ſole ſeiſed in fee, and a ſtranger 'levied a fine to the huſband and wife, and the heirs of the huſband, and they rendered to the conuſor for life of the huſband, 'remainder to *D.* for life, remainder to the right heirs of the 'huſband, the huſband died, and then *D.* died; by the opinion 'of the court of wards and the three chiefs, it was held to be no 'remainder to the huſband, but his ancient reverſion, becauſe the 'huſband cannot limit a remainder to his right heirs where the 'fee was never out of him, and therefore the intereſt of the wife 'was Dyer, 237. pl. 31. 199. a. 2 Roll. Abr. 414. Leon. 102.

" was not gone by her joining in the grant and render, but that " ſhe ſhould have it during her life againſt the heir of the huſ- " band.'

" And there a caſe is cited, where ſuch fine calling it a re- " mainder was not received: for if it were, this would be an eaſy " evaſion to defeat the lord of wardſhip, marriage, &c. of the " heir, though his anceſtor always continued ſeiſed of the ancient " fee till his death, and the ſame by priority of right attached in " his heir immediately upon his death, as included within the " words of the firſt donation.

2 Br. 6. pl. 93. " If a man had made a feoffment in fee before the ſtatute of " uſes, to the uſe of himſelf for life, remainder to *A.* in tail, re- " mainder to the right heirs of the feoffor, and died, and then *A.* " died without iſſue, the heirs of the feoffor being within age, he " ſhould be in ward for the uſe coming to the feoffor in lieu of " the land, for ſo much as was not diſpoſed of ſhall be of the " ſame natnre with the land itſelf, and then ſuch a remainder of " lands in poſſeſſion had been void, becauſe it veſted in the heir " by deſcent in virtue of the firſt donation, which was the elder " title. And ſo it ſhall be, where it is limited by way of uſe.

Dy. 172. pl. 12. 237. p'. 30. Cro. Jac. 40. 2 Co. 92. 9 Co. 126. 132. " But, where a man makes a feoffment in fee upon condition to " re-enfeoff him, and the feoffee gives it to the feoffor for life, " remainder to another in tail, remainder to the right heirs of the " feoffor; there, in ſuch caſe, his heir ſhall not be in ward by the " common law, becauſe, though he is in by deſcent, and not by " purchaſe, as ſhall appear hereafter, yet, he is not in of the old " reverſion; for both the fee and the uſe of it were out of the " feoffor, being made to a ſpecial intent, and therefore he takes it " by deſcent as a remainder, for this ſhuts out the lord from the " wardſhip, &c. becauſe the intervening remainder upon the " death of the feoffor is not held immediately of the lord, and ſo " his anceſtor died not ſeiſed of the fee within the tenure of the " lord; as in the other caſe of the reverſion he did; for that was " held immediately of the lord, though he could not have the " fruit of it till the determination of the intermediate eſtate. But " in the other caſe, if the remainder-man in tail had died without " iſſue, living the feoffor, then clearly upon his death, his heir " would be in ward, becauſe his anceſtor died ſeiſed within the " homage and fee of his lord. But this point of the wardſhip be- " longs to another head, and therefore no further occaſion to " explain it here.

Co. Litt. 22. b. Dy. 362. 1 Co. 137. " If one makes a feoffment in fee to the uſe of himſelf for life " or in tail, remainder to the uſe of the feoffee, yet the feoffee " hath no reverſion, but it is in nature of a remainder, although " the eſtate of the feoffor is executed by the ſtatute, and the " feoffee is in by the common law, which concurring with the " ſtatute law ſhall be preferred, ſince that can give him no more " than what he has already by the common law. And the reaſon " why this is a remainder ſeems to be, becauſe the eſtate firſt mov- " ing from the feoffor, the uſe immediately reſulted back to him " in fee, and then, when he limits that uſe to himſelf for life or in

" tail only, with remainder to the uſe of the feoffee, though this " cannot give him what he has already, yet it may well ſerve to " declare in what manner he ſhall have it; and the uſe being " limited in remainder, ſo ſhall be the eſtate, which takes it ſup- " ported under ſuch limitations.

" One makes a leaſe for years, rendering rent, and after by will " deviſes a further term to the leſſee rendering the ſame rent, and " deviſes over the inheritance to a ſtranger. The queſtion was, " if this ſhould paſs to the ſtranger as a remainder, or a reverſion; " becauſe the term and inheritance being both deviſed by will, " which could not take effect till the deviſor's death, he could " have no remainder of that new term, and conſequently could " not deviſe ſuch reverſion to another. But yet by the better " opinion, this ſhould be a reverſion, becauſe the rent would not " be incident to it as a remainder; and in wills, the intent of the " party is principally to be regarded. *Sed qu.* becauſe the rent " may well go to the executors of the teſtator. 2 Leon. 33. Machell v. Dunton.

" A copyholder ſurrenders to the uſe of *A.* for life, and after to " the uſe of the right heirs of the copyholder; and at another " time he ſurrenders the ſaid reverſion to the uſe of *B.* in fee, and " dies; and then *A.* dies; and the heir of the copyholder enters. " And by *Coke*, he may; for the land remains in the lord till his " death, and then his heirs ſhall be in by purchaſe, and not by " deſcent; and if ſo, he had nothing in him to make a ſurrender " of. And he ſaid, the difference was between this caſe and " where the ſurrender is, to the uſe of himſelf for life, remainder " to another in tail, *&c.*, remainder to his own right heirs, " there, his heirs ſhall have it by deſcent. *Sed quære* of this " caſe (*a*), for it appears by the books," ' that if a copyholder ſurrenders to the uſe of his laſt will, and deviſes to *A.* for life, remainder to *B.* in tail, or ſurrenders to the uſe of himſelf for life, remainder to the uſe of *A.* for life, remainder to the uſe of his will, in theſe caſes the reverſion is ſo in the copyholder, that he may in his life ſurrender to the uſe of any other; ſo that all who come in upon ſuch ſurrenders are in by the copyholder, not by the lord, for that nothing remains in the lord, but ſo much as is not diſpoſed of remains in the copyholder as ſtrongly as if it had been limited to him:' " And that in theſe caſes the heir " may enter before or without admittance; and it is likened to a " feoffment in fee to the uſe of his laſt will, notwithſtanding " which he may diſpoſe thereof in his lifetime: And it is alſo " agreed, that a ſurrender to the uſe of the right heirs of *J. S.* " who is then living is void, or to an infant *en ventre ſa mere*, or " to the uſe of one after his death, becauſe the freehold cannot " expect. And yet in theſe caſes, if the eſtate might continue in " the lord in the mean time, they might be good; and *Coke* agrees " in the principal caſe, that if the anceſtor had taken an eſtate for " life, his heirs ſhould have it by deſcent, and not by purchaſe; " therefore it ſeems to be the ſame where the law gives him an " eſtate for life, as in this caſe it does, till the future uſe comes " *in* 1 Leon. 102. Allen v. Palmer. Supplem. to Co. Copyh. 3. Cro. Jac. 376. Cro. Eliz. 148. 441. Leon. 102. 4 Co. 23.

[(*a*) This diſtinction taken by Coke is queſtioned by our author in his Law of Tenures (pag. 172.) and alſo by Mr. Fearne, (Contingent Remaind. 86. 4th ed.) It has indeed been recognized in the caſe of Roe v. Quartley, 1 Term Rep. 634.; but, as it is now ſettled, that the ſurrenderor of a copyhold taking the ultimate limitation is in of his *old* eſtate, (ſee Roe v. Grif-

ſith, 4 Burr. 1952. Smith v. Trigg, 1 Str. 487. Thruſtout v. Cunningham, 2 Bl. Rep. 1046.)

" *in eſſe*, and then the heir cannot have it by purchaſe; and conſequently the anceſtor's ſurrenders to the uſe of a ſtranger good. *Quære ergo.*"

; it ſhould ſeem, that the above caſe of Allen v. Palmer, (notwithſtanding its recognition in that of Roe v. Quartley) not now law. See Watkin's Gilb. Trin. 456. Co. Copyh. 97. Suppl. 3. 13. 15. 75. Cro. Ja. 376.]

Hob. 30. 10 Co. 41. Vent. 372.

' If a man ſeiſed of lands in fee by his will in writing deviſes them to one for life or in tail, remainder to his own right heirs, this is void as a remainder, and the heir ſhall be in of the old reverſion by deſcent, becauſe immediately upon the death of the anceſtor the eſtate deſcends to the right heir, and ſo prevents him from taking by the diſpoſition of the will.'

Salk. 241. pl. 2. Com. 72. pl. 45. Clark v. Smith, *& vide* title Deſcent.

So, if a man deviſes land to his heir at law, paying a ſum of money or an annual rent, yet the heir, notwithſtanding ſuch incumbrance or charge, takes by deſcent, and not by purchaſe.

Salk. 242. pl. 3. 2 Ld. Raym. 829. Com. 123. pl. 86. Redding v. Royſton.

But, where the eſtate deviſed is altered in quantity or quality there, the deviſee, though heir at law, takes by purchaſe; as where *A.* ſeiſed in fee of lands, hath iſſue *B.* and *C.* his daughters; *B.* hath iſſue *D.* and dies; *A.* deviſes his lands to *D.* in fee; *D.* dies without iſſue; his heir of the part of his father ſhall take the whole by purchaſe, and not any part by deſcent.

4 Mod. 380. Carth. 272. Ld. Raym. 33. Tipping v. Coſſins; *et vide* Preced. Chan. 435. S. C. cited.

*A.*, in conſideration of a marriage intended between him and *B.* and of a marriage portion, made a feoffment in fee to the uſe of himſelf and his heirs till the marriage, and after to *B.* for life, then to truſtees and their heirs during the life of *A.*, to ſupport contingent remainders, then to the firſt, ſecond, and other ſons of his body in tail male, then to the heirs male he ſhould have by any other wife, and for want of ſuch iſſue to the heirs of the body of *A.*, with remainder to his own right heirs; the marriage took effect, and they have iſſue only a daughter; then *A.* levies a fine to the uſe of himſelf for life, remainder to his wife for life, remainder to *C.* in fee with warranty; and the queſtion was, What eſtate was veſted in *A.* by the firſt deed, *viz.* Whether the heirs of the body ſhould take by purchaſe or deſcent? For if by purchaſe then the fine levied afterwards was no bar to them. And the court was of opinion, that they muſt take by purchaſe, becauſe where the anceſtor has no eſtate for life, as in this caſe he has not, they cannot be words of limitation; and here the eſtate is expreſsly limited to truſtees and their heirs during his life; and though a man cannot make his own right heirs purchaſers by the name of heirs, either in a conveyance by way of uſe, or by his laſt will, yet he may make them ſo of an eſtate-tail, which is a new created eſtate, different from what the law makes.

Eq. Rep. 20. Preced. Chan. 338. Eure v. Howard.

A ſettlement was made by *A.* to the uſe of himſelf for fifty-nine years, if he ſhould ſo long live, remainder to truſtees and their heirs during his life to ſupport contingent remainders, remainder to *B.* his ſon for ninety-nine years, if he ſhould ſo long live, remainder to truſtees and their heirs during his life to ſupport contin-

tingent remainders, remainder to the firſt and other ſons of *B.* in tail male ſucceſſively, with other remainders over, remainder to the right heirs of *A.* Then *A.* by will deviſes all his lands in poſſeſſion, reverſion, or remainder to truſtees and their heirs, in truſt by ſale or mortgage to raiſe money for payment of his debts and legacies: and if this limitation to his own right heirs veſted the reverſion in fee in himſelf, ſo as to be ſubject to his diſpoſition, or if the heirs were to take by purchaſe, was the queſtion; all the intermediate remainders being determined. And it was argued upon the reaſon of the above caſe of *Tipping* and *Coſſins*, that the heirs muſt take by purchaſe, becauſe he had only an eſtate for years, and the freehold during his life was expreſsly limited to truſtees and their heirs, and therefore againſt his own expreſs limitation he ſhould have no reſulting uſe or eſtate for life. But on the other ſide it was argued, that the reaſon of the reſulting eſtate for life was, becauſe it might poſſibly happen that all the intermediate eſtates might determine before the death of *A.*, as by his and the truſtees joining in a feoffment, *&c.*, which would be a forfeiture of their eſtates, *&c.*, and therefore of neceſſity he muſt have a reſulting uſe for his life: And my Lord Chancellour was clear of this opinion, and ſaid it was his old reverſion in him, and deviſable by will. But note, this was a remainder limited to his own right heirs.

" It appears by what has been already ſaid," ' That wherever ' the anceſtor takes an eſtate for life, and after in the ſame con- ' veyance a remainder is limited mediately or immediately to his ' right heirs, or to the heirs male or heirs female of his body, that ' in ſuch caſe the right heirs or heirs male or female, *&c.* ſhall ' not be purchaſers, but ſhall take by deſcent. Co. 93. Shelly's caſe. Moor, 136. And. 69. and the S. P. cited in numberleſs caſes.

' Therefore if a leaſe be made to *A.* for life, remainder to the ' heirs male or heirs female of his body, or to his right heirs, in ' this caſe the remainder is executed preſently in *A.*, and he is ' ſeiſed in fee or in tail, according to the reſpective limitation. 2 Roll. Abr. 417. Roll. Rep. 317. Raym. 163.

' So, if one make a leaſe to *A.* for life, or a feoffment in fee to ' the uſe of *A.* for life remainder to *B.* for life or in tail, remain- ' der to the right heirs of *A.*, or to the heirs male or female of ' the body of *A.*, in this caſe the heirs or heirs male or female of ' *A.* ſhall not be purchaſers, but ſhall take the remainder by ' deſcent from *A.*, for it was ſo executed as a remainder in *A.* ' that he might give or forfeit it as ſuch in his lifetime.' Lit. ſect. 578. Co. 104. 2 Roll. Abr. 415.

" And the reaſon of theſe caſes ſeems to be, either the preju- " dice that might enſue to the lord, or to the donor, by the loſs " of wardſhip, marriage, *&c.* if ſuch heirs ſhould be purchaſers, " becauſe they then claiming nothing from their anceſtor by here- " ditary ſucceſſion, would not be liable to the terms and conditions " affixed to the hereditary ſucceſſion only, and then every one " would make his heirs purchaſers; or from the prejudice that " might happen to the heirs themſelves, by the loſs of ſuch re- " mainder, if the anceſtor ſhould do any thing to forfeit or deter- " mine his eſtate for life after the determination of the interme- [2 Burr. 1106.]

" diate

" diate eſtate; for they not being capable of taking ſuch remain-
" der when the preceding eſtates ended, they could never after
" lay claim to it, and ſo an unwary anceſtor might defeat his heir
" of the purchaſe; or laſtly, from the conformity and parity of
" reaſon theſe bear to a limitation to *A.* and his heirs, or the heirs
" male or female of his body; for, as this gives an eſtate for life
" by implication and more; ſo the other gives him the ſame in
" expreſs words and more, *et expreſſio eorum quæ tacitè inſunt nihil*
" *operatur.* And though there be the interpoſition of another
" eſtate between them, that only breaks the order of the limita-
" tion, not the operation of the words, which being the ſame in
" both caſes, ought to have in both caſes the ſame operation and
" conſtruction. But, if a leaſe be made to *A.*, or a feoffment to
" the uſe of *A.* for years, remainder to or to the uſe of *B.* for life
" or in tail, remainder to or to the uſe of the right heirs, or heirs
" male or female of the body of *A.*, theſe remainders are per-
" fectly contingent and uncertain whether they ſhall ever take
" place or not; for if the remainder determine living *A.*, then
" they are become void, becauſe *non eſt hæres viventis*, and they
" cannot take during the life of *A.*, and then theſe would want
" a tenant of the freehold, and a tenant to do the ſervices to the
" lord in the mean time, which the law will not ſuffer. So, and
" for the ſame reaſon, if a leaſe be made, or a feoffment in fee to
" the uſe of *A.* for years, remainder to the uſe of *J. S.* who is
" then living, or to the wife whom *J. S.* ſhall marry, theſe are
" likewiſe void. It is no objection in the caſe of the wife, that
" ſhe cannot do the ſervices in her own perſon, for her huſband
" would be obliged to do them for her, and, as a recompence,
" would be tenant by the curteſy after her death."

Cro. Eliz. 355. Pethouſe v. Crane.

' Tenant for life, remainder in tail, remainder to the right
' heirs of tenant for life; the tenant for life acknowledges a ſtatute and dies, he in remainder dies without iſſue; and the queſ-
' tion was, If the right heir of the tenant for life ſhould be charged
' by this ſtatute, and the lands in his hand liable thereto? and
' adjudged that they ſhould, for that they came to him by deſcent
' from the tenant for life, who had them as a remainder veſted in
' him, and might either grant or charge it.'

Ld. Raym. 326. Salk. 254. pl. 4. Lutw. 719. Bates v. Bates.

In dower it was found by ſpecial verdict, that the huſband of the demandant was ſeiſed of the lands, *&c.* for his life, remainder to *A.* and *B.* truſtees for ninety-nine years, remainder to the heirs of the body of the huſband; and the queſtion was, Whether there was ſuch an eſtate-tail executed in the huſband, whereof his wife ſhould be endowed? and adjudged that it was, and that the intervening eſtate to the truſtees being only for years ought not to be regarded.

1 Roll. Abr. 416. [See this doctrine controverted by Mr.

" If a feoffment be made to the uſe of *A.* and *B.* during the
" joint lives, and after the death of either of them, to the uſe of
" *C.* for life, and after to the uſe of the heirs or heirs of the body
" of *B.*, this remainder is not veſted in *B.* preſently, but is in
" abeyance or contingency to veſt or not to veſt as the caſe ſhall
" happen

" happen. For, if *A.* and *C.* die in the lifetime of *B.*, the re- Fearne in his
" mainder is void, *quia non eſt hæres viventis;* and both their eſtates C.R. 32, 33.
" are determined, and yet the remainder cannot take effect. But, 4th edit.]
" if *B.* dies before *A.*, then his heirs, or heirs of his body, ſhall
" have it by deſcent, as a remainder veſted in *B.*, for that upon
" his death before *A.* the whole eſtate for life is gone, as if it
" had been limited to *B.* only for life; and if it had been ſo
" limited, his heirs or heirs of his body ſhould not have taken by
" purchaſe, for the reaſons before mentioned.

" Having conſidered the relation of anceſtor and heir, let us 1 Roll. Abr.
" now conſider the relation of teſtator and his executors, or in- 911. (3)
" teſtate and his adminiſtrators, upon remainders limited to them 2 Roll. Abr.
" for years: as for example, if a leaſe be made to *A.* for life, or 448. Co.
" for 99 years, if he ſo long live, and after his death, or after the Litt. 44. b.
" determination of that eſtate, remainder to his executors for 319. b.
" 20, *&c.* years, this term veſts in the teſtator himſelf, and he 1 Co. 134.
" may give, grant, forfeit, or diſpoſe thereof, as if it had been ex- Br. Abr. 37.
" preſsly limited to himſelf; and if he dies inteſtate without diſ- p. 17. Cro.
" poſing thereof, it ſhall go to his adminiſtrators; for the teſtator Eliz. 658.
" and executors, or inteſtate and adminiſtrators are correlatives 666. 840.
" as to chattels, as the anceſtor and heir are for inheritances; and Moor,
" as heirs are properly made uſe of for lengthening out the in- pl. 911.
" heritance to the ſame perſon, ſo are executors for lengthening Yelv. 9. 85.
" out chattels to the ſame perſon; and as heirs cannot take in Spark v.
" the anceſtor's life, ſo executors cannot take in the teſtator's Spark,
" life, becauſe neither the one nor the other can be known till 2 Roll. Abr.
" their death; and therefore as a remainder to the heirs veſts in 47. pl. 6.
" the anceſtor himſelf, where he hath an eſtate for life therein; Moor,
" ſo does a remainder to the executors veſt in the teſtator himſelf pl. 244. 459.
" where he had before any intereſt limited to him. But, as heirs 4 Leon. 239.
" may be in ſome caſes a word of purchaſe, ſo may executors Noy, 32.
" be ſo. Therefore if one make a leaſe to *A. for* 99 *years, if he* Owen, 125.
" *ſo long live, and if he die within the term, or during the term, then*
" *to his executors or aſſigns for* 40 *years*, in this caſe, his executors
" or aſſigns take by purchaſe upon the contingency of his dying
" within or during the term; for, if he ſurvives it, they ſhall not
" take at all. And though in this caſe the term be expreſsly
" made determinable upon his death, and therefore he cannot pro-
" perly be ſaid to die within the term, or during the term, ſince
" that dies with him, and his death is the determination of it; yet,
" it being at firſt granted for 99 years, if he ſo long live, his not
" living ſo long may well be made the condition of the veſting of a
" remainder to another; and it being uncertain, whether he will
" live ſo long or not, ſo is the veſting of the remainder uncertain;
" and by conſequence, it cannot veſt in the teſtator himſelf, ſince
" he muſt be dead before it can be known, whether it will veſt at
" all; and then the executors or adminiſtrators, if they ſhall be
" conſtrued within the word aſſigns, being the firſt takers, ſhall
" have it by purchaſe. Another reaſon for their taking by pur-
" chaſe in this caſe may be, that the owner intended not to
" part with the land any longer, if the firſt leſſee outlived the
" 99 years;

" 99 years; but, if he died ſooner, then he was willing to grant
" it out for a longer time, and therefore likewiſe the remainder
" was contingent.

2 Leon. 7. Dy. 309. b. " If one make a leaſe for life to *A.*, remainder to his own exe-
" cutors for years, this remainder is good, and the executors muſt
" take it by purchaſe; for a man cannot limit ſuch an eſtate to
" himſelf, and therefore the term ſhall be in abeyance till his death.
" And this was conſtrued to be a contingent remainder in the
" executors, becauſe it cannot be to the party himſelf, for two
" reaſons: 1ſt, Becauſe he cannot be grantor and grantee to
" himſelf; and therefore where there are not proper parties
" the one to convey, the other to take a right, the grant were in
" ſelf a nullity, and would be of no ſignificance, if it were not
" conſtrued a contingent limitation to the executors. 2dly, Be-
" cauſe having the old reverſion, this term, if raiſed to the part
" himſelf, would be merged, and therefore that the party's inten
" tions may take place, it was conſtrued a contingent limitation
" to the executors.

Cro. Eliz. 666. Moor, pl. 244. Dy. 309. in marg. 314. 2 Leon. 346. 2 Leon. 5. 3 Leon. 20. " And here the difference is between where a ſtranger limits
" an eſtate for life, the remainder to the executors of the tenant
" for life, for there the term for years in remainder is veſted in
" the tenant for life, becauſe the word executors is no more than
" a prolongation of his intereſt; and where a man limits an eſtate
" to himſelf for life, the remainder for years to his own exe-
" cutors, there, ſince it cannot, for the reaſons before mentioned,
" admit of that conſtruction, therefore it is a contingent term in
" the executors, who take it by purchaſe. But, where ſuch li-
" mitation is expreſsly mentioned to be for the performance of
" the will, they do not take *jure proprio*, but as aſſets to fulfil the
" intention of the teſtator.

Moor, pl. 459 1024. " One levied a fine to the uſe of himſelf for life, remainder to
" the uſe of his wife for life, remainder to the uſe of his execu-
" tors for 20 years, or to them, without any remainder to his
" wife; and after he levies a fine, or makes a feoffment to other
" uſes; and then by his will makes three executors, and dies.
" The term to the executors ſhall never ariſe: for whether the
" term were in abeyance, as the books ſay it was, ſo that he him-
" ſelf could not grant, forfeit, or releaſe it; or, whether it were
" veſted in the teſtator himſelf, yet by ſuch fine or feoffment, it is
" confounded and gone; becauſe if it be an intereſt veſted, it
" paſſeth by the feoffment; if it be not veſted, the feoffment de-
" ſtroys the particular eſtate, and then the contingent remainder
" ſinks of courſe.

Yelv. 85. " If a leaſe be made to *A.* for life, and after his death to the exe-
" cutors or aſſigns of *B.*, this is no intereſt in *B.*, but only a na-
" power in him to name executors or aſſigns who ſhall take the term.

2 Leon. 196. " But, if one make a feoffment in fee to the uſe of himſelf for life, and after his death to the uſe of his ad-
" miniſtrators for 20 years, remainder over; this limitation is ab-
" lutely void, and the other remainders ſhall veſt preſently, by
" reaſon of the interval between the death of the feoffor, and

taking out letters of adminiſtration, before which time there is no perſon to take it; and there can be no occupancy of it in the mean time, for the law will not create new eſtates to ſupply the intention of the parties."

## (C) Of the ſeveral Kinds of Remainders, as diſtinguiſhed into Remainders veſted, or in Contingency and Abeyance.

IF an eſtate be limited, either at common law, or by way of uſe, to one for life, or in tail, remainder to the right heirs of *J. S.* who is then dead, this is a good remainder, and veſts preſently in the perſon who is heir at law to *J. S.* by purchaſe; and though a daughter be then heir at law, and after a ſon be born, yet ſhall the daughter retain the land againſt him; for ſhe being heir, and coming within the deſcription at the time when the remainder was limited, it then veſted and ſettled in her immediately as a remainder by purchaſe, and ſhall not by any accident after be defeated.' 2 Roll. Abr. 415. Co. 95. 103. Plow. 56.

"So, if the land be of the nature of gavelkind, yet the eldeſt ſon only as heir ſhall take it, and not all the ſons; for the cuſtom extends only to deſcent of inheritances, and not to purchaſes, and is to be taken ſtrictly." Hob. 31. 1 Co. 103. Dav. 31. 1 Br. Abr. 254. pl. 42.

'But, if *J. S.* be living at the time of the remainder limited to his right heirs, this puts ſuch remainder in abeyance or contingency, that is, in no perſon, but *in nubibus*, till the contingency happens. For in the feoffor or donor it is not, becauſe he has limited it out of him, and all remainders muſt paſs out of him at the time of the limitation, though they do not preſently veſt in the perſon intended; and in the right heirs of *J. S.* it cannot be, becauſe he cannot have heirs during his life; ſo there is no perſon *in rerum natura* within the deſcription, to take it; therefore it is in the mean time in abeyance or expectancy, to veſt or not veſt, as the caſe happens: for if *J. S.* dies during the particular eſtate, then the remainder preſently takes place in his heirs; but, if the particular eſtate determines by death or otherwiſe in the life of *J. S.*, then ſuch remainder is become totally void, and can never veſt, but the eſtate ſettles again in the feoffor or donor, as if no ſuch limitation in remainder had been; and he becomes tenant to the *præcipe*, and is obliged to do the ſervices; and though *J. S.* die ſoon after, yet his heir can have no benefit by it, not being capable of taking the remainder when it fell.' Co. Litt. 378. a. 2 Co. 51. 2 Roll. Abr. 415. Plow. 28. 556. Poph. 74. Moor, 729. 3 Co. 20. 10 Co. 50. Raym. 145. Pollex. 56.

"But here it may be objected, that then theſe remainders ought to eſcheat to the lord, as well as where his tenant dies without heirs; for they actually paſſed out of the feoffor: and though they cannot veſt in the perſon intended, yet it is not reaſonable they ſhould return to the feoffor againſt his own grant, and when he has by his own act parted with and given them away; but the lord ought rather to have them by eſcheat. In anſwer

" to this objection, it is to be obſerved, that the reaſon of the eſ-
" cheat is the death of the tenant without heirs: ſo are the words
" of the writ—*Præcipe* A. *quod reddat* B. *decem acras terræ cum*
" *pertinentiis*, &c. *quas* C. *tenuit et quæ ad ipſum* B. *reverti debent,*
" *tanquam eſchæta ſua eo quod prædictus* C. *obiit ſine hærede.* But
" *J. S.* neither died without heir, nor, if he had, was he ever
" tenant to the lord: for nothing veſted either in him or his
" heirs, and therefore the lord can have no eſcheat as from them;
" and as to the feoffor, he or his heirs are ſtill *in eſſe*; and ſince the
" grantor could not take the remainder, and no other perſon has
" right to claim it, it muſt return back again, and ſettle in the
" feoffor, as if no diſpoſition thereof had been made."

Co. Litt. 3. Co. 66. 2 Co. 51. Hob. 33. Moor, 104. Dyer, 337. 2 Leon. 218. Roll. Rep. 254.

' But, if there be no ſuch perſon as *J. S.* at the time of the
' limitation, though he be after born, and die during the particular
' eſtate; yet his heirs ſhall never have the remainder. So, if a
' remainder be limited to *A.*, ſon of *B.* in tail, &c. or to *E.*, wife
' of *D.*, where in truth there is no ſuch *A.* or *E.*, though *B.* has
' a ſon after called *A.*, or *D.* marries one *E.*, yet they can never
' take the remainder; becauſe if there be ſuch perſons as the
' words of the gift import, there, the remainder ought to veſt in
' them preſently, and they will never after be made capable of
' taking it; but, if there be no ſuch perſons then *in eſſe*, none who
' come within that deſcription after can lay claim to it, becauſe
' the limitation was preſent to ſuch perſons. But a remainder
' limited *primogenito filio*, or *proximo hæredi maſculo* of *A.*, or *pro-*
' *pinquioribus hæredibus de ſanguine puerorum*, or *ſeniori puero* of *A.*
' or to the right heirs of *A.*, there being then ſuch *A. in eſſe*, or
' to the wife that *A.* ſhall marry; theſe are good remainders, and
' ſhall veſt when ſuch perſons come *in eſſe* as are within the de-
' ſcription; becauſe here appears no preſent regard for any perſon
' in particular, and therefore if they anſwer the deſcription at any
' time before the particular eſtate determines, it is time enough;
' and ſo there is a diverſity between a remainder limited to one
' by name in particular, and ſuch remainder limited by deſcrip-
' tion, or circumlocution, or between a general name and a ſpe-
' cial name.'

1 Br. Abr. 234. b. pl. 5. Hob. 33.

" Lands deviſable by cuſtom, were deviſed to *A.* for life, re-
" mainder to *B.* in tail, remainder to the next heir male of the
" deviſor, and to the heirs male of his body; the deviſor dies; *A.*
" enters; *B.* dies without iſſue; and after *A.* dies; and then on
" *C.* as heir of the deviſor, *viz.* daughter of *D.*, ſon of the de-
" viſor, enters and aliens in fee, and after hath iſſue *E.*, who,
" heir male of the body of the deviſor enters upon the alienee
" who brings treſpaſs. *Optima opinio*, that as the firſt who entered
" as heir to the fee-ſimple was a female, and there was no heir
" male of the deviſor to take when the remainder fell, he who
" born after ſhall not have it."

10 Co. 85.

' *A.* makes a leaſe to *B.* for life, and after the death of *B.*
' to remain to *B.* and his heirs; this remainder is contingent, and
' cannot veſt preſently, for if *A.* ſurvives *B.* it is void; becauſe
' otherwiſe the operation of livery would be interrupted during

'the life of *A.*, for he cannot give himſelf any eſtate, his livery 'operating to paſs eſtates from him, not to give any to him who 'had the whole before; and therefore during his life the opera-'tion of the livery muſt ceaſe, and by conſequence no remainder 'can take effect in virtue of that livery, which *pro tempore* being at 'an end, all that depended thereon ceaſes too, and can never after 'be revived; for the livery muſt carry out all the eſtates at once 'from the feoffor, and if he comes again into the poſſeſſion before 'they can all take effect, this breaks the force of the livery, and 'brings back again to him all that ſuch livery had taken out from 'him, and then they can never take effect but by a new livery. 'And this is the reaſon of the common caſe, that one cannot give 'lands to another to begin after his death, becauſe being to make 'livery preſently, if that cannot operate preſently, it can never 'operate at all; for it is a contradiction to give lands to one by a 'ſolemn livery, which is an act executed and works preſently, 'and yet by words to reſtrain that operation to a future time. But 'in the principal caſe, where *A.* dies firſt, there, no interruption is 'of the livery, for *B.* had an eſtate for life by virtue thereof; and 'before that determines, the ſame livery, which carried the re-'mainder in abeyance, for the uncertainty of its taking effect, does 'upon *A.*'s death direct and ſettle, or bring down the remainder 'to *B.* and his heirs.'

"If a leaſe be made to *A.* for life, remainder to the right heirs 1 Br. Abr. "of *J. S.* and *J. N.*, and after *J. S.* dies, and then tenant for 253. pl. 21. "life dies in the life of *J. N.*, the remainder for a moiety veſts "in the right heirs of *J. S.*, and upon the death of *J. N.* his "heirs ſhall take nothing, becauſe not *in eſſe* to take when the "remainder fell; and the right heirs of *J. S.* cannot take the "whole, becauſe that was limited to them and others jointly.

"If brother and ſiſter are, and lands are let for term of life, *Ibid.* "remainder to the right heirs of the brother, and after the bro-"ther dies, and then tenant for life dies, and the ſiſter enters; "ſhe ſhall retain the land againſt a ſon or daughter of the brother "born after, becauſe this veſted in her by purchaſe."

'If a leaſe be made to *A.*, *B.*, and *C.* for their lives, and if *B.* 3 Co. 20. 'ſurvives *C.*, then to remain to *B.* and his heirs, this remainder is 10 Co. 85. 'in abeyance, becauſe, though the perſon be certain, yet ſince it Co. Lit. 378. 'depends on *C.*'s dying before him, till that be known, the re-'mainder cannot veſt. So, if a leaſe be made to *A.* for life, and 'after the death of *B.*, who is a ſtranger, to remain to *C.* in fee, 'or to *A.* in fee, theſe remainders are in abeyance or contingen-'cy, and depend on *B.*'s dying before *C.* or *A.*, for if he ſurvives 'them, the remainder cannot take effect.

'If a leaſe be made to *A.* for life, remainder to the abbot of Co. Lit. 264. 'D. and his ſucceſſors, though the abbot be then dead, ſo as there Hob. 33. 'is then no abbot at all, yet the remainder ſhall be good, if an 2 Co. 51. 10 Co. 31. 'abbot be made before the death of *A.* So of a remainder to a Moor, 104. 'mayor and commonalty, dean and chapter, prior and convent, Roll. Rep. 'Sc., though there be then no mayor, or dean, or prior. So of 254. 'a remainder to the biſhop of *D.*, parſon of *D.*, or other ſole 2 Bulſ. 275.

' corporation, and his ſucceſſors; for theſe remainders not being
' limited to them by name ſpecially, but to them generally, and ſo
' whoever comes within the deſcription before the determination
' of the particular eſtate, is capable of taking by virtue thereof, are
' good remainders in abeyance, &c. But if there be no ſuch cor-
' porations at the time of the limitation, then the remainders
' are totally void; and none created after, though by the ſame
' name, can take theſe remainders, though a patent be then paſſing
' to make ſuch corporation.'

Challoner v. Bower, 2 Leon. 70.

" *A.* having iſſue two ſons and two daughters, deviſes his lands
" to his younger ſon in tail, and for want of ſuch iſſue to the
" heirs of the body of his eldeſt ſon, and if he die without iſſue,
" then to his two daughters in fee, and dies: the younger ſon
" dies without iſſue, living the eldeſt, who has iſſue; and if this
" iſſue ſhould take the remainder, his father being alive, was the
" queſtion? It was urged, that though in caſe of a grant he could
" not, yet being here in caſe of a will, the intent of the deviſor
" ſhould prevail to carry it to him. But the court was ſtrongly
" againſt it, and held no difference as to this between a grant and
" a deviſe, and would ſuffer no witneſſes to be heard to prove the
" teſtator's intent, but gave judgment for the daughters.

Hob. 74. Barn's caſe. 1 Ventr. 374.

" If one covenant, upon proper conſiderations, to ſtand ſeiſed to
" the uſe of *A.* for life, remainder to the right heirs of *B.*, in this
" caſe the remainder is not drawn out of the covenantor, and put
" in abeyance till the death of *B.*, but there is a reverſion left in
" the covenantor, out of which the remainder, when it happens,
" ſhall be drawn. And this differs from the remainders before
" mentioned, which ariſe out of the eſtate executed either at
" common law, or upon a feoffment to uſes, as will appear here-
" after."

Plow. 23. Raym. 144.

' If a man make a leaſe to *A.* for life, and that after the death
' of *A.*, and one day after, the land ſhall remain to *B.* for life, &c.
' this is a void remainder, becauſe not to take effect immediately
' upon the determination of the firſt eſtate, and ſo during the
' time there would be an interruption of the livery, and no tenant
' of the freehold, either to do the ſervices, or anſwer to ſtrangers'
' precipes.

2 Leon. 7.

' A leaſe is made to *A.* for life, remainder to the right heirs of
' *B.*, and after *B.* purchaſes the eſtate of *A.*, yet the fee is not
' executed in *B.*, but the remainder to his right heirs continues
' diſtinct; for if *A.* dies firſt, the remainder will be void; and if
' *B.* dies firſt, yet there will be an occupancy during the life of
' *A.*, and the remainder immediately upon *B.*'s death veſts as a
' remainder in his right heirs.

Co. Lit. 24, 25. 164. a. Hob. 31. Co. 102. Dyer, 374. 2 Roll. Abr. 416. 1 Br. Abr. 235. pl. 5.

' If a leaſe be made to *A.* for life or in tail, remainder to the
' heirs male of the body of *B.*, if *B.* hath iſſue two ſons, and the
' eldeſt dies leaving a daughter, and then *B.* dies, living *A.*,
' the youngeſt ſon ſhall not take this remainder; for he who takes
' by purchaſe and original veſting, muſt anſwer the deſcription
' actly, which here the youngeſt ſon does not, for he ought to
' heir as well as male, and this he is not, for the daughter of
' eld

'eldeſt ſon is heir, and ſhe cannot take becauſe ſhe wants part of the deſcription too, not being male, and therefore neither of them can take, but the remainder ſhall be void. So, if ſuch leaſe or gift in tail be made to *A.*, remainder to the heirs female of the body of *B.*, and he have iſſue a ſon and a daughter, and die, living *A.*, yet the remainder ſhall be void for the reaſon before-mentioned. Otherwiſe it is, if a gift be made to one and the heirs male or heirs female of his body, *&c.*, for there, *per formam doni* they ſhall take by deſcent though another be heir, for there, the whole eſtate-tail is in the anceſtor, but in the other caſes the anceſtor takes nothing.' 254. pl. 61. 2 Br. 94. b. pl. 1. 95. pl. 40.

" If a leaſe for life, or a gift in tail be made to *A.*, remainder to the right heirs, or heirs male, or heirs female of the body of *J. S.*, who is then or after attainted of treaſon or felony, and is executed or dies, and then after *A.* die; yet this remainder is become void, and can never take effect; becauſe none can be heir to a perſon attainted, nor can he have heirs male or heirs female of his body to take by purchaſe. But, upon a gift to a man and the heirs male or female of his body, if he were attainted before the ſtatute of 26 *H.* 8. and at this day, if he be attainted of felony, ſuch heirs ſhall take by deſcent *per formam doni*, upon conſtruction of the ſtatute *de donis*, *W.* 2. Br. Abr. 253. pl. 42. 254. pl. 61. 2 Br. Abr. 94. b. pl. 1. 95. pl. 40. 1 Co. 103. Hob. 31, 32.

" But, if a remainder be given by act of parliament to the right heirs of *J. S.*, who is attainted of treaſon or felony, this remainder is good, becauſe the act takes off the diſability, and reſtores the capacity as to ſuch remainder; eſpecially, if the attainder be taken notice of in the act; for then it is in nature of a reſtitution, and *parliamentum omnia poteſt;* and though a perſon attainted can have no heir, yet by ſuch deſcription it is ſufficiently known who is meant by it, and then the act ſupervenes with its abſolute power to enable him to take. 1 Lev. 75. St. Tr. 532. 1 Keb. 349. 615. 745. Wheatley v. Thomas.

" Three brothers are—the ſecond ſettles his eſtate to ſeveral perſons in tail ſucceſſively, remainder to his own right heirs: the eldeſt brother is attainted of treaſon and executed, leaving ſeveral children: the ſecond brother dies without iſſue: all the eſtates-tail determine; and the youngeſt brother being dead, his iſſue claimed the reverſion as heirs to the ſecond brother, and the defendant claimed by eſcheat, and had a verdict in ejectment. For though the blood of the elder brother be corrupted, ſo that his iſſue cannot take; yet, they, being heirs at law, ſtand in the way of the youngeſt brother, ſo that he or his iſſue cannot take, and therefore the land muſt eſcheat. But this more properly belongs to another head, and therefore I ſhall here conſider it no further. 3 Keb. 351. Collman v. Barton, Cro. Car. 435. Hob. 334. Co. Lit. 8. a.

" If one makes a leaſe for years either at common law or by way of uſe, remainder to the right heirs of *J. S.*, who is then living, or to the wife whom *J. S.* ſhall marry; theſe remainders are void; becauſe, till the death or marriage of *J. S.*, there is no perſon to take the freehold, and that cannot be in abeyance, as has been proved already. But it is ſaid, if ſuch limitation were by way of uſe before 27 *H.* 8. it would have been good; 1 Co. 130. 3 Co. 10. a. Sir T. Raym. 83. Poph. 482. Co. Lit. 217. a. Dav. 34. 4 Leon. 21.

4 Mod. 256. 1 Co. 135. Godb. 319. *contrà.*

" becauſe the eſtate in law continued in the feoffee, and they " were tenants to the lord, and all precipes were to be brought " againſt them. And though one book ſeem *contrà*, yet the rea- " ſon there given is only, that the remainder ought to be limited " to one *in eſſe*, which ſeems to carry very little weight in it, " when no reaſon of neceſſity or convenience requires it; and " therefore the other opinion ſeems to be law."

Moor, 488. pl. 686. 3 Co. 20. Raym. 144.

' So, if one makes a leaſe to *A.* for twenty-one years, if he o ' if *B.* ſhall ſo long live, and after the death of *B.*, or after th ' death of *A.*, to the firſt ſon of the body of *B.* in tail, and ſo t ' the ſecond, *&c.* in tail, remainder to *C.* in fee; all theſe re ' mainders are void, becauſe the firſt eſtate being but for years ' and the remainder not to take effect immediately after thoſ ' years, but at a future time, after the death of *A.* or *B.*, whic ' may be long after, and ſo during that time there would be a ' interruption of the livery, and no tenant of the freehold, there ' fore theſe remainders are void; and though it happen that *A* ' or *B.* die within the term, yet till their death the freehold woul ' be carried into abeyance, and could not veſt in thoſe in remai ' der for the uncertainty of the death of *A.* or *B.* within the term ' and therefore the happening of that after, cannot ſave the re ' mainder which was void before. But, if ſuch leaſe had bee ' made, and then it had been limited, after the determinatio ' of that eſtate, or after the expiration of the ſaid term, to *C.* f

Plow. 83. Vaugh. 46.

' life, or in tail, *&c.* this had been a good remainder execute ' preſently, as if a leaſe for years had been abſolutely to one, r ' mainder to another for life, *&c.* for here was no interruption ' the livery, or want of a tenant of the freehold.

Raym. 140. Corbett v. Stone.

' *A.* by indenture makes a leaſe to *B.* for forty years, if *A.* ſo lo ' live; and after his death to *C.* (who was no party to the deed) f ' one thouſand years, and then *A.* levies a fine to different uſes, a ' dies, and five years paſs after his death, and then the plaint ' claiming under *C.* and *D.* entered, *&c.* By the arguments a ' reaſons of the caſe, it ſeems clear, that this is no remainder at ' to *C.* and *D.*; for firſt, preſently it cannot veſt by reaſon of t ' leſſor's life interpoſing, and therefore it is no remainder veſte ' Secondly, as a contingent remainder it cannot be good; becau ' then it ought to have a particular eſtate to ſupport it, and ou ' to be in abeyance, or contingency, to veſt or not veſt when t ' determines: but here, the firſt leaſe is no ſuch particular eſta ' becauſe that reaches not to the commencement of the remain ' nor is the remainder limited with any regard to the particu ' eſtate; becauſe it is not to commence upon the determination ' that, but at a future time, *viz.* upon the death of the leſſor. A ' there is no contingency at all in the caſe, for it is to take ef ' at all events, upon the death of the leſſor, be it before or after ' end of the term, and therefore it can be no other than a fu

[*Vide* Fearne's C. R. 430. 4th edit.]

' *intereſſe termini* to begin after the death of the party that grant ' which being but for years it may well do; becauſe it enure ' way of contract. And though the grantee there was no part ' the deed, and therefore, as objected, could take nothing, y

' app

appears that judgment was given for the plaintiff; which proves, first, that the grantee had an intereſt: ſecondly, that this intereſt was not barred by the fine and five years nonclaim after the death of the grantor, not being touched, deveſted, or turned to a right. Thirdly, that though the grantee was no party to the indenture, yet he might well take by virtue thereof, if he gets the indenture to make out his title, for the grantor cannot derogate from his own grant, or avoid his own acts.'

" But, if a man deviſes lands to *A.* for five years from *Michaelmas* next enſuing, and after to *B.* and his heirs, and dies before *Michaelmas*, yet is the remainder good, becauſe till *Michaelmas* the freehold deſcends to the heir, and he is tenant to all the purpoſes, either of doing the ſervices, or anſwering to ſtrangers' precipes. For here is no livery to operate preſently, and therefore no inconvenience to allow of ſuch future limitations, as it would be, if it were by deed executed with livery. And in *Noy* it was held, that a deviſe for years, remainder to the right heirs of *J. S.*, was good, if *J. S.* died within the term, becauſe the freehold in the mean time deſcended to the heirs, and was not in abeyance." Cro. Eliz. 878. Poph. 4. Sir T. Raym. 83. Plow. 156. Co. Lit. 217. a. Noy, 43. 4 Mod. 259. 283. Swinb. 124. Godolph. 360.

'If a man ſurrenders copyhold, or makes a feoffment in fee of freehold lands to the uſe of his wife for life, remainder to the heirs of the body of the ſurrenderor and his wife, this is a contingent remainder not executed in the wife, becauſe he who will take by it muſt make himſelf heir of both their bodies, which cannot be before the death of both; and then if the wife, who has the particular eſtate, dies firſt, the remainder is become void, becauſe it cannot veſt when the particular eſtate determines. So, if ſuch feoffment or ſurrender had been to the uſe of the wife and a ſtranger for life, remainder to the heirs of the huſband and wife, this remainder alſo is contingent; for though the wife dies, yet it ſhall not veſt till the death of the huſband, and if he ſurvives his wife and the ſtranger, the remainder is become void, for the above reaſon. Roll. Rep. 238. 317. 438. 2 Roll. Abr. 416. Dyer, 99. Leon. 102.

'*A.*, in conſideration of a marriage intended between him and *B.*, covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to his wife for life, remainder to the heirs male of their bodies, remainder to *C.* in tail: the marriage takes effect: the huſband and wife join in levying a fine. It was adjudged, that the eſtates for life to the huſband and wife ſtood ſo diſtinct, that they were not merged or confounded in the eſtate-tail, being limited all in one and the ſame conveyance, and that the fine levied by them was not any diſcontinuance either of the eſtate-tail or remainders; for if the eſtate-tail ſhould be executed in the huſband and wife, then the wife would have an eſtate in poſſeſſion, whereas by the conveyance ſhe was only to have a remainder: alſo, the huſband would have only a moiety, whereas he was to have the whole during his life; but yet the remainder in tail veſts in the huſband and wife as a remainder; ſo that the heirs of their bodies ſhall take it by deſcent, and not by purchaſe.' Lev. 36. Raym. 36. Sid. 83. Keb. 76. Stephens v. Brittridge.

'chaſe.' "For there is no contingency in the caſe, but when "one dies, the other is tenant in tail executed. So, for the "ſame reaſon, if a leaſe be made to *A.* for life, remainder to *B.* "for life, remainder to *A.* and *B*, and their heirs, or to the right "heirs of *A.* and *B.*, this remainder continues diſtinct, and is not "executed in poſſeſſion. And theſe remainders are ſo diſtinct from "the poſſeſſion, that they may be granted as remainders, without "affecting the particular eſtate.

Co. Lit. 182-3-4. 2 Co. 61. Cro. Eliz. 470. 481. Poph. 52. Dy. 9. pl. 22. Cro. Car. 320. 3 Co. 5. Moor, 210. Yelv. 131. 1 Lev. 37. 1 Sid. 83.

"But, where an eſtate is limited to *A.* and *B.*, and to the heirs "of *A.*, or (which is all one) to *A.* and *B.* for their lives, and "after their deaths, to the right heirs of *A.*, or to huſband and "wife, and the heirs of the body of the huſband; or to two men, "and the heirs of their bodies, or to the heirs of the body of one "of them; theſe eſtates are, to ſome purpoſes, executed, and to "others not, to continue as remainders. For, as to prevent the "ſurvivor from taking the whole, they are not executed; becauſe "the firſt words gave them a joint eſtate for their lives, which "ſhall go to the ſurvivor; and this the limitation after ſhall not "controul. Yet they are ſo far executed in poſſeſſion, that he "who has the inheritance cannot grant it away as a remainder "diſtinct from the poſſeſſion. And in the caſe of the huſband "and wife, between whom there are no moieties, the inheritance "is ſo executed in the huſband, that if he makes a feoffment, "this will be a diſcontinuance to his iſſue; but, if he ſuffers a "common recovery with ſingle voucher, this will bind neither the "iſſue, nor remainder; becauſe his wife was ſeiſed of the whole "jointly with him, and not partly, and there are no moieties be"tween them; and therefore it cannot be good for any part: but "the feoffment deals with the poſſeſſion, and gives it away by "ſolemn livery; and therefore to preſerve the warranty, this "amounts to a diſcontinuance, and the iſſue ſhall be put to his "formedon in deſcender, and thoſe in remainder to their formedon "in remainder: and if the huſband levies a fine, this will bind "the iſſue by the ſtatute of 4 *H.* 7. and 32 *H.* 8. But, whether "this will be a diſcontinuance of the remainder or reverſion ſeem"doubtful. But, if the eſtate were to the huſband and wife, and "heirs of the body of the wife, there, a fine levied by the huſ"band would be no bar or diſcontinuance to the iſſue or thoſe in "remainder, becauſe he had but an eſtate for life. But this be"longs to another inquiry.

3 Leon. 4. 2 Roll. Abr. 417. pl. 6.

"Copyhold land was ſurrendered to the uſe of the wife for "life, remainder to the uſe of the right heirs of the huſband and "wife: it was the opinion of the juſtices, that the fee was exe"cuted for a moiety in the wife, and the huſband thereof ſeiſed "in her right; ſo that upon her death, ſuch moiety ſhould go to "her heirs, though the huſband was then living. So, if a leaſe "were made to *A.* for life, remainder to the right heirs of *A.* and "*B.*, this was executed for a moiety in *A.*, and then for the other "moiety, in both caſes it muſt be contingent, and if the wife or "*A.* die firſt, will be void; for *non eſt hæres viventis*, and it can"

" not veſt in the heirs of the huſband or of *B.* during their lives; " and though there are no moieties between the huſband and wife, " yet, in this caſe, the inheritance may well execute in the wife " for a moiety, becauſe the wife takes the whole, and the huſ- " band nothing at all, and ſo the point of taking by moieties is out " of the caſe. Alſo, the heirs of the wife, who are to take a " moiety of the inheritance, need not be heirs of the huſband too, " as they muſt, where ſuch remainder is limited to the heirs of " the body of the huſband and wife; for in that caſe it cannot be " executed for a moiety, becauſe it may happen, that the heirs of " her body cannot take after her death; as, if the huſband ſurvives, " they cannot, becauſe they are to be heirs of the body of the " huſband as well as of the wife; but in this caſe, immediately " upon the death of the wife, the inheritance for a moiety may " veſt in her heirs. But, if an eſtate be made to the wife for " life, remainder to the huſband and wife and their heirs; or to " *A.* for life, remainder to *A.* and *B.* and their heirs, theſe re- " mainders are not executed in the wife or in *A.* for a moiety, but " continue diſtinct as remainders: for otherwiſe where the re- " mainder is a joint-tenancy in fee, and the ſurvivor ſhall take " the whole, if this ſhould be executed in poſſeſſion for a moiety, " this would be againſt the intent of the deed, and exclude the " benefit of the ſurvivorſhip.

" If lands are given to a woman and the heirs of the body of " her huſband, who is then dead; it is ſaid, that the wife and " the iſſue of the huſband are joint-tenants for life, with remain- " der to the iſſue in tail. For, ſince they are named to take in " poſſeſſion as the wife, and if they ſhould take only an eſtate for " life, the donor would have again the land, though there were " ſtill heirs of the body of the huſband in being, which by the " words and intent of the gift he ought not to have, ſince he has " given it to the heirs of the body of the huſband, and whoever " anſwers that deſcription is compriſed within the words of the " gift, therefore, they ſhall alſo have a remainder in tail." 2 Roll. Abr. 416. pl. 1. 2. 6 Co. 17.

' Where one deviſed lands to *A.* and his heirs, during the life of *B.*, and after the death of *B.*, to the heirs male of the body of the ſaid *B.* now living; it was adjudged in *B. R.*, and affirm- ed in parliament againſt a judgment in the Exchequer-chamber, that *C.*, who was the ſon and heir apparent of *B.* at the time of the deviſe, ſhould take this remainder by purchaſe, as ſufficiently deſcribed and intended by the will, and that it was not a con- tingent remainder to be void on the determination of the parti- cular eſtate before the death of *B.*; and it was held, that the words *now living* ſhould refer to the heirs male, and not to *B.* himſelf, though that was the next antecedent; becauſe the de- viſor took notice before that he was living, and then to refer thoſe words to him would be a vain tautology, and *C.* was then heir apparent, and heir in common parlance.' " But, whether " he ſhould take for life only, or in tail, ſeems doubtful upon the " whole caſe." Vent. 334. 2 Vent. 311. Raym. 330. 2 Jon. 99. 2 Lev. 232. James v. Richardſon, or Burchett v. Durdant, Pollex. 457. 1 Br. P. C. 493.

M. 1713, *in Domo Procerum*, Beaumont v. Long. 1 P. Wms. 229. S. C. 1 Eq. Ca. Abr. 114. S. C. 2 Eq. Ca. Abr. 331. S. C. 1 Br. P. C. 489. S. C.

*A.* by his will in writing deviſed all his lands to *B.* and *C.*, and the ſurvivor of them, for the term of twenty-one years for the payment of his debts and legacies, and after payment the term to ceaſe, and after the end or ſooner determination of that eſtate, he deviſed the premiſes to the firſt ſon of his body, and to the heirs male of the body of ſuch firſt ſon lawfully iſſuing, and for default of ſuch iſſue to *B.* for ninety-nine years, if he ſo long live, without impeachment of waſte, remainder to the firſt and other ſons of *B.*, and the heirs male of their bodies ſucceſſively, remainder to *C.* for ninety-nine years, if he ſo long live, remainder to his firſt and other ſons in tail male ſucceſſively, remainder to the heirs male of his aunt Mrs. *Elizabeth Long*, wife of *Richard Long* clerk, lawfully begotten (*a*), and for default of ſuch iſſue, the reverſion and remainder to his own right heirs, and by his will gave 150*l.* annuity to *Dorothy Beaumont* his ſiſter, the plaintiff in error, for life, and 500*l.* to her children, and to his aunt *Elizabeth Long* 100*l.* and to her children 500*l.*, and died without iſſue. *B.* and *C.* entered by virtue of the deviſe for twenty-one years, and afterwards both died without iſſue; and *John Beaumont* and *Dorothy* his wife entered in right of *Dorothy* as heir at law to the teſtator, the term for twenty-one years being determined, and the debts and legacies paid; and *Thomas Long*, eldeſt ſon of *Elizabeth* (ſhe having, at the time of making the ſaid will, three ſons, *viz.* the ſaid *Thomas*, and two others) entered and brought an ejectment; and in the Exchequer judgment was given by Chief Baron *Ward*, *Price*, and *Lovel* againſt Baron *Bury*, for the plaintiff *Thomas Long*. But in *Trinity* term 1713, this judgment was reverſed in error in the Exchequer chamber. And now upon error brought in the Houſe of Lords it was argued, that this reverſal ſhould be affirmed. Firſt, becauſe *Dorothy* being heir at law to the teſtator, her right, as ſuch, was to be favoured; and all deviſes to diſinherit an heir at law were to be taken ſtrictly. Secondly, that to make this deviſe good to *Thomas Long* it muſt be conſtrued either a contingent remainder or the words *heirs male* be taken as a *deſcriptio perſonæ* to veſt it in him. As a contingent remainder it cannot be good for want of freehold to ſupport it; all the preceding eſtates being only for years; beſides, if it were good as a contingent remainder in its creation, yet *Elizabeth Long*, the mother, being living when the particular eſtates determined, it cannot veſt, becauſe *non eſt hæres viventis*. As *deſcriptio perſonæ* it cannot veſt, for that ought to be ſuch a deſcription as is *vice nominis*, which the words *heir male* (being a legal term, and not accompanied with any other words to determine the ſenſe otherwiſe, as heir apparent, or heir now living, *&c.*) cannot amount to, and the word *begotten* doth not determine the ſenſe otherwiſe; nor does any intent appear to confine the deviſe to the iſſue male of *Elizabeth Long*, then much leſs to *Thomas Long* only, as the perſon deſcribed in this deviſe. But notwithſtanding theſe reaſons it was adjudged, that the firſt judgment ſhould ſtand, and the judgment of reverſal be reverſed, though ten of the judg

[(*a*) *Begotten* and *to be begotten* generally bear the ſame conſtruction. *Vide* Co. Lit. 20. b. 2 Vern. 545. 711. Pr. Ch 491. 2 P. Wms. 457. *Id.* 33. Fearne's C. R. 321. 4th edit.]

* The court held, in this caſe, the word *heir* was uſed for *heir apparent*: That the teſtator had taken notice that his aunt, *E. L.* was living, and that ſhe had three ſons; he could not therefore mean that the eldeſt ſon ſhould take ſtrictly as heir, but as heir apparent he might. Beſides, he took notice of his own heir, and gave her an annuity out of the land, which ſhewed his intention that ſhe ſhould not

dges were of opinion that the deviſe was void, and only the ree judges (*Lovel* being dead) before-mentioned held it good *. have all the lands; and the limita-

n to his own right heirs was expreſsly in *default of iſſue male of the body* of his aunt *E. L.*, ſo that it s plain that he intended the apparent heir male of *E. L.* ſhould take before his own heir general, and at his own heir ſhould not take whilſt there was any iſſue of *E. L.* Mr. Fearne obſerves, that in this ſe the anceſtor did not take the legal freehold. Pa. 322. 4th edit.

[A teſtator after charging the lands with annuities to his wife, nd after her deceaſe to four of his five daughters, and another an- uity to his fifth daughter *M.* for ſeventy years, if ſhe and the teſ- tor's ſon *R.* ſhould ſo long jointly live, to commence at the ex- ration of the term of two years thereafter given in the premiſes the ſaid *M.*, and the death of teſtator's wife; and after deviſing e premiſes to his ſaid daughter *M.* for two years after his de- eaſe, with remainder to his ſon *R.* (if then living) for ninety ears, if he ſo long lived; he deviſed the premiſes ſo ſubject, to 's *heirs male*, and to the *heirs of his daughter* M. jointly and qually, and *their heirs and aſſigns for ever*. And for want of heirs ale lawfully begotten of the ſaid *R.* at the time of his deceaſe, he eviſed the premiſes to the *heirs and aſſigns of the ſaid* M. *lawfully gotten of her body*, to hold to the heirs and aſſigns of the ſaid *M.* r ever. The ſon *R.*, at the time of the will, had *one* ſon and o daughters; and the daughter *M.* had then one ſon. On the ſtator's death *M.* entered, and held the whole of the lands for e two years; when the ſon *R.* entered and held them till his eath, upon which, *M.* entering, the ſon of *R.* brought his eject- ent. Upon the caſe being argued in the court of *C. B.*, *De rey*, C. J. ſaid, the queſtion was, Whether there was a ſufficient *ſignation* of the perſon to make the *ſon* of *M.* take as her *heir*, ing the mother? That two hundred years ago it might have en thought not ſufficient, becauſe the deſcription was not legally d *technically* true. But that, within a century paſt, a more li- eral conſtruction of the words of a teſtator had prevailed; and ey had been generally taken in their *popular* ſenſe, which was moſt kely to have been his meaning. That in the principal caſe, the tent of the teſtator was clear, that the ſame favour ſhould be ex- nded to the heirs of *M.* as to the heir male of *R.*; he took no- e that *M.* was *living* by leaving her a term, and a ſubſequent nuity; and meant a *preſent* intereſt ſhould veſt in her heir, that her *heir apparent* during *her life*; he therefore did not think the ſſor of the plaintiff was entitled to more than one moiety of the emiſes.—The reſt of the juſtices agreed in the ſame opinion, d the plaintiff had judgment as to one moiety only.] Goodright v. White, 2 Bl. Rep. 1010.

J. S. having iſſue two ſons, *A.* and *B.*, deviſes in the words llowing: "I give to my eldeſt ſon *A.* all that my farm called *Dumſey*, to him and his heirs male for ever; if a female, my next heir ſhall allow and pay to her 200*l.* in money, or twelve pounds a year out of the rents and profits of *Dumſey*, and ſhall have all the reſt to himſelf; I mean my next heir, to him and his heirs male for ever." Upon the death of the teſtator, *A.* entered Ld. Raym. 185. Preced. Ch. 468. Baker v. Wall.

entered and died, leaving iſſue a daughter; and it was adjudged, that the lands ſhould go to the ſecond ſon *B.*, and not to the daughter of the eldeſt, though ſhe was heir general.

2 Vern. 729. Newcomen v. Barkham, Preced. Ch. 461. S. C.

*I. S.* deviſed to truſtees in truſt, after debts and legacies paid, to convey to *A.* his couſin and the heirs male of his body; and for want of ſuch heirs male, then to the heirs male of the body of *B.* his great grandfather; and for want of ſuch heirs male, to his own right heirs for ever, and gave to his ſiſter 2000 *l.* to be put out at intereſt during her life, ſhe to receive the intereſt, and after her death to her children, and died, and ſoon after *A.* died without iſſue; and *C.* being heir male of *B.* the teſtator's great grandfather, but not heir general, there being a daughter of an elder brother, the queſtion was between him and the teſtator's ſiſter and heir at law, who had the 2000 *l.* deviſed to her, whether the deviſe was void or not? And my Lord Chancellour held the deviſe good, and that *C.* ſhould take as a perſon ſufficiently deſcribed and intended by the teſtator.

2 P. Wms. 1. Dawes v. Ferrers. [This caſe was again brought before the court in Gwynne v. Hooke, 18th Dec. 1740, when Lord Hardwicke directed a caſe for the opinion of the court of K. B. (Reg. Lib. A. 1740, fo. 310.) who certified in confirmation of Lord Macclesfield's order, (Vin. Abr. tit. Deviſe W. pl. 13. n.) and that certificate was afterwards confirmed, and the bill diſmiſſed with coſts. Reg. Lib. A. 1741, fol. 646. But in Wills v. Palmer, 5 Burr. 2615. on a caſe ſent to the court of K. B. by the court of Chancery, the queſtion aroſe on both a will and a deed, whether *A.* took by purchaſe under the deſcription of *heirs male of the body* of *B.* not being heir general, *B.* being in the firſt caſe the grantor, the court certified, that *A.* took an eſtate-tail by *deſcent*; but they added in the certificate, that if a *third perſon* had been the grantor, they ſhould have thought that *A.* would have taken by *purchaſe* heir male of the body of *B.* And they alſo certified, that he did ſo take under the will. Cox's note, 2 P. Wms. 3.]

But, where one ſeiſed in fee deviſed his lands to his grandaughter (being his heir at law) for her life, remainder to his own right heirs male for ever, and died, leaving his grand-daughter his heir at law, and alſo leaving a deceaſed brother's ſon, who was the next of kin in the male line; it was held by Lord *Macclesfield*, that the nephew could not take, that the words *heirs male* muſt be intended heirs male of the body, and could never extend to an heir male of any collateral line; and it not being ſaid in the will heir male of his body or of his name, the grand-daughter, who was his heir at law, might have an heir male, though not of his name. And he ſaid that this caſe differed from that of *Brown* and *Barkham* *, that being merely a truſt; alſo that in that caſe the remainder was limited to the heirs male of the body of Sir *Robert Barkham* the grandfather; whereas here the deviſe was to the heirs male, without ſaying of any body.

* The caſe of Newcomen and Barkham, *ſupra*.

2 Jon. 114. 2 Lev. 223. Raym. 278. Liſle v. Gray.

*A.* ſeiſed of lands in fee by indenture, covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder to *Edward* his eldeſt ſon for life, remainder to the firſt ſon of *Edward* in tail male, remainder to the ſecond, third and fourth ſons of *Edward* in tail male, and ſo to all and every other the heirs male of the body of *Edward* reſpectively and ſucceſſively, and to the heirs male of their bodies according to their ſeniority of birth; remainder to the leſſor of the plaintiff for life, and a proviſo, that if *Edward* died without iſſue male, that he ſhall have power to charge the lands with daughters' portions not exceeding 100 *l.* a-piece: the co[ntin]

* Judgment was given for the plaintiff: Upon which a writ of error was brought in

antor dies, and *Edward* ſuffers a common recovery, and dies without iſſue male: and the only queſtion was, If *Edward* took an eſtate-tail ſubſequent to the limitation to his four ſons in tail, or if he took only an eſtate for life, with a like remainder to all his other ſons in tail male ſucceſſively, as was limited to the four firſt? it was adjudged, that he took but an eſtate for life, and that all his other ſons ſhould take by purchaſe. Firſt, Becauſe otherwiſe the words, *and to the heirs male of their bodies*, would be uſeleſs. Secondly, The words *and ſo*, &c. prove the ſame intent, which being turned into *Latin* are *eodem modo*. Thirdly, *Severally and ſucceſſively, according to their ſeniority*, are alſo a further proof of ſuch intent. Fourthly, The power to provide portions for daughters would be unneceſſary if *Edward* took an eſtate-tail, becauſe then by a common recovery he might bar it, and charge the lands as he thought fit *.

the Exchequer-chamber, where, it ſeems, the judgment was affirmed, as is obſerved by Judge Tracy, 1 P. Wms. 90. who, it appears, had ſearched the record, the reports differing in that matter. Fearne, 105. 3d edit.

'*A.* deviſes lands to *B.* for life, and after his death to the next heir male of *B.*, and the heirs males of the body of ſuch next heir male; and it was adjudged a good remainder in contingency to the next heir male of *B.* being in the ſingular number, and ſo was only a deſcription or deſignation of the perſon who ſhould take the remainder after the death of *B.*, and not any limitation of his eſtate.' and in ſeveral other caſes, which *vide* under title Deviſe.

Co. 66. 2 And. 37. Cro. Eliz. 453. Archer's caſe cited. Vent. 216. 3 Lev. 433.

If one deviſes to *A.* for life, remainder to *B.* and the heirs of his body, remainder to *C.* and his wife for their lives, and after their death to their children, they then having children, *C.* and his wife take only an eſtate for life, with remainders to their children for life, and no eſtate-tail; but had there been no children, the deviſe being immediate, the children could not take in remainder, and therefore it muſt be an entail in the huſband and wife.

6 Co. 17. Wild's caſe.

If lands are given to a woman and the heirs of the body of her huſband who is then dead, it is ſaid that the wife and the iſſue of the huſband are joint-tenants for life, with remainder to the iſſue in tail; for ſince they are named to take in poſſeſſion as the wife, if they ſhould only take an eſtate for life, the donor would have gain the land, though there were ſtill heirs of the body of the huſband in being, which by the words and intent of the gift he ought not to have, ſince he has given it to the heirs of the body of the huſband; and whoever anſwers that deſcription is compriſed within the words of the gift.

2 Roll. Abr. 416. 6 Co. 17.

*A.* deviſed lands to *B.* for life, remainder to truſtees to preſerve contingent remainders during the life of *B.*, remainder to the *heirs of the body* of *B.* lawfully begotten; and *Verney* doubting whether this was an eſtate for life in *B.* or tail, ſent it as a caſe to *B. R.*; and notwithſtanding the teſtator's plain intention to paſs an eſtate for life, yet the court held, that where the anceſtor takes an eſtate for life, and in the ſame inſtrument a limitation is made to his heirs, or to the heirs of his body, the heir cannot be a purchaſor, and that therefore this was a plain eſtate-tail.

Hil. 13 G. 2. in B. R. Colſon v. Colſon. 2 Stra. 1125. S. C. 2 Atk. 246. S. C. Fearne, 4th edit. 181. 249.

* If *A.* makes a feoffment in fee to the uſe of himſelf for life, remainder to the firſt ſon of his body begotten, and the heirs

Chudleigh's caſe, 16. 133.

" made

11 Co. 82. Co Lit 28. a. 2 Saund. 382. 386, 387. Cro. Eliz. 345. *contr.*

" male of the body of ſuch firſt ſon, and to the ſecond, *&c.* in like " manner; and for want of ſuch iſſue, remainder to himſelf and " the heirs of his body, with remainder to *B.* in fee; in this caſe " till iſſue, *A.* is tenant in tail general executed, with remainder " to *B.* in fee. But, if he had iſſue a ſon, then all his eſtate-tail " opens and lets in the remainder to ſuch ſon, and then he is be- " come again tenant for life, remainder to ſuch firſt ſon in tail " male, *&c.*, remainder to himſelf in tail general, remainder to *A.* " in fee. And this ariſes upon the conſtruction of the ſtatute " of uſes; for before that ſtatute the uſe being nothing elſe but " the perception of the profits, and no eſtate in the land itſelf " was not ſubject to the ſame rules of law by which the land itſelf " was governed, nor had the *ceſtuy que uſe* any other remedy than " by *ſubpœna* in Chancery, to compel the tenant of the land to let " him into the perception of the profits, or convey the poſſeſſion to " him. And though that ſtatute by carrying the poſſeſſion to the " uſe, did in effect take away and deſtroy the uſe, for ſo much as " was executed in poſſeſſion, yet it ſtill left in the parties the ſame " power of limiting and appointing the uſes, as they had before. " And when the perſon, who was to take the uſe, came *in eſſe*, the " ſtatute ſupplied the place of the Chancery, and carried the poſ- " ſeſſion to the uſe, if nothing were done in the mean time to " hinder the riſing of the uſe; and though the eſtates were before " united, yet by an act of parliament they may well be ſevered " again to let in the intermediate uſe, ſince the ſtatute executes " the poſſeſſion only according to the uſes when they happen, as " well as thoſe that are capable of being executed preſently. And " therefore in that caſe, though the wife of the tenant in tail have " by the intermarriage title of dower, yet it is defeated again by " the birth of a ſon, which turns the eſtate-tail to an eſtate for " life by the terms of the ſettlement under which only the title " of dower accrued, and therefore muſt be ſubject to be defeated " by the terms of the ſame ſettlement."

Poph. 5. Moor, 104. Perk. ſect. 56. Dav. 35.

' If one makes a leaſe to *A.* for life, remainder to him who ' firſt comes to St. *Paul*'s church, *&c.* this is a good remainder ' in abeyance or contingency, but can veſt in none till he qualifies ' himſelf to take it by coming to St. *Paul*'s church; nor can ' any one grant it away, though he ſhould happen after to come ' there firſt.'

Cro. Car. 102. Yelv. 85. Poph. 5. 10 Co. 51. Cro. Eliz. 580. 1 Leon. 245. Co. Lit. 378. b.

" If one makes a feoffment in fee to the uſe of himſelf and his " wife, and to the heirs of the ſurvivor of them, or to the heirs " ſuch as dies firſt; this is in the nature of a contingent remainder " der to the ſurvivor, or who dies firſt, and after the contin- " gency happened, the heirs ſhall be in by deſcent; but by a fine " ment before it takes place, the remainders will be deſtroyed. " But theſe contingent remainders cannot be granted over, be- " cauſe they are in no perſon to grant; therefore, where a leaſe " was made to the huſband and wife for 21 years, remainder to " the ſurvivor of them for 40 years, and the huſband granted over " this remainder; it was holden a void grant, though he ſurvived " becauſe till the contingency happened, he had nothing in

to grant, releaſe, or ſurrender. So, if a leaſe be made for life, remainder to the right heir of *J. S.* who is then living, if the eldeſt ſon of *J. S.* grants this remainder, and then *J. S.* dies, yet upon the determination of the particular eſtate, the grantor may enter, becauſe his grant was void, having nothing in him to grant. And in the caſe of the huſband and wife, if lands are given to them, and to the heirs of the body of the ſurvivor of them, and they both join in a leaſe for 21 years, obſerving all the circumſtances requiſite by 32 *H.* 8. yet this leaſe ſhall not bind the iſſue for the above reaſon. 10 Co. 58.

" A leaſe was made to *A.*, *B.*, and *C.* for their lives, remainder to the aſſigns of the ſurvivor of them for 99 years. *B.* was the ſurvivor. It was holden, that the 99 years was an intereſt veſted in him, which he might well diſpoſe of, as he thought fit, and not a bare power only of nominating one to take it. For *aſſigns* is a word proper for the limitation of a further intereſt to the ſame party, in caſe of a chattel, as heirs is for the inheritance, and yet both veſt in the party himſelf; for aſſigns are either in fact, or in law, as executors, *&c.*; and it appears before, that a remainder to his executors in ſuch manner veſts in the party himſelf; and ſo it does in caſe of ſuch a limitation to his aſſigns, who for want of an actual aſſignee, will be his executors." Clerk v. Sydenham, Yelv. 85. Plowd. 288. *Vide ſupra.*

' One levies a fine to the uſe of himſelf for life, and after his death to the uſe of his two daughters till his ſon *B.* ſhould return from beyond ſea, and ſhould come to the age of twenty-one years, or die, and after ſuch return and age of twenty-one years, or death, which ſhould firſt happen, to the uſe of the ſaid *B.*, and the heirs of his body begotten; *B.* returns from beyond ſea: it was adjudged, that this was a good remainder, and ſhould veſt in him immediately upon his return, though he was not then twenty-one; for the laſt diſjunctive *or* is to be applied to the whole ſentence, and makes it diſjunctive in all, and though his coming from beyond ſea, or to twenty-one years, are uncertain, yet his death is certain; and therefore this remainder does not depend altogether upon uncertainties. And in this caſe it ſeems the heirs of his body ſhall not take by purchaſe, though his death had happened firſt, and ſo the remainder could not veſt in himſelf, for the limitation being to him and the heirs of his body, whoever takes by virtue thereof, muſt take as from him, and conſequently will be in by (*a*) deſcent, and not by purchaſe. Cro. Eliz. 269. Leon. 243. Co. Lit. 225. Ld Vouxe's caſe. Fearne's C. R. 19. 4th edit. (*a*) 1 Co. 99. Shelley's caſe.

' So, if one deviſes lands to *A.* for life, *ſi tam diu ſola vixerit*, and after her death or marriage, remainder over to another, this is a good remainder, becauſe it is certain one of the two contingencies will happen. But, if one gives lands to *A.* till *B.* comes to twenty-one years of age, and when *B.* comes to ſuch age, then to remain over, this remainder is contingent, and uncertain whether it will ever veſt, for if *B.* dies before ſuch age, the remainder is become void. So, where land is given to a woman ſo long as ſhe ſhall remain ſole, or to *A.*, till *B.* comes from *Rome* to *England*, and after her marriage, or *B.*'s coming to *England*, 2 Leon. 82. 3 Leon. 182. 3 Co. 20. Dyer, 142.

' then

'then to remain to *C.* in fee, theſe remainders are contingent
'and uncertain whether they ſhall ever veſt or not, for if the wo
'man never marries, nor *B.* comes to *England*, theſe remainder
'will not veſt, but are become void. So, if lands are deviſed to on
'for life, and if the deviſee be diſturbed, that then the land ſhall re
'main over to another in fee, this creates no remainder till ſuch di
'turbance, and if that never happens, the remainder fails likewiſe
'for theſe remainders are not to ariſe but upon ſuch acts done
'and therefore if they fail, ſo does the remainder.

Acton v. Hare, Poph. 97. 10 Co. 85.

'One levies a fine to the uſe of *A.* and the heirs male of h
'body, till he or the heirs male of his body attempt to alien
'ſell, and then to the uſe of *B.*, &c.; *A.* dies without iſſue, a
'without any attempt, *&c.*; *B.* will have no eſtate; for his re
'mainder was not to begin but upon ſuch attempt precedent, a
'that not happening, the remainder never takes place.' "A
"*vide infra*, that a remainder to commence after ſuch attempt,
"repugnant and againſt law."

Plow. 23. 3 Co. 20. Raym. 144. Co. Lit. 378.

'A leaſe is made to *A.* for life, remainder to *B.* for life, a
'if *B.* dies before *A.*, that then the land ſhall remain to *C.* f
'life, this is a good remainder, if the contingency happens, othe
'wiſe not; and in the mean time the eſtate continues in the leſſo
'and is not in abeyance, being expreſsly limited to go over, if ſu
'contingency happens, therefore till it does happen, nothing
'deveſted out of the leſſor.'

Holcroft's caſe, Moor, 486. Sir T. Raym. 429. S. C. cited.

"*A.* by indenture covenants to levy a fine to the uſe of hi
"ſelf for life, and after his deceaſe to the uſe of *B.* his ſon,
"long and until he attempt to alien, and then to the uſe of
"and the heirs male of his body during the life of *B.*, and i
"mediately after his deceaſe, to the uſe of the firſt and other ſo
"of *B.* in tail male ſucceſſively, remainder to *C.* in tail. It w
"objected, that no uſe veſted in *C.* till *B.* attempted to alien,
"the uſe to *C.* and all the limitations after depend on *B.*'s
"tempt to alien. But it ſeemed to the court, that it ſhould
"intended in the limitation of the uſe, that after *B.*'s death wi
"out iſſue male, *C.* ſhould have the land, be there any attempt
"alien or not, by reaſon of the words, *and immediately after his*
"*ceaſe to the firſt ſon*, &c.; for the uſe which was to ariſe upon
"attempt to alien, is only reſtrained to the uſe for the
"of *B.*

Hob. 30, 31. 1 Br. Abr. 155. pl. 83. Plowd. 25. a.

"If one deviſe land to *A.* and the heirs of his body, provi
"that if *A.* happen to die without heirs of his body, that the
"ſhall remain to *B.*, this is a good remainder veſted preſen
"and no contingency at all, but the ordinary limitation of a
"mainder upon an eſtate-tail. So, in a leaſe for life, upon c
"dition that if the leſſee die, then it ſhall remain, *&c.* this
"good remainder executed preſently."

Luxford v. Cheeke, 3 Lev. 125. Sir T. Raym. 427. S. C. by the name

'One deviſes lands to his wife during her natural life, if
'does not marry, but if ſhe marries, then preſently after my ſon
'to enter and enjoy, to him and the heirs male of his bo
'it was adjudged, firſt, That by this will the wife had an e
'for her widowhood only; ſecondly, That this was a remai
've

reſted in *A.* preſently to take effect in poſſeſſion upon the death or marriage of the wife, which ſhould firſt happen, and not a contingent remainder to take effect only in caſe the wife married.

of Brown v. Cutter. 3 Leon. 182. [In Lady Anne Fry's caſe,

Ventr. 203. Hale expreſſed a ſimilar opinion, where, he ſaid, it is all one as if the eſtate had been deviſed her for life, *and if ſhe marries, then to remain*, which had been but an eſtate *quam diu ſola vixerit.*—In caſe where a teſtator deviſed lands to his wife *during her widowhood*, and *if ſhe ſhould marry again*, at then his daughter ſhould enter, provided that if his wife married and ſurvived his daughter, the ate ſhould return to her; Lord Hardwicke took a diſtinction between the deviſe of an eſtate during idowhood, with remainder over, and a deviſe during widowhood with remainder over on her marrying ain within *a limited time*. Jordan v. Holkham, Ambl. 209. Where there was a deviſe to a wife provided ſhe remained a widow; but in caſe ſhe married a ſecond huſband, then to teſtator's nephew when ſhould attain the age of twenty-three years; it was held, that the widow had an eſtate *till* the nephew attained the age of twenty-three years, though ſhe married before. Doe v. Freeman, 1 Term Rep. 389.]

'One deviſes lands in this manner: My will is to entail all my lands to my nephew *A.*, and the heirs male of his body, and, for default of ſuch iſſue, to his brother and the heirs male of his body, &c. *habendum* to them ſeverally, and to the heirs male of their bodies, to the only intent and true meaning of this my will, and ſo long as they and every of them do perform and keep the true meaning thereof touching the entailing all my ſaid lands in manner following; and therefore I give all my ſaid lands to *A.*, and the heirs male of his body begotten, until he or they make any acts to alter or diſcontinue the eſtate-tail, and then to *B.*, and the heirs male of his body, with other remainders over, and dies, *A.* enters; *B.* dies, leaving iſſue *C.*, and then *A.* levies a fine; and it was objected that *C.* could not enter, becauſe the remainder deviſed to his father was contingent, and not to ariſe but upon *A.*'s alteration of the eſtate, and not before or otherwiſe, and then *B.* dying before that contingency happened, the remainder could not veſt. But it was adjudged, that the remainder to *B.* was not contingent, but an immediate deviſe, and that otherwiſe the intent of the deviſor, which was to give to every one in remainder ſucceſſively, would be deſtroyed, though it was holden that the limitation over upon his alienation did not ſo defeat the operation of the fine, as to prevent the diſcontinuance wrought thereby, and give him in remainder immediate title of entry thereby, for that ſuch clauſe tended to a perpetuity, and was condemned in law upon the reaſon of other caſes there cited.'

Foy v. Hinde, Cro. Jac. 696. Jon. 57. Raym. 429.

"*A.* in conſideration of a marriage intended between *B.* his nephew and *C.* the daughter of *D.*, and of 200 marks paid by *D.*, makes a feoffment to the uſe of *B.* and *C.* for their lives, and after carnal copulation to the uſe of the iſſues of their bodies, remainder to *B.* and the heirs of his body begotten, &c. The marriage never takes effect, but *B.* marries another woman, and hath iſſue by her; and *A.* married alſo, and had iſſue; and after the death of *A.* and *B.* the queſtion between their children was, 1ſt, If the uſe ſhould ariſe to *B.* and *C.* for their lives by reaſon of the money paid, though no marriage was had? 2d, If the remainders which were limited after the marriage are not now prevented from riſing, by reaſon no mar-

Moor, 101. pl. 247. Dy. 334. b. Calthrop's caſe.

"riage

" riage was had? As to the firſt, the juſtices thought, the u
" would well ariſe, though no marriage was had, becauſe it w
" limited out of the eſtate of the feoffees, which was an eſta
" executed, and needed no conſideration to raiſe the uſe. But,
" it had been by way of covenant to ſtand ſeiſed, they held, no u
" would ariſe; becauſe the marriage was the principal conſider
" tion, and that failing, the conſideration to raiſe the uſe fa
" likewiſe, and the money would not be ſufficient. As to t
" ſecond point, they thought the conſideration of name and blo
" ſufficient to raiſe a uſe to *B.* who was *A.*'s nephew, and that
" might be independent on the other limitations, which were n
" to ariſe but upon the marriage had. But no judgment w
" given."

' Lands were ſettled to the uſe of the huſband and wife f
' their joint lives, and after the death of either of them, to t
' heirs of the body of the wife by the huſband to be begotten, a
' for default of ſuch iſſue, the wife ſurviving the huſband, to t
' uſe of the wife for life, and after her death to the heirs of h
Sid. 247. Raym. 126. Keb. 888. Merrell v. Rumſey, & *vide* Perk. ſect. 337. 5 Co. 9. 2 Roll. Abr. 418.
' body begotten; the huſband dies leaving iſſue by the wife, a
' ſhe marries again and ſuffers a common recovery; and the pr
' cipal queſtion was, Whether this was an eſtate-tail executed
' the wife, or that the remainder was contingent? It was
' gued, that the remainder depending on their joint lives, and
' ing limited to the heirs of the body of one of them, ſo that
' may be fruſtrate, if the wife ſurvives, muſt needs be continge
' becauſe by the death of the huſband the joint eſtate for life
' determined, and yet the remainder to the heirs of the body
' the wife by the huſband cannot take effect, for *non eſt hæres*
' *ventis*. But *per cur.* clearly, and with ſome diſpleaſure at
' argument, the words *heirs*, &c. are not words of purchaſe,
' of limitation to the wife, and the eſtate veſts in her preſen
' and is not in contingency; as if an eſtate be limited to a wo
' *durante viduitate*, remainder to her heirs or the heirs of her bo
' this is a fee-ſimple or fee-tail executed in her preſently;
' though ſhe afterwards marries, yet that ſhall not deſtroy
' eſtate that was well veſted and ſettled in her before; and
' the remainder cloſes with the particular eſtate to all purpoſes
' dividing the joint-tenancy, and is no more than an eſtate to
' huſband and wife, and the heirs of the body of the w
Perk. § 337. " And they ſeemed to rely upon the caſe in *Perkins*, where l
" were leaſed to *A.* and *B.* for the life of *C.*, remainder to
" right heirs of *A.*; then *C.* died, living *A.* and *B.*, and afte
" takes wife and died, living *B.* It is there ſaid, that the wi
" *A.* ſhall be endowed, becauſe *C.* died, living *A.* the huſban
" that the freehold and inheritance were united in the huſ
" during the coverture. Which caſe, if it be law, may give
" colour to the principal caſe. But it ſeems to me not to be
" for the rule is, that where by poſſibility the particular e
" may determine, before the remainder can take effect, t
" ſuch remainder is contingent; and by the death of *C.* the
" ticular eſtate is abſolutely determined, for the remainder

not then take effect, becauſe *A.* cannot have heirs during his life. And this is no infringement of the other rule, that wherever the anceſtor takes an eſtate for life, and after in the ſame conveyance a limitation is made to his right heirs, or the heirs of his body mediately or immediately, that in ſuch caſe the remainder veſts in the anceſtor himſelf, and by conſequence the heirs ſhall be in by deſcent, and not by purchaſe; for here, *A.* took no eſtate for his own life; and though it was an eſtate of freehold, yet it was ſo limited, that without any act or default of his it might determine during his life; and ſince the life of *C.* was made the meaſure of the continuance of the eſtate of *A.* and *B.*, it is more reaſonable to give it *A.* after *C.*'s death, than it is to give it *B.* likewiſe: but both their eſtates are to be bounded and circumſcribed by the life of *C.*, and when he dies, living *A.*, who can then have no heir to take the remainder, it ſeems in reaſon, the remainder is deſtroyed. So, in the principal caſe, when the eſtate is limited to the huſband and wife during *their joint lives*, this is no abſolute eſtate for their lives ſo as to go to the ſurvivor, but the death of either of them determines that eſtate, and the remainder being limited to the heirs of the body of the wife who ſurvived, and can have no heir during her life, ſeems to be defeated thereby. And note, they ſeemed to agree, that if an eſtate were made to the huſband and wife *during coverture*, remainder to the heirs, or heirs of the body of the huſband, that this was a contingent remainder. And there ſeems no difference in reaſon between ſuch a limitation, and where it is *durante viduitate*, or to two for their joint lives, or to two during the life of a third perſon, with ſuch remainder over; becauſe in all thoſe caſes the particular eſtate determines, before the remainder can take effect. And the caſe in 2 *Ro. Abr. ſupra*, ſeems expreſsly to contradict the principal caſe, and the reaſon of it. So the caſe *ſupra*. But in the principal caſe, if the wife had died firſt, there had been no doubt but the heirs of her body had taken by deſcent, ſhe having had the whole during her life. And this ſeems to differ much from a limitation to baron and feme, and the heirs of the body of the feme; for there, whichever of them dies firſt, yet the ſurvivor ſhall hold during life. *Ideo quære* of theſe matters. As to the ſecond point of the caſe, if the ſecond limitation to the wife ſhould take effect, becauſe it was upon the dying without ſuch iſſue, whereas there was iſſue ſo begotten living at the death of the huſband; the court ſaid, there was no colour for it, for ſuch heir and ſuch iſſue is all one, for unleſs in the heir, it is not ſuch iſſue. Note, this objection ſeems to make the ſecond remainder to the wife conditional upon the huſband's not leaving iſſue at the time of his death, which here he did. But the limitation is not confined to his leaving iſſue at the time of his death, but is general, *and for default of ſuch* iſſue or heir, and ſeems not to differ from the common limitation of remainders after eſtates-tail, and therefore may well veſt as a remainder in the wife immediately upon the huſband's death.

5 Co. 9.

1 Sid. 247.

*Quære.*

[See Fearne's C. R. 432, 433, &c. whether the doctrine of the principal caſe is vindicated, and Rolle's diſtinctions are controverted.]

10 Co. 85. " One makes a feoffment in fee to the uſe of himſelf for life, and
" after to the uſe of ſuch perſon and perſons to whom he ſhall
" demiſe any part of the premiſes for life or years, and after for
" the performance of his laſt will, and to the uſe of ſuch perſon
" and perſons to whom he ſhall by his laſt will deviſe any eſtate
" or eſtates, and after to the uſe of *B.* in tail, with other remain-
" ders over. Theſe remainders are contingent, and not executed
" in *B.* and the others till the death of the feoffor, becauſe the
" feoffor hath ſuch power that by his will he may give away the
" whole fee-ſimple, and therefore till his death it being uncertain
" whether they will ever veſt or not, they muſt needs be contin-
" gent, and then the uſe of the fee in the mean time veſts again
" in the feoffor. But *quære* in this caſe, if he afterwards makes a
" feoffment in fee, or commits a forfeiture, if thoſe in remainder
" may not enter preſently: for ſuch feoffment is not in purſu-
" ance of his power, and if it be not warranted by that, it cannot
" be good at all. For if it ſhould, he might then derogate from his
" own grant, and avoid it in what manner he pleaſed. And if it
" be ſo, that thoſe in remainder may enter in ſuch caſe, then the
" remainder muſt be veſted in them before, and cannot be con-
" tingent; for the feoffment which gives away the whole eſtate
" to another, can never operate ſo as to veſt it in them at the ſame
" time too. Beſides, the account given of theſe remainders is in-
" conſiſtent with their being in contingency; for all contingent
" remainders paſs out of the feoffor at the ſame time with the
" particular eſtate, and are carried into abeyance till the contin-
" gency happens; but here it is ſaid, the uſe of the fee is veſted
" in the feoffor till his death, which cannot be; therefore, it
" ſeems more reaſonable to conſtrue theſe remainders to be veſted
" preſently, though ſubject to be diveſted and taken out of them
" by the feoffor, if he purſues his power in deviſing away the
" whole. But, if he makes ſuch feoffment, it ſhould ſeem, he can
" never after execute his power, for that was incluſively given
" away and extinguiſhed in the feoffment, whether thoſe in re-
" mainder may enter for the forfeiture or not; and if they cannot
" then their eſtates are abſolutely in the power of the feoffor, and
" his reſerving to himſelf a power to defeat them in ſuch a par-
" ticular manner was altogether idle, which ſeems not rea-
" ſonable."

## (D) Of Remainders in Abeyance or Contingency; what Eſtate is ſufficient to ſupport them; when they are to take effect; and by what Means they may be deſtroyed or prevented from coming in *eſſe*; and therein, of Remainders by way of executory Deviſe or future Intereſt.

" A Contingent remainder muſt veſt during the particular
" eſtate, becauſe if remote contingencies ſhould be allowed
" to hang over titles, no man would know when he was ſafe

" his purchaſes. The law therefore has appointed how long ſuch " contingencies are to expect, which is, only during the continu- " ance of the particular eſtate, and then the remainder muſt come " in being; ſince remainder *ex vi termini* ſignifies a remaining " part of a particular eſtate preceding. Whether ſuch particular " eſtate determine by effluxion of time, or by merger of the parti- " cular eſtate in a greater, it is all one; for if the contingent re- " mainder do not veſt before ſuch merger, it can have no being " afterwards; ſince the particular eſtate is the ſole limitation on " which the remainder is to take place.

" Contingent remainders ariſe either at common law, or by way " of uſe, and are alſo to be deſtroyed two ways: 1ſt, By the " merger of the particular eſtate which ſupports them; for the " particular eſtate being, as hath been ſaid, the ſole time of limit- " ation in which theſe contingencies are to take place, the merger " of that eſtate is the deſtruction of the remainders; and this, " whether ſuch remainders be limited at common law or by way of " uſe. But then every particular eſtate upon which ſuch remain- " ders depend muſt be taken away; for the remainder is the re- " maining part of each particular eſtate, when there are more " than one in the limitation; and each particular eſtate is the " time appointed by law when ſuch contingent remainders are to " take place; and therefore the deſtroying of one of theſe parti- " cular eſtates is no deſtruction of the remainder. Hence it is, " that if an eſtate be limited to *A.* for life, remainder to *B.* for " life, with contingent remainders over; if *A.* makes a feoffment, " this does not deſtroy the contingent remainder, becauſe *B.* hath " a right to enter and recontinue his eſtate, which therefore in " judgment of law ſubſiſts in him; and therefore that eſtate is not " gone within the compaſs of which the contingent remainder is to " veſt. So it is, if *B.* had only a right of action; as, if a deſcent " had been caſt upon the heir of the feoffee of *A.*, and put *B.* to " his real action; becauſe he who hath the right to the eſtate, " hath, by the better opinion, in judgment of law, the eſtate in " him.

2 Roll. Abr. 796. Wegg v. Villers, 1 Ventr. 188.

" 2dly, Such contingent remainder ariſing by way of uſe, may " be alſo deſtroyed by taking away the ſeiſin out of which the uſe " ariſeth. For the ſtatute of the 27 *H.* 8. hath executed the ſeiſin " of the feoffee to the uſes limited, ſo that if there be no ſeiſin at " the time when the uſe is to take place, ſuch uſe muſt be deſtroy- " ed; becauſe no ſeiſin or poſſeſſion can be executed to it; and " therefore if the perſon in whom the legal ſeiſin is, made a feoff- " ment for value without notice, ſuch feoffee comes into a good " title at law, and there is no reaſon in equity to take it from " him, and by conſequence, in ſuch caſes, the ſeiſin out of which " the uſe ariſeth is deſtroyed. And therefore if a man covenants " to ſtand ſeiſed to the uſe of himſelf and his heirs, till an in- " tended marriage of his ſon takes effect, and after the marriage " to the uſe of his ſon for his life, remainder to his wife for her " life, with contingent remainders to the iſſue of the marriage, the " father makes a feoffment in fee for value, without notice of the

" uſes before ſuch marriage; ſuch uſes are deſtroyed; and though
" the marriage takes effect, they can never ariſe, becauſe the ſeiſin
" out of which the uſes were to ariſe is deſtroyed. Otherwiſe it
" is, if the feoffment had been without value, or with notice
" becauſe ſuch feoffees had only acquired a ſeiſin which equity
" would make liable to the uſes as a mere ſubſtitute of the feoffor
" The ſame law of a leaſe for years reſerving rent for the time of
" the continuance of ſuch leaſe; becauſe ſuch leaſe is valuable
" Otherwiſe, of a leaſe for years reſerving no rent; becauſe ſo
" no valuable conſideration.

2 Roll. Abr. 796. Wegg v. Villers. [*Vide* Fearne's C. R. 433, 434, 435, 436, 437, &c.]

" If a man makes a feoffment to *J. S.*, to the uſe of himſelf for
" life, remainder to his daughter on her marriage for her life, re-
" mainder to her firſt ſon, remainder to his own right heirs;
" he makes a feoffment in fee, or grants the reverſion without
" value, that will not diſplace the contingent remainders; be-
" cauſe the feoffee comes in as a volunteer, and therefore ſhall
" not diſturb a valuable ſettlement. But, if ſuch feoffor and
" *J. S.* join in a feoffment for value without notice, it will deſtroy
" the remainders, for the former reaſon. But, if he himſelf make
" a feoffment for value without *J. S.*, ſuch contingent remainder
" by the better opinion, will ariſe out of the firſt livery to *J. S.*
" they happen within the life of the daughter, which is called the
" *ſcintilla juris* in *J. S.* to be executed to the contingent uſe
" The reaſon of which is, that ſince there is a particular eſtate
" ſtill continuing in the daughter, within the compaſs of which
" the contingent remainders may ſtill veſt; and ſince before the
" ſtatute there was a ſeiſin continuing in the feoffee, and the in-
" tention of the ſtatute was to preſerve and not to deſtroy the
" eſtate, therefore, in ſupport of the ſtatute, the law rather will
" ſuppoſe a ſeiſin in feoffees to be executed to the contingent
" uſes, if they happen within time, than ſuffer ſuch contingent
" uſes to be deſtroyed by limitations ſubſequent to them.

" Let us in the next place ſee by what means theſe contingent
" remainders may be deſtroyed or prevented from ever ariſing.

Co. 134. 138. Poph. 82.

' And here the rule is, that if the contingent remainder do
' not veſt either during the particular eſtate, or at the inſtant
' of the determination thereof, ſuch remainder is for ever deſtroy-
' ed. The reaſon whereof ſeems to be, to prevent the incon-
' nience and danger that might otherwiſe enſue to purchaſers
' allowing ſuch remainders to take place wherever they happened
' for if but the latitude of a day were given to their veſting after
' the particular eſtate ended, they might as well ariſe one hundred
' years after; the reaſon of ſuch allowance being the ſame;
' ſince by the limitation they ought to veſt when the particular
' eſtate determines, if they cannot ſo do, they ſhall never after
' take effect, be they limited either at common law or by way of
' uſe.

2 Leon. 178.

' Therefore, where one made a feoffment in fee to the uſe of
' himſelf for life, and after to the uſe of his firſt ſon and his
' heirs; the father and feoffees, before any iſſue, infeoffed *I. S.* and
' his heirs for a valuable conſideration without notice, and the

the father died leaving iſſue a ſon who enters; by the better opinion, the contingent uſe to the ſon was deſtroyed; becauſe by the feoffment the particular eſtate was determined, and the ſon not being *in eſſe* to take advantage of the forfeiture and wrong done to his remainder, ſhall never after ſet it up againſt the purchaſer; and the feoffees, by their joining in the feoffment, have excluded themſelves of any entry to revive the remainder, if that were neceſſary, as (*a*) a releaſe by them after the feoffment of the father would likewiſe have done.'

(*a*) 2 Roll. Abr. 797.

" One made a feoffment in fee to the uſe of himſelf for life, remainder to the uſe of his eldeſt ſon in tail, remainder to his own right heirs, and before iſſue, ſuffered a recovery, and died leaving a ſon. It was holden, that in this caſe the ſon ſhould not avoid the recovery by 32 *H.* 8. becauſe the remainder was not in him at the time of the recovery, as by the words of the ſtatute it ought to be. But, it was holden, that he might avoid the recovery by the common law; becauſe, ſays the book, the recompence could not extend to ſuch remainder as was not *in eſſe* at that time. But this is againſt the expreſs reſolution of the caſes after mentioned; for a common recovery is now but a common aſſurance, and therefore if tenant in tail, remainder to the right heirs of *J. S.* ſuffers a common recovery, living *J. S.*, yet the remainder is barred, though it was then in abeyance, and the recompence in value could not extend to it."

2 Leon. 224.

1 Co. 136. a. 6 Co. 42. a. 2 Roll. Rep. 217. Poph. 139. Copwood's caſe. 1 Leon. 260. *contr. per* Wray.

' *A.* had iſſue *B.* and *C.* his ſons, and made a feoffment in fee to the uſe of himſelf for life, and after to the uſe of the feoffees and their heirs during the life of *B.*, remainder to the uſe of the firſt, ſecond, and other ſons of *B.* in tail male, remainder to the uſe of *C.* and the heirs of his body, remainder to his own right heirs, and dies; the feoffees infeoffed *B.* in fee, without conſideration, and with notice of the firſt uſes, and after *B.* hath iſſue a ſon, and if he was barred by the feoffment of the feoffees, was the queſtion? It was adjudged, upon ſolemn argument in the Exchequer-chamber, that he was barred; for the feoffment of the feoffees diveſted all the eſtates and future uſes, and though *B.* had notice this was not material, the eſtate out of which the uſes were to ariſe being diveſted and gone; and the new eſtate given by the ſecond feoffment ſhall not be ſubject to the uſes limited by the firſt feoffment; and there being no ſon of *B.* to enter when the particular eſtate determined, as in this caſe it did by the feoffment, which was a forfeiture thereof, he ſhall never enter after; for the ſtatute 27 *H.* 8. *c.* 10. executes no uſes but when the eſtate continues in the feoffees to ſerve them, and not when that is diveſted, and the uſe itſelf turned to a right. Alſo it was held in the ſame caſe, that if there had been no alteration of the poſſeſſion, but that *B.* had died before the birth of his ſon, he ſhould never after have the eſtate, the remainder to *C.* being then executed, and the ſon of *B.* born out of due time. And they agreed that the preſerving ſuch contingent uſes would create perpetuities, and tend to the deſtruction of

Co. 120. Poph. 70. Chudleigh's caſe.—— [See various obſervations on and arguments drawn from Chudleigh's caſe, in Fearne, 158. 217. 225. 248. 3d edit.]

* *Vide* ſtat. 10 & 11 W. 3. c. 16. *ante*, 312.

'of families, who, upon no occaſion whatever, could diſpoſe o
'their eſtates.

Roll. Abr. 119. Uvedal v. Uvedal. * It is proper to obſerve, that Chancery will not admit of waſte by colluſion between tenant for life and the perſon entitled to the firſt veſted eſtate of inheritance, to the prejudice of ſons n

'*A.* tenant for life, remainder to his firſt, ſecond, and othe
'ſons in tail male ſucceſſively, remainder to *B.* for life, and ſo t
'his firſt, ſecond, and other ſons in tail male, then *B.* having iſſu
'a ſon, and *A.* no ſon, *A.* cuts timber trees; the ſon of *B.* who
'then tenant in tail ſhall have them, for the property thereof is i
'him by reaſon of his inheritance, and the remainder to the fir
'and other ſons of *A.* is no impediment, being but a poſſibilit
'which may never happen, and is of no regard till it does happe
'but may be deſtroyed by feoffment, *&c.**

*in eſſe*. See the caſe of Garth and Sir John Hind Cotton, 1 Vez. 524. 546.

Cro. Car. 152. Biggot v. Smith. 3 Mod. 309. S. C. cited. Ld. Raym. 316. S. C. cited. Vent. 189. † In this caſe the particular eſtate was not ſubſiſting at the huſband's death, when the fee ſhould have veſted, for

'One made a feoffment in fee to the uſe of himſelf and his wif
'and to the heirs of the ſurvivor of them, and after the huſban
'made a feoffment in fee, and died; the wife entered, and infeoff
'a ſtranger, and died; and the queſtion was, Whether by the wif
'entry the fee ſhould veſt in her, being the ſurvivor, ſo as h
'iſſue might enjoy it? It was adjudged, that the huſband
'feoffment had deſtroyed this future contingent uſe of the fe
'for whatever cannot accrue at the time of the death of the par
'who firſt dies, cannot afterwards, by any act, be revived; a
'though in this caſe the wife had a joint eſtate for life with h
'huſband, yet, during the coverture, ſhe was bound by his feo
'ment, and ſo could not prevent the deſtruction of the conti
'gent fee, which was not to take effect till the death of one
'them †.

his ſecond feoffment had deſtroyed it during the coverture; and though the wife's right of entry n effect at the inſtant the remainder ſhould have veſted, yet it was inſufficient, for it ſhould have b then actually exiſting. Fearne, 434. 4th edit.

Cro. Car. 364. Boreton v. Nicholls.

'So, where one hath iſſue two ſons *B.* and *C.*, and mak
'a feoffment in fee to the uſe of himſelf for life, remainder
'the uſe of *C.* for life, remainder to the firſt ſon of *C.* w
'ſhould have iſſue of his body, and to his heirs for ever; a
'for default of ſuch iſſue, to the uſe of the firſt daughter of
'who ſhould have iſſue of her body, and to her heirs for eve
'and ſo to the ſecond, *&c.* remainder to the right heirs of *C.*
'ever, and dies; *C.* enters, and hath iſſue a ſon, who dies wi
'out iſſue; then after *C.* levies a fine with proclamation, and
'enters as for a forfeiture of his eſtate for life; it was
'judged againſt *B.*, for the fee veſted preſently in *C.*, and
'other limitations were but contingent, and ſo barred and
'ſtroyed by the fine, there being then none *in eſſe* to take the
'and then the fee was immediate to his eſtate for life, and ſo
'fine good, and no forfeiture.

Cro. Jac. 168. Bell's caſe cited.

'If one make a feoffment in fee, or covenant to ſtand ſeiſ
'to the uſe of himſelf for life, and after to the uſe of his f
'ſon in tail male, *&c.*, and, before the birth of any ſon, mak
'feoffment in fee, this deſtroys the contingent remainder to
'ſon, ſo that it can never after ariſe.

'O

'One made a feoffment in fee to the uſe of himſelf for life, remainder to the uſe of his wife for life, remainder to *A.* his eldeſt ſon for life, remainder to the eldeſt iſſue of *A.* which ſhould be at the time of his death, remainder to *C.* in fee; *A.* hath iſſue *B.* his eldeſt ſon; the feoffor dies; his wife releaſes to *A.* for years, and he makes a feoffment in fee to *D.*, to whom *C.* levies a fine; the wife dies, then *A.* dies—it was adjudged, that, by this feoffment, the remainder to the eldeſt ſon of *A.* which ſhould be at the time of his death, was deſtroyed, though he had then a ſon actually born; becauſe it was contingent and uncertain whether that ſon would continue to be his eldeſt at the time of his death; for he might die, and another be his eldeſt; and therefore the remainder could not veſt in him in his father's life, and by conſequence being in contingency was deſtroyed by the feoffment, which determined the particular eſtate before the remainder could take place. But note, if the wife had entered, this had revived the contingent remainder, for her right of entry was ſufficient for that purpoſe; or if ſhe had ſurvived *A.* then, though ſhe had died before entry, yet might the feoffees, after her death, enter and revive the contingent remainder.

Cro. Eliz. 630. Moor, pl. 726. Smith v. Belay. Lit. Rep. 291. Like caſe.

2 Roll. Abr. 794.

'*A.* makes a leaſe for life by indenture, with livery to *B.*, and if it fortune *B.* to marry any wife who ſhall ſurvive him, then the land ſhall remain to ſuch wife for her life; *proviſo* if *B.* does not in writing, or laſt will, declare his mind that ſhe ſhall have it, then it ſhall not remain to her; *B.* before marriage makes a feoffment to *C.*, to whom *A.* levies a fine, and ſuffers a recovery, and after *B.* marries, and makes a declaration, that his wife ſhall have the remainder, *&c.*; then he and his wife levy a fine to *C.*, and after he makes another like declaration and dies; and his wife enters. And by certificate of two judges to the Chancellour, her remainder was deſtroyed by the feoffment, becauſe the freehold was thereby determined before the remainder could take effect; alſo the poſſibility of the wife was inclusively given away in the fine, and then the declaration was to no purpoſe. And ſo it ſeems it would have been, if he had made ſuch declaration, and after had made the feoffment, for that declaration had only made the remainder abſolute to the wife who ſhould ſurvive him, which being contingent, and uncertain who that would be, would be barred and deſtroyed by the feoffment.'

Moor, pl. 750. Powle v. Veer.

"A *ceſtuy que uſe* in fee 1 *H.* 8. deviſes, that his feoffees ſhall be ſeiſed to the uſe of *B.* his ſon for life, remainder to the next heir of the body of *B.* and *C.* his wife for life, remainder to the next heir of the ſaid heir begotten, and for default of ſuch iſſue to the uſe of the heirs of the body of *B.* and *C.* his wife for the life and lives of every ſuch heir or heirs, and for default of ſuch heirs, to the uſe of the heirs of the body of *B.* remainder to the right heirs of *B.* and if any one of the ſaid heirs ſhall let, ſet, alien, or mortgage his right, title, or intereſt, or ſuffer any recovery to be had againſt him by his conſent, *&c.*

1 Leon. 256. Manning v. Andrews. *Vide* 1 Co. 138. Mo. 378 that ſuch limitations of perpetual freehold are againſt law and void; becauſe thereby lords

would loſe their ward-ſhips, eſcheats, &c. *Ideo quære.*

" that then the uſe limited to ſuch heir ſhall be void during his " life, and the feoffees ſhall thenceforth be ſeiſed to the uſe of " the heir apparent of ſuch offender, as if he were dead. *A.* dies; " *B.* hath iſſue by *C.* a ſon named *D.* and dies, in 31 *H.* 8. *C.* " dies; *D.* enters, and hath iſſue two ſons, *E.* and *F.* then *D.* " 4 *El.* by indenture and fine conveys to the defendant with war- " ranty, and afterwards, 6 *Eliz.*, *E.* levies a fine to him with war- " ranty likewiſe. Afterwards *E.* hath two ſons, who are now " living. The heir of the ſurvivor of the feoffees within five " years after the full age of *F.* and ſeven years after the fine " levied, enters to revive the uſe limited to *F.* who enters, and " lets to the plaintiff. And by *Geoffries* J. B. had an eſtate-tail, " becauſe the eſtates are limited to go in a courſe of deſcent from " heir to heir of his body. But by *Gawdy* and *Southcote* J. every " iſſue of *B.* and *C.* hath eſtate for life ſucceſſively with a re- " mainder in tail expectant, as heirs of the body of *B.* and ſuch " remainder in tail ſhall not be executed in poſſeſſion by reaſon " of the meſne remainders for life limited to the heirs of the " body of *B.* and *C.* for their lives, which, though they are but " contingent, ſhall hinder the cloſing of the eſtate for life with " the remainder in tail in poſſeſſion. But by *Wray* C. J. and, as " it ſeems, the better opinion, *B.* and *C.* have but eſtates for life " by expreſs limitation; but the remainder to the heirs of the " body of *B.* which is an eſtate-tail, cloſes with their eſtates for " life, and gives them an eſtate-tail in poſſeſſion, ſubject to open " and let in the contingent remainders to the heirs of the body of " *B.* and *C.* for their lives reſpectively; then *D.* by his fine ſevers " his two eſtates, forfeits his eſtate for life, and lets in *E.* his " heir apparent for his life, and *E.* by his fine lets in *F.* his then " heir apparent by purchaſe, which the ſons of *E.* born after ſhall " not diveſt. But by *Geoffries* J. *E.* being in by forfeiture of *D.* " his father, his eſtate ſhall not be again ſubject to the forfeiture " by his alienation; or, if it be, yet *F.* can have no more than " *E.* had at the time of the forfeiture, which was but during the " life of *D.* his father, and not the inheritance in tail, for that " continued in *D.* ſubject to no forfeiture. As to the regreſs of " the feoffees, *Geoffries* J. held, that *F.* taking in his turn as heir " of the body of *B.* and *C.* which was contingent, they ought to " enter to revive the uſe to him, but that their entry by fine and " nonclaim was barred. *Southcote* J. thought they could not en- " ter at all, becauſe the ſtatute takes out all the right from them, " but that *F.* might enter, and was not bound to the five years, " having no right at the time of the fine levied, his right com- " ing by the fine of *E.* as the *cauſa cauſans.* But *Wray* was clear, " that no eſtate was left in the feoffees to warrant their entry; " but that the contingent uſes, when they happen, ſhould veſt " without ſuch entry: then, when *D.* levied a fine, he gave an " eſtate of inheritance to the defendant, having the entail and " fee annexed to his eſtate for life, and *E.* by his entry could " gain only an eſtate for life as next heir apparent according to

" the

" the will, and by his fine he could give only that eſtate for life,
" and ſo by the fine of *D.* the right of the entail and fee were
" clearly barred and gone; and by the fine of *E.* his eſtate for
" life was gone; and ſo *F.* to whom no eſtate was ſpecially limit-
" ed; but who was to take only as heir apparent to *E.* had no
" cauſe to enter. *Quære* of this caſe."

' One deviſed lands to *A.* for life, and after to the next heir male of *A.* and the heirs male of the body of ſuch next heir; *A.* having iſſue *B.* his ſon, made a feoffment in fee to *C.* upon whom *B.* entered; it was adjudged, firſt, that this was good as a contingent remainder; ſecondly, that by this feoffment of *A.* who was but tenant for life, the contingent remainder was deſtroyed, for every remainder ought to veſt either during the particular eſtate, or at leaſt *eo inſtanti* that the particular eſtate determines; and here by the feoffment the eſtate for life of *A.* was determined by forfeiture; and ſince the remainder could not then take effect, for *non eſt hæres viventis*, it can never after riſe.' Co. 66. Cro. Eliz. 453. Hob. 338. *& vide* 2 Leon. 219. Moor, 104. 2 Sid. 67.

" So it is, if a leaſe be made to *A.* for life, remainder to the right heirs of *J. S.* if *A.* makes a feoffment living *J. S.* the remainder is gone. But in theſe caſes, if *A.* had been diſſeiſed, yet the remainder might have taken place; for, as the right of the particular eſtate was ſubſiſting, ſo the right of the remainders which depended upon it was in the ſame condition, and *A.* by his re-entry ſhall reſtore not only his own eſtate, but the contingent remainders likewiſe. But in that caſe, if *J. S.* dies, and then *A.* dies before any re-entry, then the feoffees muſt enter to revive the uſe to his right heirs; becauſe, until ſuch entry, the diſſeiſin continues, and the uſe to draw after it the poſſeſſion, until that poſſeſſion be reſtored, it cannot be carried to the uſe, and none have right to the poſſeſſion but the feoffees." 1 Co. 130. b. 134. b. 135. b. 129. a. 2 Sid. 67.

' If one makes a gift in tail to *A.* remainder to the right heirs of *J. S.*, and *A.* makes a feoffment in fee, and then *J. S.* dies, and after *A.* dies without iſſue, yet the right heirs of *J. S.* ſhall never have the remainder; for by the feoffment of *A.* the eſtate-tail, and all remainders, were diſcontinued and veſted in the feoffee, and there was not any particular eſtate in fact, or in right, to ſupport the remainder when it ſhould happen; and upon the death of *J. S.* this remainder was as capable of veſting as a remainder, as ever it could be after, his right heir being then certainly known; but ſince by the feoffment of *A.* the whole eſtate-tail, and the right of it, as to himſelf, was determined, and yet the remainder could not then take effect, it ſhall never afterwards. Otherwiſe it would be, if *A.* had only been diſſeiſed, for then the right of the eſtate-tail had preſerved the right of the remainder. And ſo it ſeems the law is at this day upon a feoffment to the uſe of *A.* in tail, remainder to the right heirs of *J. S.* Co. 135. b. *& vide* 2 Roll. Abr. 796. 2 Sid. 64. 129. Vent. 188.

' *A.* tenant for life, remainder to his firſt ſon in tail, remainder to *B.* for life, remainder to his firſt ſon in tail; *A.* having a ſon accepts Vent. 188. 2 Lev. 35. 2 Keb. 872.

Lloyd v. Brooking.

‘ accepts a fine from *B.* and then makes a feoffment in fee, and
‘ then *B.* has iſſue a ſon born—the remainder to him is not de-
‘ ſtroyed; for the acceptance of the fine diſplaced nothing; and
‘ though the feoffment diſplaced all the eſtates, yet the right left
‘ in the firſt ſon of *A.* ſhall ſupport the right of the contingent
(*a*) 3 Lev. 437. Duncombe, S. P. 1 Saund. 251. and 2 Vern. 755. [allowed to be good law by Lord Hardwicke in Hooker v. Hooker, Ca. temp. Hard. 13. Elie v. Oſborne, 2 P. Wms. 610. Manſel v. Manſel, Ca. temp. Talb. 252.]
‘ remainders. For though the feoffment of *A.* was a forfeiture of
‘ his eſtate for life, yet his ſon, who was next in remainder, and
‘ had a right thereto, was not bound to take advantage thereof,
‘ but might ſtay till the death of *A.* and as he might then have
‘ entered, ſo, if he dies, whereby the remainder and right of entry
‘ go over to another, they may likewiſe enter, after the death
‘ of *A.* or before, as they think fit. And it is there ſaid, the
‘ way to preſerve ſuch contingent remainders is to limit the uſe
‘ to the huſband for life, or more modernly to him for years,
‘ then to the uſe of the feoffees for the life of the huſband, and
‘ then to limit the contingent remainders; or, if it were to the
‘ huſband for life, remainder to truſtees and their heirs during
‘ the life of the huſband, remainder to the heirs or heirs male of
‘ the body of the huſband, yet is not the fee or fee-tail executed
‘ in the huſband otherwiſe than as a remainder (*a*), by reaſon of
‘ the interpoſing limitation to the truſtees, and therefore in ſuch
‘ caſe the wife of the huſband ſhall not be endowed.’

Wegg v. Villers, 1 Roll. Abr. 796. 1 Ventr. 188. S. C. cited.

“ *A.* covenants to ſtand ſeiſed to the uſe of himſelf for life, re-
“ mainder to his wife for life, remainder to *B.* his daughter for
“ life, remainder to the firſt ſon to be begotten of the body of *B.*
“ and after to divers other ſons of *B.* in like manner, remainder
“ to his own right heirs; and after, for diſturbing the riſing of the
“ contingent eſtate, grants his reverſion in fee without conſidera-
“ tion, and with expreſs notice of the firſt uſes; and afterwards
“ makes a feoffment in fee, and dies: his wife enters: *B.* dies,
“ and then the wife dies. It was adjudged, 1ſt, That this grant
“ of the reverſion, which was in himſelf, and out of which the
“ contingent remainder was to ariſe, (being by way of covenant
“ to ſtand ſeiſed,) could not prevent the contingent remainder
“ from riſing, becauſe the grantee had expreſs notice of the ſet-
“ tlement, and therefore took it ſubject to the uſes limited there-
“ by. 2d, That this feoffment did not deſtroy the contingent
“ eſtate; for this was a forfeiture of his eſtate for life, and of the
“ eſtate for life of the wife in remainder during the coverture, ſo
“ that the daughter might have entered for the forfeiture during
“ the coverture, which right of entry was ſufficient to ſupport
“ the contingent remainder. But it is there ſaid, it would have
“ been more doubtful, if the daughter had not had an eſtate for
“ life, but that the contingent remainder had depended imme-
“ diately upon the eſtate for life of the wife, becauſe the feoff-
“ ment of the huſband paſſed his eſtate and the eſtate of the wife
“ too, during the coverture, and then neither of their eſtates were
3 Mod. 310. “ *in eſſe* to ſupport the contingent remainders, and that in ſuch
“ caſe the contingent remainder ſhould be deſtroyed.—This was
“ upon a conveyance made by Sir *Edward Coke*.

“ Note

" Note, It was held by *Glyn*, C. J. in the above caſe, that if the " feoffment of the Lord *Coke* had preceded the grant of the rever- " ſion, this had for ever deſtroyed the contingent remainders, and " that no entry by thoſe in remainder could have revived them. " And therefore there ſeems a difference between ſuch contin- " gent remainders as are to ariſe out of the eſtate of the perſon " who makes the feoffment, and ſuch as ariſe out of the eſtate of " a third perſon. Where they are to ariſe out of the eſtate of " the perſon who makes the feoffment, they are thereby for ever " deſtroyed, becauſe there can be no *ſcintilla juris* left in him " againſt his own feoffment to ſerve them, when they come *in eſſe*. " But, where the *ſcintilla juris* is in a third perſon, there, if the " firſt eſtates are reduced in poſſeſſion before the happening of the " contingency, the *ſcintilla juris* is likewiſe reſtored to ſuch third " perſon ſufficient to ſerve them, when they come *in eſſe;* and " therefore in the above caſe, he having granted his reverſion out " of which the contingent uſes were to ariſe, though he himſelf " after made a feoffment by diſſeiſin, yet, upon the entry of the " wife after his death, the *ſcintilla juris* in the grantees of the re- " verſion revived to ſerve the future uſe. But, if after ſuch " feoffment, they had releaſed all their right, *&c.*, or, if they " themſelves being lawfully in poſſeſſion, had made ſuch feoff- " ment, the contingent remainders could never afterwards have " ariſen. But, where ſuch feoffees to uſes enter and diſſeiſe the " tenant in poſſeſſion, and make a feoffment in fee, there, by the " entry of thoſe in remainder in whom an eſtate certain was " ſettled, the diſſeiſin is purged, and by conſequence their *ſcintilla* " *juris* reſtored to ſerve the contingent uſes.

2 Sid. 159. [Mr. Fearne, after explaining very fully this doctrine as to the neceſſity of an actual entry to reſtore or reduce contingent uſes after they have been diveſted, adds,—But we ought to be very cautious how we at this day admit ſuch a doctrine in practice; a doctrine which would lead us to conclude, that in common caſes of ſtrict ſettlement upon marriage, where the conveyance is by way of uſe, if the father, the

firſt tenant for life, were by feoffment, &c. to diveſt the eſtates, leaving them a right of entry, the contingent remainders to the ſons, &c. could not take effect; unleſs the mother, ſuppoſing her to take a remainder for life and to ſurvive the father, or elſe the truſtees to whom the remainder for preſerving contingent uſes was limited, or elſe the general grantees or releaſees to whom the lands were conveyed to the uſes expreſſed, ſhould actually make an entry into the lands; an opinion which, with all due deference to what was delivered by the court of K. B. in their arguments upon the caſe of Wegg v. Villers, I cannot perſuade myſelf would hold at this day; for, Firſt, as to what was reſolved in the caſe of Wegg. v. Villers, we are to obſerve; that as there was, beſides the *right of entry* in *the daughter*, an *actual entry* made by the *mother* in that caſe; the point, whether the mere right of entry in the daughter would have been ſufficient, without any entry by her or by the mother, or by the grantee, was not the queſtion which came before the court; nor of conſequence, did the judgment of the court in that caſe depend upon or decide the doctrine in regard to that point. And as to the other caſes put and agreed to by the court in their debate of the principal caſe, the opinions upon them were really extrajudicial; and, indeed, ſo far as they reſpected the ſuppoſed neceſſity of an *entry* to reſtore or reduce contingent uſes; they appear to have been founded on an artificial ſtrain of reaſoning, much too ſubtle and metaphyſical to bear any great ſtreſs. If we are to infer (as is ſaid in the arguments in Chudleigh's caſe) a *ſcintilla juris* in the feoffees, that may enable them to enter and reſtore their *poſſibility of a ſeiſin*, (or, if the contingency has happened, their *actual ſeiſin*,) to ſerve the contingent uſes; what is it that confines us to ſuch narrow and inſufficient limits, in regard to the meaſure of this *ſcintilla juris?* Why not extend the inference one degree further, and ſuppoſe ſuch a *ſcintilla juris*, as may be competent to ſerve the contingent uſes, without the unneceſſary circuity of an *actual entry?* The latter inference is certainly more adequate, and better adapted to the end propoſed; and what is there diſcoverable in the ſtatute of uſes, which excludes this and admits the former? Nay, how does it appear that any thing, contained in that ſtatute, puts us to the neceſſity of recurring to any *ſcintilla juris* at all in the feoffees, or any entry to be made either by them or by the *ceſtui que uſe* under any preceding veſted uſe, in order to reſtore and reduce a contingent uſe to the *capacity* of taking effect, whilſt a right of entry ſubſiſts in any preceding *ceſtui que uſe?* On the contrary, does not the ſtatute expreſsly enact, that where any perſon, &c. is ſeiſed to the uſe of others, ſuch other perſons, *i. e.* the *ceſtui que uſe*, ſhall be deemed and adjudged in lawful ſeiſin, eſtate, and poſſeſſion, &c. *to all intents, conſtructions, and purpoſes in the law*, of and in

in ſuch like eſtates as they had in the uſe, &c. (*a*)? And muſt not theſe words, *to all intents, conſtructions, and purpoſes in the law*, be referred to the *legal* properties, qualities, and capacities of eſtates of the like degree or meaſure at common law? If ſo, the *ceſtui que uſe* become entitled to, and take by virtue of this ſtatute, eſtates poſſeſſing and bearing in themſelves all the qualities, properties, and capacities of eſtates at common law, of the like degree or meaſure; now one of the *legal* qualities or capacities, of an eſtate at common law, of the degree or meaſure of freehold, is, that after it is diveſted and turned to a *right of entry*, ſuch right of entry will ſupport a contingent remainder; and one of the qualities or capacities of a *contingent remainder* at common law is, a capacity of being ſupported by ſuch right of entry: why then do not, a preceding *veſted uſe*, of the degree or meaſure of freehold, and a ſubſequent *contingent uſe*, reſpectively, acquire theſe *legal* qualities, properties, or capacities, amongſt other qualities or properties of eſtates of like nature and degree at common law? If they do, it is obvious there can be no neceſſity for any *actual entry* by any body, to reſtore a contingent uſe, where there ſubſiſts a *right of entry* in a *ceſtui que uſe* of a preceding veſted freehold to ſupport it; but ſuch right of entry alone will preſerve its capacity of veſting and taking effect. If we deny this, we at the ſame time deny that the *ceſtui que uſe* have lawful ſeiſin, eſtate, and poſſeſſion, &c. to *all intents, conſtructions, and purpoſes in the law*, of ſuch eſtate as they have in *the uſe*. I think, that a little attention to the apparent operation of the ſtatute of uſes, in relation to this point, will be ſufficient to prevent our too haſtily admitting a doctrine, which, without the aid of metaphyſical ſubtleties, ſeems hardly reconcileable to the *expreſs force* of that ſtatute. Fearne's C. R. 442. 4th edit.]

Heyns v. Villars. 2 Sid. 64. 98. 129. 157.

" This caſe was upon the ſame conveyance with that of *Wegg* " v. *Villars*: but the caſe, as there put, is, that after ſuch cove- " nant to ſtand ſeiſed, Sir *Edward Coke* made a leaſe for years, " and then granted the reverſion without any conſideration, and " the leſſee attorned, and after Sir *Edward* entered, and made a " feoffment in fee before the birth of any ſon, and then died, and " his wife entered: and then, it was agreed, that by the leaſe for " years and the grant of the reverſion, the whole eſtate of Sir " *Edward*, out of which the contingent uſes were to ariſe, is " tranferred, and that the leaſe for years ſhould be good againſt " the contingent remainders, but not againſt the remainders that " were actually veſted, as ſhall appear hereafter: but, as to the " reverſion, that being granted without conſideration, was liable " to ſerve the contingent uſes when they came *in eſſe*, in the ſame " manner as if it had not been granted over at all: then, by ſuch " leaſe and grant of the reverſion, the whole eſtate being out of " Sir *Edward*, his feoffment after was a diſſeiſin, and diveſted all " the eſtates *in eſſe*, and turned them and the contingent re- " mainders to a right, which right was reſtored again to poſſeſ- " ſion by the entry of the wife after his death.—But there, it " was clear, that when the wife entered, ſhe revived the eſtate " to herſelf for life, and the contingent remainders alſo. And it " is ſaid in *Ventris*, 189. that it had been a queſtion, whether " a right of action would ſupport a contingent remainder; but " that a right of entry would, was never doubted. And there " it was agreed, that if *A.* makes a feoffment in fee to the uſe " of himſelf for life, remainder to *B.* for life, remainder to the " firſt ſon of *B.* in tail, *&c.*, remainder to his own right heirs, " that in this caſe a feoffment by *A.* will not deſtroy the contin-
1 Co. 130. " gent remainders, becauſe the right of entry in *B.* for the for- " feiture preſerves them, and if he does ſo enter, all the eſtates " in remainder are reveſted, ſo that his ſon after his death may

(*a*) *Vide* 2 Co. 54. a. Moor, 212. 1 Leon. 258. 1 Mod. 155.

" enter

" enter without any re-entry by the feoffees. But, if after ſuch " feoffment *B.* dies before entry leaving a ſon, he cannot enter " though his contingent eſtate be not deſtroyed; but in ſuch caſe " the feoffees muſt enter by the *ſcintilla juris* left in them for ſuch " purpoſe to revive the contingent uſes for the reaſon before " given.

" If one makes a feoffment to divers others with ſeveral con- " tingent remainders, and no eſtate is left in the feoffees, and " after they enter and diſſeiſe the tenant in poſſeſſion, and make " a feoffment in fee, yet, if the tenant in poſſeſſion, or any of " thoſe in remainder in whom an eſtate certain was ſettled before " the feoffment, re enter, by this all the contingent remainders " are reduced *in ſtatu quo*, &c., and may be executed by the ſtatute " of uſes; for the feoffees are but conduits to convey the eſtate, " and have no power to deſtroy any contingent eſtate. But, upon " ſuch ſettlement, if the eſtates *in eſſe* are diveſted by diſſeiſin, " feoffment, *&c.* before the contingencies happen, and afterwards " they happen, and then the eſtates *in eſſe* determine before any " re-entry; if the feoffees releaſe all their right in the land, or " make a feoffment, or any other way bar their right of entry; " in this caſe, the contingent uſes can never be revived to be ex- " ecuted by the ſtatute, becauſe the feoffees have barred their " *ſcintilla juris*, and none *in eſſe* can enter. 1 Roll. Abr. 797. pl. 15, 16.

" If one on marriage of his ſon, *&c.* covenant to ſtand ſeiſed " to the uſe of the ſon for life or for 99 years, if he ſo long live, " remainder to two ſtrangers during the life of the ſon, upon " truſt to ſupport contingent remainders, with remainder to the " firſt and other ſons in tail; this remainder to the two ſtrangers " is void, becauſe there is no conſideration; and then, by con- " ſequence, there is no eſtate to ſupport the contingent remain- " der to the ſons." 2 Lev. 52. 54. 3 Keb. 110.

'If tenant for life, with contingent remainders to his firſt and 'other ſons, before the birth of any ſon, make a feoffment in fee, 'with condition of re-entry, the contingent remainders ſhall never 'ariſe, though the condition be broken, and a re-entry made be- 'fore the birth of any ſon; becauſe the feoffment, though upon 'condition, was a forfeiture and determination of the particular 'eſtate, and the remainder not being capable of taking place is gone 'for ever, for the recovery does not purge the forfeiture. Show. P. C. 151.

'*A.* tenant for life, remainder to his firſt and other ſons in tail 'mail ſucceſſively, remainder to *B.* in tail, remainder over; *A.* be- 'fore the birth of any ſon ſurrenders to *B.* and then a ſon was born. 'In this caſe it was held that by the ſurrender the contingent 'remainder was gone and deſtroyed; but the principal queſtion in 'this caſe was, if the ſurrender was effectual, becauſe *B.* knew no- 'thing of it till five years after the birth of the ſon, and then he 'agreed to it; and this in *C. B.* and *B. R.* was adjudged to be no 'ſuch ſurrender as ſhould deſtroy the contingent remainder; but 'the judgment, as to this point, was reverſed in the Houſe of 'Lords, againſt the ſenſe of all the judges except two. But it 'afterwards appearing, that at the time of the ſurrender *A.* was *non* Ld. Raym. 313. Carth. 211. Show. P. C. 150. 3 Lev. 284. 2 Salk. 427. pl. 2. 576. 618. Comyn, 45. pl. 30. 3 Salk. 300. pl. 10. 2 Vent. 198. 3 Mod. 301. Comb. 438.

Thompſon v. Leech. ‘ *compos*, this was held a void ſurrender, and not only voidable: and ‘ therefore no eſtate paſſed by it, and then by conſequence the con- ‘ tingent remainders were not touched.

2 Saund. 380. 2 Lev. 39. 3 Keb. 11. Purefoy v. Rogers. 4 Mod. 284. 3 Mod. 310. S. C. cited, and in ſeveral other books. ‘ *A.* tenant for life, remainder to her firſt and other ſons in tail ‘ male ſucceſſively; *A.* takes a huſband, and, before the birth of any ‘ ſon, the reverſioner in fee grants and conveys his reverſion to the ‘ huſband and wife by fine, and then *A.* hath iſſue a ſon, and dies. ‘ And *per cur.* though if *A.* had ſurvived her huſband, ſhe might have ‘ avoided and waived the eſtate taken by the fine, yet the contingent ‘ remainder to the ſon is utterly deſtroyed, there being then none ‘ *in eſſe* when the particular eſtate determined, for the huſband and ‘ wife take by entireties, and therefore the eſtate for life of the wife ‘ was merged before the contingency happened, and the poſſibility ‘ which the wife had, of avoiding the inheritance, given by the ‘ fine, and thereby reviving her eſtate for life, will not preſerve it; ‘ for if the contingent remainder cannot take effect when the par- ‘ ticular eſtate determines, be it by ſurrender, merger, feoffment, ‘ or otherwiſe, it can never after ariſe.’

2 Saund. 386. 3 Keb. 12. “ *A.* tenant for life, remainder to his firſt and other ſons in “ tail ſucceſſively, remainder to *B.* in fee: *A.* and *B.* before the “ birth of any ſon, levy a fine of their eſtate to a third perſon. “ This makes no diſcontinuance or diveſting of any eſtates, be- “ cauſe each gives only his own eſtate. Yet by *Hale* and other “ good opinions, the contingent remainder is deſtroyed, becauſe, “ though the eſtates paſs divided from them, yet they are united “ in the grantee, and ſo no particular eſtate in being to ſupport “ the contingent remainder.”

4 Mod. 259. 3 Lev. 408. Salk. 227. pl. 6. Carth. 309. Reeve v. Long. ‘ *A.* ſeiſed in fee deviſes his lands to *B.* eldeſt ſon of his bro- ‘ ther *C.* for life, remainder to the firſt ſon of *B.* in tail, and ſo to ‘ all his other ſons in the ſame manner ſucceſſively, remainder to ‘ *D.* ſecond ſon of *C.* for life, remainder to his firſt and other ‘ ſons in tail ſucceſſively, and dies; *B.* enters and dies, leaving ‘ his wife *enſient* with a ſon, then *D.* enters as in his remainder, ‘ and ſix months after the ſon is born; and all this matter being ‘ found ſpecially, it was adjudged in *C. B.* for *D.* againſt the ſon ‘ firſt, becauſe this being a contingent remainder to the ſon, and ‘ he not being born at the time when the particular eſtate deter- ‘ mined, this became void: ſecondly, *D.* being the next in re- ‘ mainder, and having entered before the birth of the ſon, was in ‘ by purchaſe, and therefore ſhall not loſe his eſtate by a ſon born ‘ after. And this judgment was affirmed in *B. R.* for they ‘ held it plainly to be a contingent remainder, and not an ex- ‘ ecutory deviſe or a ſpringing remainder, for that would intro- ‘ duce a perpetuity not to be barred by a common recovery, be- ‘ cauſe it would be the ſame to all the other ſons; but here ‘ being a contingent remainder, and not happening in time, it is ‘ gone for ever; and they relied on *Archer*'s caſe. But upon a writ ‘ of error brought into parliament, the judgment was reverſed by ‘ almoſt all the Lords, becauſe being in a will, they thought that ‘ by the meaning and equity thereof they ought not to diſinherit ‘ the heir for ſuch a nicety, and that a will was otherwiſe to be

‘ expounded

' expounded than a deed; and therefore they conſtrued it an ex-
' ecutory deviſe or ſpringing remainder to the firſt and other ſons,
' and that the freehold ſhould veſt in *D.* till the ſon was born.
' But all the judges were much diſſatisfied with it, and did not
' change their opinions, but blamed the judge who permitted it
' to be found ſpecially where the law was ſo certain and clear.

' *Note, That now by the* 10 & 11 W. 3. cap. 16. *Proviſion is*
' *made, that after-born ſons and daughters, to whom remainders are*
' *limited in contingency, ſhall take in the ſame manner as if they had*
' *been born in the father's lifetime, though no eſtate be limited to truſ-*
' *tees to preſerve and ſupport ſuch contingent remainders, which act*
' *was made by reaſon of this caſe, and of the ſtrictneſs of the law*
' *herein.*' [*Vide* 1 Term Rep. 634.]

" One having three ſons *A.*, *B.*, and *C.*, deviſes lands to them Cro. Jac.
" ſeverally without limitation of any eſtate, and that *if any of them* 260.
" *die, the other ſurviving ſhall be his heir.* *A.* the eldeſt dies leav- 1 Bulſtr. 61.
" ing iſſue; and if this part ſhould go to his ſon, or to *B.* and *C.*, Wood v.
" was the queſtion. It was adjudged by three juſtices againſt Ingerſole,
" *Fleming* C. J. for the ſon of *A.* becauſe nothing but a freehold Swinb. 118.
" paſſed by the deviſe, and the reverſion in fee deſcending upon
" *A.* his eldeſt ſon, had merged his eſtate for life, and that after
" his death this could not be revived to veſt the remainder in
" *B.* and *C.* But *Fleming* C. J. was of opinion, that this might
" well veſt in *B.* and *C.* by way of remainder, and then the words
" implied that every one ſhould have it after the other, and there-
" fore, though the freehold of *A.* was merged by the deſcent of
" the fee, yet to ſupport the intent of the will, this ought to veſt
" in the ſurviving ſons for their lives.

" One having three ſons *A.*, *B.*, and *C.*, deviſes lands to them 2 Lev. 202.
" ſeverally without limitation of any eſtate, and if any of them Sir T. Jon.
" die, his part to remain to the others, equally to be divided be- 79. 3 Keb.
" tween them. *A.* dies having firſt granted the land for 1000 789. 924.
" years to the defendant. It was adjudged, that though by the Forteſcue
" deſcent of the fee upon *A.* the eldeſt ſon, his eſtate for life was v. Abbott,
" merged, and ſo the contingent remainders to the other ſons Pollexf. 481.
" were deſtroyed (for in theſe caſes the remainder muſt be in
" contingency, and cannot veſt preſently, becauſe it is uncertain
" which of the ſons will ſurvive) yet that it ſhould be good to
" them by way of executory deviſe, according to the opinion of
" *Fleming* in the caſe next before, (for ſo muſt his opinion be un-
" derſtood, though it is there ſaid, by way of *remainder*,) and that
" this was the moſt reaſonable conſtruction to ſupport the intent
" of the will. And they ſaid, the caſe of *Wood* v. *Ingerſole* was
" beſt put in *Bulſtrode*; for upon inſpection of the record the
" words appear to be *if any of my ſons die, the* ONE *to be the other's*
" *heirs*, which words import no certainty, which of the ſurvivors,
" or whether both ſhall have the part of the ſon who dies firſt,
" and therefore that part of the deviſe was void, and by con-
" ſequence would not carry over the eſtate from the ſon of *A.* or
" defeat the leaſe made by *A.* And *Jones* ſays, it was reſolved
" in this caſe by the court, that to ſupport the intent of the will
" it ſhould be conſtrued, that he deviſed for life to *A.*, remainder

" to

" to *B.* and *C.*, equally to be divided between them; and ſo in
" the other deviſes; and that by this conſtruction an actual croſs
" remainder for each one's part ſhould be executed in the other.
" *Sed quære* of this conſtruction.

1 Lev. 11. Sir T. Raym. 28. 1 Sid. 47. 1 Keb. 29. 119. MSS. Plunkett v. Holmes.

" One deviſed lands to *A.* his eldeſt ſon for life, and if he
" ſhould die without iſſue living at the time of his death, then
" to *B.* his ſecond ſon, and his heirs; but if *A.* had iſſue living at
" the time of his death, then the lands ſhould remain to *A.* and
" his heirs; and died. *A.* entered, and ſuffered a common re-
" covery, and died without iſſue, having by his will deviſed the
" lands to the defendant. *B.* entered, and let to the plaintiff; and
" the queſtion was, if *A.* had by the will an eſtate for life only,
" with a contingent remainder to *B.*? or, if the fee was veſted in
" *A.* with an executory deviſe to *B.*? and, admitting it to be an
" executory deviſe to *B.*, if the common recovery barred it? It
" was argued for the plaintiff, that *A.* had the fee; for though
" an eſtate for life only is deviſed to him, yet by deſcent of the
" reverſion, the whole fee was executed in him, which merges his
" eſtate for life, and then the eſtate to *B.* can be no other than an
" executory deviſe. For when all the fee is given to or veſted in
" one perſon, with a limitation of a fee to another perſon upon a
" contingency, this cannot be a remainder; for a fee cannot be
" limited upon a fee, as appears before, but of neceſſity this muſt
" take effect as an executory deviſe. But when only part of the
" eſtate, as for life or in tail, is given to one, and the reſidue to
" another upon a contingency, as to the right heirs of *J. S.*, who
" is then living, or to ſuch perſon as ſhall be living in ſuch houſe
" at ſuch a time, this remainder is contingent. But here, the
" whole fee is in *A.*, either by the deviſe, by a tranſpoſition of
" the words, or by deſcent of the fee, and then the deviſe to *B.*
" can be no other than an executory deviſe, which being to hap-
" pen within the compaſs of one life, hath been allowed good.
" (*Cro. Ja.* 590. *Pet* v. *Brown.*) As to the ſecond point, they
" relied upon the ſame caſe, that this cannot be barred by the
" common recovery. *Sed per totam curiam* it was adjudged, that
" *A.* had but an eſtate for life by the will, and the remainder to
" his heir was not executed; for both the remainders to *A.* and
" to *B.* are upon a contingency, not a contingency upon a con-
" tingency, which the law will not allow, (for then by the ſame
" reaſon it might allow a hundred contingencies one after another,
" and ſo quite elude the ſtatute of *quia emptores*,) but upon one and
" the ſame contingency, which looks ſeveral ways. *viz.* if *A.*
" hath iſſue living at the time of his deceaſe, then to him and his
" heirs; but if not, then to *B.* and his heirs. And the caſe was
" thus conſidered, as if *A.* had been a ſtranger, and not heir at
" law. But then conſidering him as heir at law, and that
" the reverſion deſcended to him, yet, *per curiam*, not ſo ab-
" ſolutely as to merge and confound the eſtate for life given
" by the will againſt the expreſs words and intent thereof; but
" there ſhall be an hiatus or opening to let in the remainder
" when they happen; and though *A.* happens to be heir at law,
" yet this being matter *debors* the will, no uſe ſhall be made of

" in ex
" point
" rema
" main
" deſce
" derati
" a thir
" to *B.*
" ſtroye
" of the
" ſtruct
" ſo tak
" barred
" tuity.
" not in
" and th
" for life
" the ſec
" ing the
" by the
" his eſta
[*A.* de
aſſigns for
of her bo
male and
male at h
tion reſpe
tenant by
court held
in the ſiſte
ſcended or
by the cur
merge her
' Father
' himſelf f
' der to th
' ly, rema
' right heir
' if by the
' remainde
that they
deſcent,
and there
theſe cont
the eſtate
*adjudged*,
(*a*) deſcen
on the caſ
fered from
upon maki
open, ſo a

" in expounding the will; and *Archer*'s caſe is expreſs in the " point, where, though *Robert* the deviſee for life was heir, yet the " remainder to his next heir male was a good contingent re- " mainder, and the eſtate for life, not merged in the fee, ſhould " deſcend on him. And it cannot be ſuppoſed, that this conſi- " deration eſcaped a quick-ſighted reporter, but was omitted as " a thing of no value. As to the ſecond point, if the remainder " to *B.* be contingent, there is no doubt but it is barred or de- " ſtroyed by the recovery, and ſo it would be, by a bare ſurrender " of the eſtate for life. And they all agreed, that if, by any con- " ſtruction, it could be made a contingent remainder, it ſhould be " ſo taken, rather than an executory deviſe, which could not be " barred by a common recovery, and ſo would tend to a perpe- " tuity. And note, they all ſeemed to agree, that the fee was " not in abeyance, but deſcended to *A.*, ſubject to ſuch hiatus, " and that *quoad B.* the deviſee in remainder, *A.* had but an eſtate " for life. *Quære* if the conſtruction in this caſe does not thwart " the ſecond of the two preceding caſes, where the court, allow- " ing the remainders to be in contingency, held them deſtroyed " by the deſcent of the fee upon the eldeſt ſon, which merged " his eſtate for life, and therefore they were." Cro. Car. 158. 360. 1 Co. 66.

[*A.* deviſed lands to his ſiſter, who was his heir at law, and her aſſigns for her life, and if ſhe ſhould marry, and have iſſue male of her body living at the time of her death, then to ſuch iſſue male and his heirs male for ever; but if ſhe ſhould leave no iſſue male at her death, then to *G.* and his heirs for ever. The queſtion reſpected the title of the teſtator's ſiſter's huſband to be tenant by the curteſy of the lands ſo deviſed to her; and the court held, that the inheritance was never executed in poſſeſſion in the ſiſter, during her life, (notwithſtanding the inheritance deſcended on her,) and therefore her huſband could not be tenant by the curteſy; it follows, that the deſcent of the fee did not merge her eſtate for life, or deſtroy the contingency.] Boothby v. Vernon, 9 Mod. 147.

' Father and ſon are, the father conveys land to the uſe of himſelf for life, remainder to the uſe of the ſon for life, remainder to the firſt and other ſons of the ſon in tail male ſucceſſively, remainder to the heirs of the body of the father, or to his right heirs, and dies before the birth of any ſon of his ſon; and if by the deſcent of the fee or tail upon the ſon, the contingent remainders were deſtroyed, was the queſtion? It was *argued*, that they were not, becauſe the inheritance came to the ſon by deſcent, which was an act in law, and not by his own act; and therefore the law, which does no wrong, ſhall not deſtroy theſe contingent remainders, but that upon the birth of the ſons the eſtate ſhall open again to let in the remainders. But it was *adjudged*, that the contingent remainders were deſtroyed by the (*a*) deſcent of the inheritance upon the ſon; and they relied on the caſe of (*b*) *Wood* v *Ingerſoles*, and held, that this caſe differed from the caſes cited, where the eſtates were united at firſt upon making the conveyance, and if they ſhould not afterwards open, ſo as to let in the remainders, the conveyance would de- ' ſtroy Vent. 306. 2 Jon. 76. 3 Keb. 731. 820. Hartpool v. Kent. (*a*) For this *vide* Co. Lit. 28. a. 11 Co. 80. Lev. 11. Raym. 28. Sid. 47. Plunkett v. Holmes. 2 Lev. 202. 2 Jon. 79. Forteſcue v. Abbott. (*b*) Cro. Jac. 260.

'ſtroy itſelf; but here, this deſcent was an act ſubſequent to the 'conveyance, and made an alteration in the eſtates limited there-'by, and therefore had deſtroyed the contingent remainders.'

Hooker v. Hooker, Ca. temp. Hardw. 13. Fearne's C. R. 502.

[Lands were conveyed to the uſe of *A.* and his wife for life, remainder to the uſe of *B.* the ſon of *A.* for his life, remainder to the firſt and other ſons of *B.* in tail, remainder to *A.* in fee. *A.* and his wife died in the lifetime of *B.* who afterwards died without iſſue, leaving a wife. The queſtion was, Whether the wife of *B.* was entitled to dower in the lands? It was decreed ſhe was: and Lord Chancellour, with one of the judges, was of opinion, that the eſtate for life in *B.* was merged by the deſcent of the inheritance upon him, and the contingent remainder de-ſtroyed.]

Vent. 345. 2 Jon. 136. Raym. 413. Harriſon v. Belſey.

'*A.* and *B.* joint-tenants for their lives, remainder to the firſt 'ſon of *A.* in tail, and ſo to the ſecond, &c. remainder to the 'right heirs of *B.* Before any iſſue *A.* releaſes to *B.* and his 'heirs, and after hath iſſue a ſon; and if by this releaſe, before 'the birth of a ſon, the contingent remainders were deſtroyed, 'was the queſtion? It was argued, upon the diverſity in the 'above caſe, that this uniting of the eſtate for life with the re-'mainder in fee, being by conveyance and act ſubſequent to the 'limitation of the contingent remainders, and before they came 'in being, had deſtroyed them; for now the eſtate for life upon 'which they depended is gone, and the whole fee executed in *B.* 'and therefore they can never after ariſe. But by three juſtices, '*diſſentiente Dolben*, it was *adjudged* that theſe contingent remain-'ders were not deſtroyed; for to ſome purpoſes the whole fee 'was executed in *B.* immediately upon the firſt conveyance, and 'this releaſe of *A.* gave him no greater eſtate, nor in any other 'degree than he had before; for after ſuch releaſe he is in of 'the whole eſtate by the leſſor, as he was before, and as he would 'have been, if it had come to him by ſurvivorſhip; and his eſtate 'being at firſt given, ſubject to theſe contingent remainders, must 'open to let them in, when they happen, as it would have done 'had no ſuch releaſe been made; and though they were limited 'immediately after the eſtate for life to *A.* and *B.*, yet till they 'came *in eſſe* they did not prevent the cloſing of the fee in *B.*, and 'therefore did not depend abſolutely upon the eſtate for life, and 'have now no other impediment to hinder their riſing than they 'had at firſt.' "Note, *Ventris* reports the ſame caſe to be ad-"judged, that they were deſtroyed, but gives no reaſon for the "judgment; and the other two reporters were two of the judges "that gave the judgment, and therefore are more to be relied "upon."

Roll. Rep. 238. 317. 438. Lane v. Pannell. [*Vide* Watk. Gilb. Ten. 266. and notes; and Fearne's C. R. 458.]

'A copyholder in fee ſurrenders to the uſe of his wife and 'B. for their lives, remainder to the uſe of the heirs of the body 'of the ſurrenderor and his wife; *B.* and the wife are admitted 'accordingly; after *B.* ſurrenders his part to the uſe of the huſ-'band, and then the huſband ſurrenders the whole to the uſe of 'C. and his heirs, who is admitted accordingly; then the wife 'dies, leaving iſſue, who brings ejectment for the moiety of

'wife; and adjudged not maintainable; for when *B.* ſurrenders 'his moiety to the uſe of the huſband, this makes a ſeverance of 'the jointure; and when the huſband after ſurrenders the whole 'to *C.*, he by this hath an eſtate for the life of *B.* in the one 'moiety, and for the life of the wife in the other moiety; and 'though, if ſhe had ſurvived her huſband, ſhe might have defeated 'the ſurrender of her own moiety, yet now, ſhe dying firſt, the 'eſtate of *C.* as to that moiety is determined; and ſince he who 'would claim it muſt make himſelf heir of both their bodies, 'which during the life of the huſband he cannot do, and yet the 'particular eſtate as to that moiety is determined; therefore the 'remainder as to that moiety which was contingent is deſtroyed, 'and the huſband's death can never ſet it up again; but for the 'other moiety, if the huſband dies, living *B.*, it will take place, 'elſe not, being contingent, and not capable of veſting during 'the life of the huſband. And as to the huſband's ſurrender to 'the uſe of *C.* and his heirs, this was no ſuch forfeiture or de-'termination of the eſtate for life as to give an entry to thoſe in 'remainder, for then that had deſtroyed the contingent remain-'der of the whole; and though the wife had ſurvived and de-'feated ſuch ſurrender as to her own moiety, yet it appears be-'fore, that that would not have revived the contingent remain-'der, being not capable of veſting when the particular eſtate 'ended; but ſuch ſurrender of the huſband works only by way 'of grant for what he might lawfully paſs, and not ſo ſtrongly as 'livery of ſeiſin.'

"A copyholder in fee ſurrenders to the uſe of his will, and af- "ter by his will deviſes the eſtate to *B.* for life, remainder to the "heir of his body begotten, for ever, and dies. *B.* is admitted, "and after ſurrenders to the lord of the manor to do with it as he "pleaſes, and dies, leaving a ſon. Now admitting the remainder "to the heir of the body of *B.* to be a good remainder, and that "ſuch heir ſhould take it by purchaſe, this ſurrender of *B.* hath "not deſtroyed it; for this operates only as a grant to the lord "of his eſtate for life, and is no forfeiture to give an entry to a "remainder-man; and by conſequence continues in the lord to "ſupport the contingent remainder, in the ſame manner as it did "in *B.*, there being only a change of the perſon, but no altera-"tion made in the eſtate; for it is ſtill determinable upon the "death of *B.* as it was before, and not ſooner.

2 Roll. Abr. 794. (6). Pawſey v. Lowdall. [So, in the above caſe of Lane v. Pannell, it is obſervable, that the ſurrender of the baron to *B.* in fee, did not deſtroy the contingent remainder; for the legal freehold being in the lord, the ſurrender of the baron paſſed no more than he lawfully might. Fearne's C. R. 470 4th edit. So, where copyhold lands were deviſed to *A.* for life, remainder to his firſt and other ſons in tail, &c. remainder to *B.* in fee, and *A.*, before he had any ſons born, bought the reverſion of *B.*, and had it ſurrendered to his (*A.*'s) own uſe, thinking by that means to merge his eſtate for life, and ſo deſtroy the contingent remainder to his firſt ſon; it was agreed, that this ſurrender of the reverſion would not bar the ſon, becauſe the freehold and inheritance were in the lord; for there is not the like inconvenience as in freehold eſtates at common law, in reſpect of contingent remainders, where there is nobody againſt whom to bring the *præcipe*. Mildmay v. Hungerford, 2 Vern. 243.]

"*A.* tenant for life, remainder to *B.* for life, remainder to the "firſt, ſecond, and other ſons of *B.* in tail male ſucceſſively; *A.* "and *B.* join in an indenture tripartite between *A.* of the firſt "part, and *B.* of the ſecond part, and *C.* and *D.* of the third "part,

3 Keb. 759. MSS. Hales v. Riſley.

" part, whereby *A.* covenants with *C.* and *D.* to levy a fine to
" other uſes: *B.* ſeals the deed; and it was argued by the ſealing
" it ſhould be ſaid that *B.* joined in the fine, and by the fine all
" the eſtates are diveſted and put to a right, and the contingent
" eſtates diſturbed; and *B.* is eſtopped from entering to revive
" them; and though he hath a ſon after, yet he cannot enter till
" the contingent uſe be revived by entry; which, as this caſe is,
" no perſon has power to do. But *per cur.* clearly—*B.*'s ſealing
" the deed, only ſhews his conſent that *A.* may levy the fine; for
" he does not covenant, or transfer over his eſtate in remainder;
" and admitting that *B.* ſhould be eſtopped, yet his ſons, who
" claim not under him, are not eſtopped to ſay, that there was
" a ſufficient eſtate continuing to ſupport the contingent remain-
" ders; and then, if they are preſerved, every one, who hath
" right, may enter in his turn. And after it was adjudged ac-
" cordingly; and ſaid, there was nothing in the caſe worth an
" argument.

Mo. 8. 15. Sir Thomas Palmer's caſe. Pop. 22.

" *A.* covenants upon proper conſiderations to ſtand ſeiſed to
" the uſe of himſelf for life, remainder to *B.* his ſon for life, re-
" mainder to the firſt and other ſons of *B.* in tail ſucceſſively;
" remainder to the right heirs of *A.*; after *A.* is attainted of trea-
" ſon, and executed before the birth of any ſon of *B.* It was
" adjudged, that by ſuch attainder the king had the fee-ſimple
" diſcharged of all the remainders to the ſons not then born, and
" that they were utterly barred. The reaſon ſeems to be, becauſe
" they were to ariſe by way of uſe out of the eſtates of the co-
" venantor, which by ſuch attainder are come to the king; and he
" cannot be ſeiſed to the uſe of any perſon (*a*). But it ſeems
" if they were to ariſe out of an eſtate executed in feoffees, the
" the attainder of *A.*, which could only forfeit his own eſtate ſo
" life, and remainder in fee, would not prevent them from riſing
" But the greater doubt in ſuch caſe would be, if the feoffees
" themſelves were attainted of treaſon before the birth of any ſon
" for all the books agree, they have no eſtate left in them, but
" *ſcintilla juris* to ſerve the contingent uſes when they happen
" and how far that *ſcintilla juris* is forfeitable, or their entry re-
" quiſite to ſerve the contingent uſes, when no actual diſturbance
" is made of the poſſeſſion, ſeems doubtful. For in other caſes
" unleſs the poſſeſſion be diſturbed by diſſeiſin, feoffment, &c.
" entry of the feoffees is requiſite to raiſe the contingent uſes
" when they happen, as appears before. *Ideo quære* of this.

[(*a*) But, here, the queſtion ariſes, how we are to reconcile this reſolution with the principle that *any preceding veſted freehold* eſtate will ſupport a contingent remainder; for here, whatever effect the forfeiture of *A.*'s eſtate for life and remainder in fee, might otherwiſe have had, yet as *B.* had a *veſted* freehold, why was not that capable of ſupporting the contingent remainder to his ſons? If indeed there had been an office found antecedent to the birth of a ſon of *B.*, that *A.* was ſeiſed in fee, it might be accounted for the reſolution in the above caſe, by taking away the *right of entry* of *B.*, according to the diſtinction I ſhall notice after the next cited caſe. But abſtracted from a circumſtance of that nature which does not appear in the report of Sir Thomas Palmer's caſe, that of Corbet v. Tichborn, 2 Sid. 576. of much later date, ſeems to claim our better attention. It was a caſe where *J. S.* being tenant for life, remainder to his wife for life, remainder to his firſt and other ſons, &c. in tail, remainder to him in fee, committed treaſon, and afterwards had a ſon, and then was attainted; and upon a trial at bar K. B. the court held, that whether the ſon was born before or after the attainder, the contingent remainder to him was not diſcharged by the lands veſting in the crown during the life of *J. S.*, becauſe of the wife's eſtate, (viz. a veſted eſtate of freehold in remainder, which was ſufficient to ſupport it. this eſtate of the wife, it ſeems, was not turned to a right, or affected by the forfeiture of the huſband nor the crown thereby in poſſeſſion of any other eſtate than what *J. S.* was entitled to at the time

appears by another caſe, of Linch v. Coqte, 2 Salk. 469. where tenant for life, remainder to his firſt ſon in tail, remainder to *J. S.* in fee, was attainted of high treaſon, and died without iſſue. And upon its being urged, that the whole eſtate veſting in the king by 33 H. 8. c. 8. without any office finding the ſpecial matter, he in remainder, could not enter, any more than if a general office had been found, which would have ſuppoſed a fee; it was held, that no other eſtate veſted in the king by the ſaid act, than the party attainted had; juſt as if a *ſpecial* office had been found; and therefore the remainder-man might enter on the king, the king's eſtate being determined. For the ſtatute ſaved the right of others; though it was otherwiſe where an office found an eſtate in fee in the party attainted. Fearne's C. R. 425. 4th edit.] 2 Jo. 773. Keb. 732. 3 Mo. 196. 374. 389. 391.

" *A.* ſeiſed in fee of lands, after 27 *H.* 8. makes a feoffment " in fee to the uſe of *D.* his wife for her life, and if he ſurvives " his ſaid wife, then to the uſe of himſelf, and of ſuch woman as " he ſhall happen to marry, for their lives, for the jointure of ſuch " wife, remainder to *B.* in fee. Afterwards, *B.* and the feoffees " by conſent of *A.* join in a feoffment in fee to the uſe of *A.* and " his wife for their lives, remainder in *C.* in tail, remainder to *A.* " in fee; and this was by deed and letter of attorney to make " livery. Afterwards *B.* levies a fine with proclamation to other " uſes, and then *D.* his wife dies, and he marries a ſecond wife, " and dies; and ſhe, by the aſſent and command of the firſt feoffees, and after the five years after the fine, enters to raiſe the " uſe to herſelf. And by the better opinion her entry was not " lawful; for by the ſecond feoffment all the eſtates were diveſted and put to a right. And whether ſuch feoffment were " only the diſſeiſin of the attorney, who made the livery, and the " confirmation of him in remainder, and of the feoffees; or the " diſſeiſure of all; yet by ſuch joining in the deed of feoffment, " the feoffees have barred their *ſcintilla juris*, and cannot enter to " revive the future uſe to the ſecond wife. And *A.* by his fine " hath barred himſelf to enter in right of his wife to reverſe the " firſt eſtates; and his firſt wife could not enter, being covert; " and therefore, there being none to enter to revive ſuch future " uſe, it is by the feoffment deſtroyed, and the ſecond wife's entry " unlawful.

Dyer, 339—42. 198, 9. 2 Leon. 14. Pop. 76. Co. 1. 136. Brent's caſe.

[*Vide* Fearne's C. R. 216, 217, 218, 219, 220, &c.]

" *A.* ſeiſed of lands makes a feoffment in fee to the uſe of himſelf and his wife for lives, and after their deaths, to the uſe of *B.* their ſon for life, and after his death, that the feoffees ſhould be ſeiſed *ut in eorum priſtino ſtatu*, upon condition that they ſhould receive the profits, and pay to *C.* wife of *B.* 20 *l. per annum* during her life; and after that they ſhould be ſeiſed to the uſe of the heirs male of the body of *B.* The feoffor and his wife die; *B.* enters, and makes a feoffment to *D.*, and dies; and after *C.* dies, and then the heir male of the body of *B.* enters. It was adjudged lawful; and that the feoffment of *B.* was no diſcontinuance, nor barred the heir of his entry. But this was without any great argument, and no reaſon given for the judgment. However, it ſeems well given; for by reaſon of the intermediate remainder to the feoffees, *B.* was not ſeiſed by force of the entail when he entered and made the feoffment, and then, by *Littleton*'s rule, his feoffment makes no diſcontinuance, and, by conſequence, as the feoffees might have entered preſently for the forfeiture, they being next in remain-

Cro. Eliz. 277. Maſon v. Nevill.

Co. Lit. 347. (a). Raym. 37.

" der, ſo, after the death of *C.*, the heir of the body of *B.* may
" likewiſe enter, becauſe then the preceding eſtates are deter-
" mined. And if the feoffment of *B.* made no diſcontinuance,
" there is nothing to hinder their entry, though they are in of the
" entail, by deſcent from their father, after ſuch entry.

Cro. Eliz. 764. 854. 2 Roll. Abr. 611. 792. 794. (4). Wood v. Reignold.

" *A.* ſeiſed of lands in fee by indenture covenants with *B.*, in
" conſideration of a marriage intended between *A.* and *C.* daugh-
" ter of *B.*, to ſtand ſeiſed to the uſe of himſelf and his heirs till
" marriage, and after to the uſe of himſelf and *C.* and the heirs
" of his body, remainder to his own right heirs; and then before
" the marriage, he makes a leaſe for 31 years, reſerving rent, to
" begin after the end of a former leaſe, then *in eſſe*. The mar-
" riage takes effect: and in ejectment after the death of *A.* it
" was held, that this leaſe ſhould bind the future uſe to the wife,
" as a leaſe upon good conſideration by the feoffees at common
" law ſhould bind *ceſtuy que uſe*, but that ſubject to that leaſe the
" uſe to the wife ſhould ariſe, becauſe the ſame ſeiſin and freehold
" continues, and therefore the uſe to the wife ſhould ariſe out of
" the reſidue of the eſtate, and ſhe ſhall have the reverſion and
" rent reſerved upon the leaſe; for wherever the ſtatute finds a
" ſeiſin to uſes, there, it carries the poſſeſſion to them; and not-
" withſtanding ſuch leaſe for years, yet the ſeiſin to the uſes con-
" tinued.

Cro. Jac. 168. 2 Roll. Abr. 293. (1). Bold v. Sir Hen. Wynſton.

" And yet we have another caſe in our books where it was
" held the wife was not at all bound by ſuch leaſe. The caſe
" was this:—*A.* covenanted, in conſideration of love as to his ſon,
" to ſtand ſeiſed to the uſe of his ſon for life, remainder to the
" uſe of ſuch woman as he ſhould after marry, for her life; re-
" mainder to the firſt and other ſons in that marriage, in tail, &c.
" And after, the ſon proving extravagant and being in gaol, *A.* the
" father, to diſturb the riſing of the uſe to the future wife, makes
" a leaſe for 1000 years, and then the ſon marries the gaoler's
" daughter. And yet it was held, that ſhe was not bound by
" this leaſe, but ſhould have the land diſcharged of it. And the
" reaſon given is, becauſe there being a good eſtate by the firſt
" limitation to ariſe when the wife is known, if this be not de-
" ſtroyed, this cannot be charged or incumbered, becauſe it has
" relation to the covenant, and therefore the leaſe ſhall be con-
" ſtrued to ariſe out of the reverſion which the covenantor has
" in him, and might lawfully charge. But to difference this caſe
" from the former, it is to be obſerved, that, here, the covenantor
" had nothing but a reverſion in him; he had no eſtate for life
" as he had in the caſe preceding: beſides, this leaſe was made
" without any conſideration, and for no other purpoſe, but to de-
" feat the riſing of the uſe to the wife. And if it ſhould be good
" in poſſeſſion, being for 1000 years, and no rent reſerved upon
" it, it would defeat the whole ſettlement; and therefore it is
" more reaſonable to conſtrue ſuch leaſe to ariſe out of the rever-
" ſion which the covenantor had and might lawfully charge, than
" to allow it good againſt the wife who came in upon ſo valuable
" a conſideration as marriage. But, if ſuch leaſe had been made
" for

" for money, or, if a rent had been reſerved upon it, then though
" the leſſor had not any eſtate for his own life, yet ſuch leaſe had
" been good againſt the ſettlement; becauſe, though it was made
" in conſideration of marriage, yet not being with any woman in
" particular, nor in conſideration of any marriage portion, it Co. 3.
" would be fraudulent and voluntary, as to any ſubſequent pur- Swine's caſe.
" chaſer for a more valuable conſideration, as money or rent is.

" *A.* gives lands to the uſe of *B.* for life, remainder to his eldeſt 2 Roll. Abr.
" ſon in tail, remainder to the right heirs of *B.*; and before the 794. (5).
" birth of any ſon, *B.* makes a leaſe for years, and then a ſon is
" born: he ſhall avoid this leaſe after the death of *B.*, for the
" freehold not being altered, ſo that the contingent remainder
" may well take place, this leaſe for years ſhall not affect it, but
" ſhall be conſtrued to ariſe out of the eſtates which *B.* had, and
" might lawfully charge, and ſhall be ſubject as they would have
" been, to open and let in the remainder, when it happens. But,
" if ſuch leaſe had been made for a valuable conſideration of mo-
" ney or rent, then it would come within the rules before men-
" tioned, as I conceive.

" *A.* ſeiſed in fee, levies a fine to the uſe of himſelf for life, Cro. Eliz.
" remainder to the uſe of ſuch woman as he ſhould after marry, 826.
" and ſhould ſurvive him; remainder to *B.* in tail: then *A.* mar- Mo. 634.
" ries *C.*, and after, by fine, reciting that he was tenant for life, Wells v. Fenton.
" remainder to ſaid *C.* for life, he and *C.* grant the ſaid lands to a
" ſtranger for 40 years, if he and his wife, or either of them,
" ſhould ſo long live: *A.* dies; and if *C.* was barred was the Pop. 5.
" queſtion? And *per totam cur.* ſhe was barred by eſtoppel.
" Yet they agreed, that if a leaſe be made to one for life, re-
" mainder to the right heirs of *J. S.* who is living, and after his
" eldeſt ſon grants or levies a fine of ſuch remainder, yet, after
" the death of *J. S.* he ſhall enter, becauſe he had nothing in him
" at the time of the grant or fine, and therefore ſuch grant or fine
" were merely void. And there, two judges againſt two, held, that
" the fine had extinguiſhed this future uſe by way of prevention.
" But a *quære* is made of it, becauſe it was but a grant by tenant
" for life, which ends with his death. This is the caſe, as it is
" reported by *Moore*. But in *Croke*, the caſe is reported to be,
" that after ſuch ſettlement the huſband and wife levied a fine to
" a ſtranger in fee, who granted and rendered the land to the
" huſband for life, remainder to the defendant for 60 years, re-
" mainder to the right heirs of the huſband; and that the huſ-
" band died, and *B.*, who had the remainder in tail by the firſt ſet-
" tlement, entered and let to the defendant; and that after *C.*
" married again, and ſhe and her huſband let to the plaintiff; and
" upon ſpecial verdict found, it was adjudged for the plaintiff.
" Which proves, that the wife was not bound even by eſtoppel,
" for then it could never have been adjudged for her leſſee the
" plaintiff; and that the joining of the wife in the fine ſignified
" nothing. But, then, as it ſeems, this muſt prove too, that the
" fine was not levied in fee as it is reported; for then clearly the
" contingent remainder to the wife would have been deſtroyed;

" becauſe by ſuch fine the eſtate for life of the huſband was de-
" termined, and an entry given to him in the remainder for the
" forfeiture, before the contingent remainder could take place;
" and then, by all the caſes before mentioned, it appears to be for
" ever deſtroyed. And therefore taking it to be only a grant by
" fine for years, and not for any valuable conſideration, then it
" determined by the death of the tenant for life who granted it;
" and though it had been for a valuable conſideration, then it de-
" termined by the death of the tenant for life who granted it. And
" indeed, admitting it had been for a valuable conſideration, yet I
" cannot ſee how it could have continued longer than his life, or
" bound the contingent uſe; for ſuch leaſe by *ceſtuy que uſe* in
" poſſeſſion differs from a leaſe by feoffees to uſes at common law,
" or by covenantor to ſtand ſeiſed to uſes; for there, in both
" caſes, the uſe takes effect out of the eſtate which ſhall ſerve and
" ſupply the uſes; and therefore ſhall bind or not bind as it hap-
" pens to be made for a valuable conſideration, or voluntarily, as
" appears before. But, where ſuch leaſe is made by *ceſtuy que*
" *uſe* in poſſeſſion, this takes its effect out of his eſtate only, and
" by conſequence can continue no longer than that does; and
" then, when the freehold is not deſtroyed, the contingent re-
" mainder may well veſt, nothing being done to diſturb or diſ-
*Quære.* " place its riſing. *Quære* therefore of this caſe.

Mo. 743. Barton's caſe. Cro. Eliz. 765. " *A.* covenants upon proper conſiderations to ſtand ſeiſed of
" make a feoffment in fee to the uſe of himſelf for life, and after
" of part to the uſe of *B.* his wife for life, for her jointure, with-
" out waſte, and after to the right heirs of *A.*, provided, that if the
" heir of *A.* diſturbs *B.*, that then the uſe to the right heirs of *A.*
" ſhall ceaſe, and that then *A.* and his heirs, or the feoffees, &c.
" and all others ſhall ſtand ſeiſed to the uſe of *B.* and her heirs.
" Afterwards, *A.* makes a leaſe for 100 years, to begin after the
" death of *B.*, rendering 12*l.* rent, and dies. The heir diſturbs
" *B.* and breaks the condition; yet by the two chief juſtices it
" was held, that the future uſe to *B.* in fee was checked by the
" leaſe, though the leaſe was but an *intereſſe termini* till *B.*'s death.
" *Et quia non potuit ſurgere tempore mortis* B., by reaſon of the
" leaſe for years, *it is deſtroyed for ever.* But *quære* of this caſe
" for by the other caſes preceding, it appears, that at moſt, ſuch
" contingent uſes are only bound by the leaſe for years, and not
" that neither, except where they are made for a valuable con-
" ſideration. But here, the reaſon given why this contingent li-
" mitation to the wife is deſtroyed by making ſuch leaſe for years
" is the ſame that is given where contingent remainders are de-
" ſtroyed by making a feoffment in fee, whereas the reaſons and
*Quære.* " operations of the one and the other are very different. *Li*
" *quære* of this caſe. Note—*Croke* cites the reſolution of this caſe
" and ſays, the reaſon thereof ſeems to be, becauſe the uſe limited
Cro. Eliz. 765. " to the right heirs was the ancient reverſion, and no new eſtate
" and then there could not be a condition annexed thereto. But
" this ſeems no good reaſon; for an executory uſe may as well
" be limited to ariſe upon a condition precedent as an executory
" devi

" deviſe, and then the ſtatute carries the poſſeſſion after it; and " why it may be created by original limitation, and not out of the " reverſion, after other eſtates, will be difficult to reconcile, ſince " the reverſion is as much the owner's, as ſuch, as the poſſeſſion " was before any limitation at all made; becauſe the firſt had a " fee, though it was but a baſe and determinable fee. But yet in " a will, ſuch limitation has ſometimes been held to be good, not " as a direct remainder, but as an executory deviſe. But this is " not law, becauſe it is the affectation of a perpetuity, ſince ſuch " contingencies cannot fall till after the entail is ſpent, which is " too diſtant to expect.

" So, a gift at common law, before the ſtatute of *Weſtm.* 2. to " one, and the heirs of his body, and if he died without heirs of " his body, to go over to another, this was a void remainder, be- " cauſe the firſt donee had a conditional fee, which, after iſſue, " he may diſpoſe of for ever, and bar the donor of his poſſibility " of reverter; and therefore ſuch poſſibility could not be good as " a remainder, nor did any formedon in remainder lie at common " law, when all inheritances were fees abſolute, or condi- " tional.

Plow. 235. a. 339. b. 248, 249. 2 Inſt. 336. Vaugh. 36.

" So, where one deviſed lands in *London* to the prior and con- " vent of *B. ita quod reddant annuatim decano et capitulo Sancti Pauli* " 14 marks, and if they fail of payment, that their eſtate ſhall " ceaſe; and that the ſaid dean and chapter and their ſucceſſors " ſhall have it: it was held by *Baldwin* and *Fitzherbert*, the " greateſt lawyers of the age, as my Lord *Vaughan* ſays, that this " remainder was void; becauſe the firſt deviſe carrying a fee, no- " thing remained after to be diſpoſed of; and executory deviſes, " after a fee-ſimple, were in former ages unknown, which is the " reaſon that this caſe is denied by ſome to be law. And it was " held, that, for the condition broken, the heir of the deviſor " ſhould enter; of which more hereafter.

Dyer, 33. a. pl. 12. Finch, 46. Swinb. 122. 1 Brook. 234. (2). Cont. Vaugh. 277.

" But this rule, that a fee cannot be limited after a fee, hath " been long ſince exploded, in caſe of deviſes, and of uſes, where " the firſt eſtate, though in fee, is limited to determine upon a " contingency that may happen within the compaſs of a life or " lives in being, or ſome reaſonable time after. And the reaſon " of giving way to it at firſt ſeems to have been, to let men into a " means of providing for the ſeveral branches and exigencies of " their own family.

3 Chan. Caſes, 19. 22. 31. 36. 49.

" The firſt caſe we meet with to this purpoſe, is this. In debt " againſt *A.* as ſon and heir of *B.*, he pleads *riens per deſcent*, but " of the third part of the manor of *D.* the plaintiff replies, that " he had the whole manor of *D.* by deſcent; and upon iſſue it " was found, that the ſaid manor was held by knight's ſervice, " and that *B.* father of the defendant, by his will in writing de- " viſed it to his wife, till the defendant his ſon ſhould come to the " age of 24 years, and when he came to the ſaid age of 24 years, " that he ſhould have the whole to him and his heirs for ever, his " wife having a third part thereof during her life; and if her ſaid " ſon ſhould die before the age of 24 years without iſſue, then the " whole

2 Leon. 11. 3 Leon. 64. 70. Dyer, 124. Hynd v. Lyon, Cro. Eliz 205. 2 Roll. Abr. 626. (3). 839. (1). 2 Mod. 291. [*Vide* Scott v. Scott, Ambl. 383. *contra*. But

*quære* of that caſe, and whether it can be ſupported either by principle or authority.]

" whole ſhould be to the wife for life; and after her death to C. " in tail, remainder to the right heirs of the deviſor. It was " found that the wife was dead, and that the ſon had attained his " age of 24 years; and it was adjudged that he had the fee by " deſcent, and ſo aſſets; for the entail with the remainders over " not being to ariſe to *A.* unleſs he died before 24; and ſo that " part of the deviſe being become void by his attaining 24, then it " reſted wholly upon the firſt part, which being a deviſe to his " ſon and heir apparent in fee, is void, and he ſhall take by deſcent " notwithſtanding ſuch deviſe. And he could not have an eſtate " tail in the interim till he attained 24, and then to have the fee " as a remainder, becauſe the entail was only to ariſe to him upon " his dying before 24, as a condition precedent; ſo that neither " the tail nor the fee could veſt in him preſently, by force of the " deviſe; but it was, as if he had left the fee to deſcend to him " and his heirs, and only ſaid, if my ſon die without iſſue before " 24, then I give the lands to my wife for life, and after to C. in " tail, *&c.* which is a good executory deviſe upon the happening " of the contingency, and the fee, in the mean time, deſcends, as " would have done if there had been no will. And whether by " the words, *if his ſon died without iſſue before* 24, an eſtate-tail " ſhould veſt upon ſuch death, or, that they ſhould be only the " terms and conditions upon which the executory deviſe was to " take place, and after no eſtate at all, ſeems doubtful; though " the caſe of *Gardiner* and *Sheldon*, after mentioned, ſeems to make " for the latter: for, if he died before 24, leaving iſſue, and that " being made the condition upon which the remainder limited " after were to ariſe, could be no condition to veſt an entail in " himſelf, becauſe he and his iſſue, that is, all who could take the " entail, were to be dead before the entail could veſt, and then " could not veſt for want of perſons to take it, which would make

But *vide infra.*

" the deviſe idle and repugnant as to that part: therefore, the " words ſeem to make no alteration of the eſtate the law would " caſt upon the ſon by deſcent, but to be wholly relative to the " limitations after, as the modus upon which they were to take " effect, and not to controul the operation of the law in the mean " time, in giving him the fee by deſcent. And to conſtrue the " caſe otherwiſe, would make it wholly uſeleſs to the purpoſe for " which it is cited by my Lord Chancellour *Nottingham* in the " Duke of *Norfolk*'s caſe; for there, either it muſt create an entail " to begin when all the iſſue who were to enjoy it were dead; or " it muſt make an entail at large with the remainders over; and " then there is no great myſtery in the caſe. The firſt is impoſ- " ſible, and the latter it cannot be, becauſe it is confined to " dying before 24; for, if he ſurvives that age, it is not to take " place.

Dyer, 330. 1 Vent. 212. 2 Roll. Abr. 829. (3). Vaugh. 267. Clache's caſe.

" One ſeiſed of lands in fee by his will in writing, deviſes *Blackacre* " *acre* to *A.* his daughter and her heirs, and *Whiteacre* to " daughter *B.* and her heirs, and if ſhe die before the age of " years, living *A.*, then *A.* ſhall have *Whiteacre* to her and " heirs; and if *A.* die having no iſſue, living *B.*, then *B.* ſhall have "

" the part of *A.* to her and her heirs; and if both die, having no " iſſue, then to *J. S.* and his heirs, and dies. *B.* attains her age " of 16 years, and then dies without iſſue in the life of *A.* And firſt, " it was held, by three juſtices againſt *Dyer*, that the daughters " had an eſtate-tail upon the whole will, and not a fee determin- " able upon a contingency ſubſequent. 2d, That by the words, " *if both die without iſſue*, no croſs remainders in tail were created " by implication, but that upon *B.*'s death without iſſue after 16, " *J. S.* ſhould have her part preſently, without ſtaying till the " death of *A.* without iſſue.

" A copyholder in fee ſurrenders to the uſe of *B.* an infant and " his heirs, and if he dies or marries before the age of 21 years, " then he ſurrenders to the uſe of *C.* and his heirs; this was held " a good ſurrender to the uſe of *C.* upon ſuch contingency, " though *B.* had a fee before, becauſe the contingency was " to happen within the compaſs of a life, or upon the death of " one then in being. But it is ſaid by *Rolle*, that the ſurrenderor " died before the contingency happened, in which caſe the uſe " could not riſe to *C.*, though it happened after; becauſe, upon " the happening of the contingency, as this caſe is, the ſurrender " is to operate as a new original ſurrender to the uſe of *C.*, and " this cannot be when the perſon who ſhould make it is dead " before, any more than attornment after the death of the grantor " ſhall avail the grantee of the reverſion. But, if he had ſur- " rendered to the uſe of his will, and then had, by his will, deviſed " ſuch eſtates, they would be good; becauſe the ſurrender was " made to ſupply and ſerve all the contingencies and limitations " of the will, and the uſe in the mean time veſted in the ſur- " renderor and his heirs; whereas the ſurrender in the other " caſe would, according to the wording of ſuch inſtrument, " operate double as to original ſurrenders. *Quære.*

Cro. Jac. 376. Godb. 264. 2 Roll. Rep. 119. 137. 253. 2 Bulſt. 27. 2 Roll. Abr. 791. 794. Sympſon v. Southern. Note—Several books put this caſe of an infant *in ventre ſa mere*, and turn the defect of this conveyance in the remainder on the want of a perſon in being to take immediately.

[Mr. Fearne referring to Croke it

Note by M. Watkin. See P. 65.

his caſe of Sympſon v. Southern, in his Eſſay on Remainders, ſays, that according to was reſolved, that the ſurrender to the uſe of *C.* was void, for that a man could not *onditional ſurrender* to operate *in futuro*. On the other hand, Mr. Fearne ſays, the ſame caſe, as reported y Rolle, is cited in *Lex Cuſtumaria* (121.) as an authority, that ſuch future uſes are good, and that a ee may be limited on a fee, upon a contigency, in copyhold eſtates. And this, he ſays, the caſe in olle's Abridgment ſeems to leave undecided. But, he adds, in Gilbert's Tenures (260, 261.) it is id, that ſuch a reſolution ſeems not to be grounded on ſo good reaſon, as the contrary reſolution in roke; for the uſe upon a ſurrender of a copyhold is not like a uſe or truſt at common law: but he ho is admitted upon a ſurrender, is admitted to the legal *cuſtomary* eſtate, and is not ſeiſed to a *uſe*; herefore uſes upon ſurrenders are, in general, governed entirely by the ſame rules, as conveyances at com- on law, in which ſuch limitations were not allowable; and that upon this principle it ſeems a fee upon fee in caſe of a ſurrender of copyhold is not good, any more than in a conveyance at common law. ut the above opinion of Gilbert is, ſays Mr. Fearne, I think, excluded by decided caſes, for the validity f conditional limitations in ſurrenders of copyholds, appears to have been admitted in the caſe of Stocker . Edwards, or Edwards v. Hammond (2 Show. 398. and 3 Lev. 132. where the ſame caſe ſeems to be ſomewhat differently reported. Fearne's C. R. 372. 4th edit. and *vide* Welcock v. Hammond, cited 3 Co. 20. b. Brian v. Cawſen, 3 Leon. 115.). And the deciſion in the caſe of Sympſon v. Southern ay be referred to the point of the *habendum* after the death of the ſurrenderor being void, taking that o the *conditional future operation*, which was denied to the ſurrender. And in the caſe of Paulter v. Carthill, Cro. Eliz. 361. Beamond, Juſtice, conceived the limitation of a fee upon a fee, as good in ſurrenders of copyholds, as in uſes of land upon a feoffment. So, ſays he, in the caſe of a ſurren- er of copyholds, to the intent the lord ſhould admit *A.*, whom the ſurrenderor intended to marry, after marriage; until marriage to the uſe of himſelf and his heirs, and after marriage to the uſe of himſelf and *A.* in tail; the whole court of C. B. held, (Bentley v. Delamore, 1 Freem. 267, 268. and ide Calth, Reading, 31, 32. for the ſame point; and *vide* Taylor v. Taylor, 1 Atk. 386.) that it

was

was good enough to limit a remainder upon a contingent fee in copyholds; as in caſe of mortgages of copyholds a ſurrender *in futuro* is good, for the freehold remains in the lord. Thus far Mr. Fearne; vide Fearne's C. R. 416, 417, 418.—But, if we carefully examine the different reports of the caſe of Sympſon v. Southern, and the other authorities to which Mr. Fearne refers, it will be found perhaps that they will not ſupport the poſition they are brought to eſtabliſh, and that the above doctrine of our author, advanced in his *Tenures*, remains unimpeached, and muſt be admitted to be ſound law.—As the caſe of Sympſon v. Southern is reported by Rolle (1 Ro. Rep. 109. 137. 253.) judgment is ſaid to have been given for the party who claimed the ulterior fee. But the report is very obſcure, if not contradictory in many places. The court are there ſaid to have been of opinion with Coke; but Coke's argument, both in Rolle and Bulſtrode, ſeems incompatible with ſuch an opinion. In Croke (Cro. Ja. 376.) the judgment is ſaid to have been given for the party claiming under the heir at law, and ſo it is ſaid in Godbolt and Bulſtrode (Godb. 264. 2 Bulſtr. 272.). In Rolle's Abridgment it is firſt noticed with a *dubitatur* (2 Roll. Abr. 791. Uſes (P.), pl. 2.); and afterwards, when it is mentioned as adjudged, it is declared, that the ulterior fee never aroſe, as the contingency did not happen in the life of the ſurrenderor, *Id.* 794. (S. 3.) pl. 8. In *Lex Cuſtumaria* (120. ch. 15.) the ulterior limitation is ſaid to have been good: but the author reſts himſelf on the firſt ſtatement in 2 Rolle's Abridgment without inſerting the *dubitatur*. Indeed, he only tranſlates from that of Rolle, and, with Rolle, calls the *ulterior fee* a *remainder*. Therefore it is only in Rolle's Reports that the judgment of the court is ſaid to have been given in favour of the perſon claiming the ulterior fee; and as *Croke*, *Godbolt*, *Bulſtrode*, and even Rolle himſelf in another and better-conſidered work, declare that the judgment was given againſt him; and as the author of *Lex Cuſtumaria* is no authority himſelf, but depends only upon a quotation from Rolle, without noticing the *dubitatur* inſerted by that writer; this caſe of Sympſon v. Southern can ſurely not be regarded as eſtabliſhing the doctrine that a fee may be limited upon a fee in a ſurrender of copyholds.——To proceed then to an examination of the *decided* caſes mentioned by Mr. Fearne as ſupporting that doctrine.—In the caſe of Stocker v. Edwards, as reported by Shower, a conditional limitation was ſaid to have been good in a ſurrender. But, if the caſe of Stocker v. Edwards be the ſame with that of Edwards v. Hammond as reported by Levinz, and Mr. Fearne ſeems to conſider it ſo, it is indeed "ſomewhat differently reported" by the latter writer. In *Shower*, the ſurrender was "to the uſe of the ſurrenderor for life, and after "to the uſe of John his youngeſt ſon, and *the heirs of his body*, if he attained the age of 18 years; and "if he died before he attained that age *without iſſue male*, then to his right heirs." Whereas in *Levinz*, the limitation was "to the uſe of the ſurrenderor for life, and afterwards to the uſe of his eldeſt "ſon *and his heirs*, if he lived to the age of 21 years: provided, and upon condition, that if he died be"fore 21, that then it ſhould remain to the ſurrenderor and his heirs." But, what puts an end to the application of the caſe in *Levinz* is, that in that caſe the ſurrender was *to the uſe of a will*; though that important circumſtance is omitted in the tranſlation of Levinz. The words in the original are, that the copyholder ſurrendered *a ſon volunt, et deviſe al uſe luy meſme pur vie, et apres al uſe ſon eigné fitz a ſes heyres, s'il vivra al age de* 21 *anns*, provided, &c. as above. The caſe of Welcock v. Hammond, cited by Lord Coke, was alſo on a ſurrender to a will, as was the caſe of Brian v. Cawſen, in Leonard, and that of Taylor v. Taylor in Atkins. In the caſe of Paulter v. Cornhill, indeed, Beamond, Juſtice, conceived a fee limited upon a fee by a ſurrender to be good enough; for, ſaid he, it ſhall be as a uſe limited upon a feoffment, and theſe uſes ſhall riſe out of the firſt ſurrender. But, as to the point, whether a fee might be ſo limited on a fee, it is obſervable, that we are informed by the reporter, that "the court ſpake not "much thereto, but willed to have it ſpecially found." The caſe of Bentley v. Delamore, in Freeman indeed, ſo far as it goes, countenances the doctrine, that a fee may be limited on a fee by ſurrender: but that caſe is very looſely given; and it is there ſaid, that "a ſurrender *in futuro* is good; and the miſchief" [here ſeems an omiſſion in the report] "for the freehold remains in the lord." Now the validity of a ſurrender *in futuro* has already been denied by Mr. Fearne himſelf.—The only authority which remains is the paſſage referred to in Calthorpe; and that, to be ſure, ſupports Mr. Fearne's poſition. The words are theſe: "If a copyhold be ſurrendered to the uſe of *J. S.* and his heirs, until he ſhall "marry *A. G.*, and after the ſaid marriage, then to the uſe of them two in tail ſpecial; if after they "do marry, then is the ſurrender to them in tail, and till then, to him in fee."

Upon the whole, therefore, we find, that the caſe of Sympſon v. Southern militates againſt, rather than ſupports the doctrine, that a fee may be limited upon a fee of copyholds by ſurrender; that the paſſage in *Lex Cuſtumaria* cannot be a better authority than the book it reſts upon; and in truth, that the extract it gives, is not faithfully given, as it delivers that *abſolutely*, which was originally accompanied with *dubitatur*; that the caſe of Stocker v Edwards, in *Shower*, is ſhaken by the report of what Mr. Fearne himſelf conſiders as the ſame caſe in *Levinz*; and that the caſe in *Levinz* was *on a ſurrender to the uſe of a will*; that the caſes of Welcock v. Hammond, Brian v. Cawſen, and Taylor v. Taylor, were on ſurrenders to will alſo; that in the caſe of Paulter v. Cornhill, the opinion of Beamond was not acceded to by the court, but was itſelf founded upon a principle which has been repeatedly denied, namely, that the limitation ſhould be conſidered as a uſe limited on a feoffment. 1 Brownl. 127. 1 P. Wms. 17. 1 Ld. Raym. 627. 1 Vez. 257. That the caſe of Bentley v Delamore is very looſely given, and filled with abſurdity; that if it aſſerts that a ſurrender *in futuro* is good, it might eaſily admit the other poſition that if it is erroneous in the one inſtance, it has no great claim to authority in the other; that the doctrine therefore reſts on the ſolitary paſſage in Calthorpe: is it then too much to ſay, that the main foundation upon which Mr. Fearne has profeſſed to eſtabliſh his doctrine, fail him, and that therefore, notwithſtanding the great authority of his name, we ſhall not be juſtified in pronouncing that a fee may be

ſtited on a fee by a ſurrender of copyholds? Beſides, a ſurrender of copyholds is to be conſtrued as a common law conveyance—If then, as is univerſally acknowledged, a fee cannot be limited on a fee by a common law conveyance; it follows, as an inevitable conſequence, that a fee cannot be limited on a fee by a ſurrender; for if it may, then a ſurrender is not to be conſtrued as a common law conveyance; which is contrary to our poſition.] *See now 1. Watk. Copyh. 200.*

"One having iſſue, *A.* his only daughter and heir, by will deviſes lands in *D.* to her and her huſband, and her heirs, upon condition, that they ſhould aſſure lands in *F.* to his executors, and their heirs to perform his will; and, if they failed, then he deviſed the ſaid lands in *D.* to his executors and their heirs, and died. It was adjudged to be no condition; for that, by the deſcent to the daughter, being heir, it would be deſtroyed: but it was held a limitation, or executory deviſe, to his executors, in caſe the aſſurance was not made; and that they might, for breach thereof, enter and ſell; for though a fee cannot be limited upon a fee abſolute, yet upon a fee determinable it may; and, in this caſe, it enures as a new original deviſe to take effect, when the firſt deviſees failed to make the aſſurance. Cro. Jac. 592. Palm. 135. 2 Roll. Rep. 218. 425. Dy. 33. a. in margin. Fulmerton v. Steward, & Cro. Eliz. 359. the ſame caſe by the name of Cleer v. Peacock. Swinb. 106. 120.

"One by his will deviſed lands to his mother for life, and after her death to his brother in fee; provided that, if his wife (being then enſient) be delivered of a ſon, that then the land ſhould remain to him in fee, and dies. The ſon is born; and it was held, that the fee of the brother ſhould ceaſe, and veſt in the ſon, by way of executory deviſe, upon the happening of the contingency. Dyer, 127 a. in margin.

"One by his will deviſes ſeveral rent-charges or annuities out of his lands to his younger children; and deviſes, that, if his heir paid the ſaid annuities to his children, that then he ſhould have the ſaid land to him and his heirs; and if he failed of payment, then his executors ſhould have the lands; and if they failed to pay them, then his children ſhould have the lands to them, and the ſurvivor of them, and dies. The heir makes a feoffment in fee of the lands, and then the annuities were not paid. It was adjudged, the feoffment has not deſtroyed the contingent limitations, but that for non-payment they could veſt according to the will; and there a difference was taken between contingent remainders, which depend upon a direct limitation, and are to perſons unknown, or not *in eſſe*, and contingent uſes, or deviſes to perſons *in eſſe*, and known, which are to take effect upon a collateral condition or contingency; for theſe cannot be deſtroyed or given away by feoffment, as the others may; but the land is charged with them into whoſe hands ſoever it comes. 2 Roll. Abr. 793. (2). Purſlow v. Parker. 2 Roll. Rep. 219. Palm. 136. Cro. Jac. 144. Meſme caſe *per noſme* of Molineux v. Molineux.

"One deviſed lands to his wife till his ſon came to the age of twenty-one years, and then that his ſaid ſon ſhould have the lands to him and his heirs; and if he died without iſſue before his ſaid age, then his daughter ſhould have the ſaid lands to her heirs. This is a good contingent or executory deviſe to the daughter, if the contingency happens; and, in the mean time, the fee deſcends to the ſon and heir, and if he lives till twenty-one, 2 Roll. Rep. 297. 217. Palm. 132. Boulton's caſe, cited to be reported by Lord Chancellour Egerton, 6 & 7 Eliz.

" one, though he after die without iſſue, or leave iſſue, though
" he die before twenty-one, yet the daughter is not to have the
" lands; becauſe he is to die without iſſue, and before twenty-
" one, elſe the daughter cannot take.

Swinb. 116. " One having iſſue three ſons, *A.*, *B.*, and *C.*, deviſes his
" lands to his ſon *A.*, after the death of his wife, to him and the
*Qu.* If the wife has an eſtate for life by this implication? [It ſhould ſeem, ſhe clearly hath.] " heirs of his body lawfully begotten, in fee-ſimple; and if he
" die in the lifetime of his wife, that then his ſon *C.* ſhould be
" his heir, and dies. *A.* hath iſſue, and dies in the lifetime of
" the wife. It was adjudged, that the iſſue ſhould have the land
" after the death of the wife, and not *C.*, for it is in effect a de-
" viſe to the wife for life, remainder to *A.* in tail, remainder to
" *C.* in fee, upon the contingency of *A.*'s dying in the life of the
" wife, and does not abridge the eſtate-tail expreſsly given to *A.*
" by his dying in the life of the wife.

Dyer, 354. a. pl. 33. " *Ceſtui que uſe*, 12 *Ed.* 4., by will deviſes lands to *B.* his ſon
" and his heirs for ever, provided, that if he die without iſſue
" living his executors, that the land ſhould be ſold by his
" executors, and dies; then the executors die, and after, the de-
" viſee being dead likewiſe, the heir of his body brought a for-
" medon, ſuppoſing it to be an entail; the tenant pleads *ne don*
" *pas*; and, upon iſſue joined, the court was of opinion, that it
" was no entail, *&c.*: and upon this, and ſome of the foregoing
" caſes, was the following judgment given.

Cro. Jac. 590. Palm. 131. 2 Roll. Rep. 216. 1 Roll. Abr. 611. (9). 835. p. (2). 2 Roll. Rep. 426. Vaugh. 272. Pells v. Brown. 4 Mod. 283. Swinb. 124. 2 Leon. 111. " One having iſſue three ſons, *A.*, *B.*, and *C.*, by his will in
" writing deviſes lands to *B.*, his ſecond ſon, and his heirs for
" ever; and if *B.* die without iſſue, living *A.*, then *A.* to have
" thoſe lands to him and his heirs for ever. *B.* enters, and ſuf-
" fers a common recovery to the uſe of himſelf and his heirs,
" and then deviſes thoſe lands to the plaintiff and his heirs, and
" dies without iſſue, living *A.* It was adjudged, firſt, that *A.*
" had a fee-ſimple by the deviſe to him and his heirs for ever,
" and that the other words did not ſo correct or qualify it, as to
" make it an eſtate-tail, not being, *if he die without iſſue general*,
" but upon the contingency of his dying without iſſue, living *A.*
" ſo that if he ſurvived *A.*, or died in the life of *A.*, leaving
" iſſue, *A.* was to have nothing: and this being a contingency to
" happen within the compaſs of lives then in being, though the
" firſt deviſe was a fee, yet the limitation over, upon ſuch con-
" tingency, was good, and not within the danger of a perpetuity,
" for the limitation to *A.* is not a remainder directly, which can-
" not be after a fee, but it takes effect by executory deviſe, as
" upon determination of the firſt eſtate, by the happening of the
" contingency, carries over the land to the other. Secondly, it
" was adjudged, that this, being a mere collateral poſſibility, was
" not bound by the recovery, unleſs he to whom it was limited
" had been party by way of voucher; for it had no exiſtence at
" all, when the recovery was ſuffered, and therefore the recom-
" pence in value could not extend to it, any more than to a re-
" mainder limited to the right heirs of *J. S.* who is then living
"

" for though that remainder be carved out of the eſtate of the " donor or leſſor, yet it cannot then veſt for want of a perſon " capable to take it: or, it is rather to be reſembled to an eſtate " to *A.* and his heirs, ſo long as *B.* hath heirs of his body, in " which caſe a recovery ſuffered by *A.* ſhall not bar the poſſibi- " lity of the reverter to the donor, it not having any real exiſtence " as a reverſion or a remainder, but only as a mere poſſibility; " and therefore, whoever comes into the land, takes it ſubject to " ſuch poſſibility, which, like an infection, ſticks to it, and can " no ways be drawn out without the concurrence of him who is " to have the benefit thereof. And the reaſon why a recovery " will not bar theſe contingent intereſts is, becauſe the recovery " will not bar any perſons but ſuch as are in being to make de- " fence, becauſe ſuch perſons are preſumed to call in the war- " ranty, and to receive a recompence from the warrantor.

" So, where a man deviſed to *A.* for life, remainder to *B.* and his " heirs, and if *B.* die without heirs, then to *A.* and his heirs; it is ſaid " to be ruled by *Fleming*, Ch. J. that if *B.* die without heirs, *A.* ſhall " have the land. But this caſe ſeems to be no law, and is contra- " dicted by another caſe which was ſtronger, and yet adjudged " otherwiſe, where one deviſed lands to *A.* and his heirs, and if he " died before 21 years of age, then he deviſed the ſaid lands to *B.* " and died. *A.* entered, and hath iſſue a daughter, and died be- " fore twenty-one. It was adjudged, that the daughter ſhould " have the land. So, where one limited an eſtate to a man " and his heirs, and if he died without heirs in the life of *J. S.*, " then to *J. D.* and his heirs; this was held a void limitation, " though it was brought within the compaſs of a life in being: " and that the lord ſhould have it by eſcheat, *per North*, Ch. J.; " for in this laſt caſe it was a direct limitation after a fee, and " was not to abridge the fee at all, but only a proviſion, that if " the fee were out in ſuch a time, another ſhould have the " land, which would elude the ſtatute of *quia emptores*, &c. and " defeat the lords paramount of their ſeignories, and ſo for the " firſt caſe, which is a direct perpetuity. But for the ſecond " caſe, it ſeems now to be law, and is within the reaſon of other " caſes, where ſuch executory limitations in wills have been al- " lowed good: therefore, where one deviſed lands to his wife for " life, remainder to his ſon and his heirs; and if he died before " his age of twenty-one years, then to remain to *J. S.* in fee; " the ſon entered, levied a fine, and died before twenty-one; it " was adjudged, that *J. S.* ſhould have the land; becauſe, ſay " the books, it was a plain limitation.

Dyer, 4. in margin.

3 Chan. Caſ. 22.

Cro. Eliz. 142. Mills v. Snowball.

" But, where one deviſed lands to his ſon and heir, and if he " died before his age of twenty-one years and without iſſue of his " body then living, then to remain over; he ſurvived twenty-one " years, and then ſold the land, and died; it was adjudged a good " ſale, becauſe he had the fee preſently; for the eſtate-tail was " limited to commence upon a contingency ſubſequent, which did " not happen.

1 Sid. 148. 1 Keb. 531. Collinſon v. Wright. Cro. Jac. 695. [*Vide ſupra*, vol. 4. pag. 295.]

" One

Soulle v. Gerrard, Cro. Eliz. 525. Moore, 422. S. C. by the name of Sowill v. Garret. [Walſh v. Paterſon, 3 Atk. 194. S.C. cited.]

" One having iſſue four ſons, deviſes lands to *B.* (one of them) " and his heirs for ever; and if he dies within the age of twenty- " one years, or without iſſue, that then the land ſhall be equally " divided between his three other ſons: *B.* hath iſſue, the defend- " ant *C.*, and dies within age; the three ſons enter, and let to " the plaintiff. It was adjudged *per totam curiam*, that this re- " mainder, upon the contingency of his dying before the age of " twenty-one years, was utterly void, having before given him a " fee-ſimple; and then it is, as if the limitation were ſingle, that " if he died without iſſue, which explains the former limitation " to him and his heirs, and ſhews what heirs the teſtator meant, " and ſo makes it an entail. And two juſtices held, that if the " remainder might begin upon the firſt limitation, yet, by " the words and intent of the deviſor, this cannot begin till the " other part of the limitation be alſo performed, *viz.* that he die " without iſſue; and that *or* ſhall be taken for *and*; for the words " being *if he died without iſſue, or died within age, then*, &c. This " word *then* ſhews the beginning of the remainder, *viz.* that it " ſhall be, *when* he dies without iſſue, and not before; and ſo all " one, whether it be taken as a copulative or a disjunctive. But " this caſe ſeems not law now; for by the other caſes it appears " that in caſe of a will ſuch limitation, even upon the firſt part, is

2 Roll. Rep. 220. Hoe v. Garrell. Palm. 136. Swinb. 116.

" good by way of executory deviſe. And there is a caſe cited in " *Rolle* which ſeems to be the ſame caſe, and is reported only " upon the firſt part of the disjunctive; and adjudged good, not " as a condition, but as an executory deviſe. And as to the other " part of the disjunctive, it is not taken notice of, becauſe on the " making an entail, there could be no queſtion of the remainder.

2 Roll. Rep. 220.

" And another caſe of one *Oclie*, 9 *Eliz.* is there cited, where " a man deviſed lands to his grandchild and his heirs, with a " proviſo, that if he died before payment of ſuch a ſum, or be- " fore he came to the age of thirty years, that then another ſhould " have the lands; and adjudged, that upon the happening of the " contingency, the other ſhould have the land.

1 Roll. Abr. 835. Hanbury v. Cockrell. Hardr. 150. S. C. cited *& que fuit Contingent Remainder. Quære?*

" One having iſſue two ſons, *B.* and *C.*, by divers venters, de- " viſes *Blackacre* to *B.* and his heirs, and *Whiteacre* to *C.* and " his heirs, provided that if either of his ſaid ſons die before " marriage, or twenty-one, and without iſſue, then he gives his ſaid " lands, ſo given, to ſuch ſon who ſhall ſo die before marriage, " before twenty-one, and without iſſue, to ſuch of his ſaid two " ſons as ſhall ſurvive the other, and dies; *B.* marries, and has " iſſue a daughter, and dies; and after *C.* attains his full age " and dies, without iſſue, before marriage. In this caſe it was " judged, that *B.* and *C.* had no eſtate-tail, but a fee determi- " able upon the contingency of death before marriage at any " time, or after marriage, and before twenty-one, and without " iſſue; ſo that if they were married under age, or attained full

" *Vide* the caſe.

" age, though not married, or had iſſue upon marriage at any " time, the limitation over was not to take place, and then " the ſurvivor for life only.

" C

" One makes a feoffment in fee to the uſe of himſelf and his " heirs, and when *J. S.* pays ſuch a ſum of money, then to the " uſe of him and his heirs; or, when he marries ſuch a woman, " or, when he comes to full age, then to the uſe of him in fee. " This was adjudged a good remainder in fee upon the happen- " ing of the contingency, though in the mean time the feoffor " had the whole fee ſimple in him; or rather, this takes effect " by way of ſpringing uſe, as appears in the caſe of *Lloyd* and " *Carew* hereafter mentioned. 1 Roll. Rep. 137. 2 Bulſt. 273. Lady Ruſſell's caſe.

" One deviſed lands to his eldeſt ſon in tail, remainder to his " youngeſt ſon in tail, remainder to his daughter in tail, and if " they all died without iſſue, that the land ſhould be ſold by his " executors. The eldeſt died without iſſue; then the youngeſt " entered, and ſuffered a common recovery, and died without iſſue; " and the daughter likewiſe died without iſſue. It was held clear- " ly, that the executors were barred, and could not make ſale ac- " cording to the will; for this was only a plain limitation or power " to them to ſell after the former eſtates tail ſpent, and no con- " tingency or executory deviſe; and therefore was ſubject to be " barred as other remainders expectant upon eſtates tail are. Mo. pl. 201.

" One deviſed lands to *A.* for life, and if he died without iſſue, " then *B.* ſhould have the lands. In this caſe, *A.* hath but an " eſtate for life by expreſs words, and therefore ſhall have no " greater eſtate by implication againſt the expreſs words; but " thoſe words, *if he die without iſſue*, are only a condition, upon " the happening or not happening whereof the remainder to *B.* is " to veſt or not veſt; and, being uſed only for that purpoſe, ſeem " to be confined to his having no iſſue at the time of his death; " and then in the mean time the fee deſcends to the heir at law. 9 H. 6. 74. 20 Roll. Rep. 217. Palm. 134.

" So, where one deviſed lands to his brother *B.*, and if he died, " having no ſon, that the land ſhould remain to *C.* for life; and " if he died without iſſue, having no ſon, that it ſhould remain " to the right heirs of the deviſor: by this will, *B.* hath an eſtate- " tail, and *C.* only for life, or at moſt but to him and the heirs " female of his body. And the words, *having no ſon*, are a kind " of condition precedent, upon the fulfilling or failing whereof " the remainder limited to his own right heirs is to take effect by " the will; for, if he had a ſon, he cannot die without iſſue; " and therefore it muſt be intended ſuch iſſue as he may die with- " out, though he hath a ſon, *viz.* iſſue female; and if the words, " *having no ſon*, make the contingency, the other words, *if he die* " *without iſſue*, may well create an entail female; ſince there is " no deviſe expreſsly for life, as in the other caſe, but only by " conſtruction of law. And if the words, *die without iſſue*, be " not ſo conſtrued, they are uſeleſs and idle. But one book ſays, " that the ſon hath an eſtate tail to the heirs male of his body. " But *quære* of this. Mo. pl. 939. Milſinder v. Robinſon, Swinb. 112, 113. 1 Roll. Abr. 837. (12). 4 Mod. 258. 1 Roll. Abr. 837. pl. 12. The ſame is alſo ſaid in Moore's Report.

" Copyhold land is ſurrendered to the uſe of *A.* and *B.*, and " of the longer liver of them, and for want of iſſue of *B.* of his " body lawfully begotten, to remain to *C.*: adjudged, that *B.* had " but an eſtate for life by the words of the ſurrender, and then " he Cro. Car. 366. 1 Roll. Abr. 839. (7). Vaugh. 261.

Seagood v. Hone. *Vide* Allen v. Naſh. 1 Brownl. 127. 1 Mod. 52.

" he ſhall not have a greater eſtate by implication in a ſurrender " or conveyance, though in a will it would, perhaps, be other- " wiſe; therefore the words, *for want of iſſue*, are the condition " upon which the remainder to *C.* is to ariſe or not ariſe. And ſo " it is, if a leaſe be made to *A.* for life, and if he die without " iſſue, that it ſhall remain to *B.* &c.

Cro. Jac. 695. Chadock v. Cowley. [Fearne, 370. 4th edit. S.C.]

" One deviſes lands to his ſon *A.* and his heirs, and deviſes " other lands to his ſon *B.* and his heirs, and that the ſurvivor " of them ſhall be heir to the other, if either of them die with- " out iſſue. This makes an eſtate tail, and not a fee determin- " able upon their reſpective deaths without iſſue; becauſe ſuch " dying without iſſue is not confined to any time. And though " it was objected that theſe words are uſeleſs, becauſe if one died " without iſſue, the other would be his heir of courſe, and then " the fee given by the firſt words ſhould ſtand, yet it was ad- " judged *ut ſupra*, becauſe *non conſtat*, but that he might have " other children who might be heirs to them. Note; the book " ſays the other children by other venters. But *quære* of that, " for they could not be heirs to them.

Cro. Jac. 415. 1 Roll. Rep. 398. 436. 3 Bulſt. 192. Webb v. Herring. Cro. Car. 58. Swinb. 122. accord. *per* Cro. and Yelverton v. Richardſon, who held it a fee; but Vaugh. 270. holds with the other opinion. 2 Roll. Rep. 423. Swinb. 111. 120.

" One having a wife, a ſon, and three daughters, deviſes land " to the ſon after the death of the wife, and if the three daugh- " ters ſurvive the wife, and the ſon, and his heirs, then to them " for their lives. This is a good remainder to the daughters " and the ſon hath but an eſtate tail; for if he ſhould have " fee, then the remainder would be void and idle, for they can- " not ſurvive him and his heirs, unleſs it be meant heirs of his " body, for they themſelves would be his heirs, and conſequently " cannot ſurvive themſelves; therefore it muſt be, ſuch heirs as " they may ſurvive, that is, heirs of his body, which in a will " gives him an eſtate tail by implication. So, if a man hath iſſue " two ſons, and deviſes to the youngeſt and his heirs, and if he " die without heirs, to the eldeſt in fee; this makes an eſtate tail " in the youngeſt, becauſe otherwiſe the remainder would be " void, the eldeſt being heir to him. And the diverſity is, where " ſuch remainder is limited to him who will be heir, there, by " a neceſſary implication, by the word *heirs* in the firſt part of " the deviſe muſt be meant *heirs of his body*, and where ſuch devi- " is over to a ſtranger, which carries no ſuch neceſſary implica- " tion in the firſt part of the deviſe, it makes the remainder void " and againſt law.

3 Bulſt. 195. 1 Roll. Rep. 436.

" If an alien be made denizen, and lands be given to him and " his heirs, remainder over to another; or to a baſtard and his " heirs, with ſuch remainder over; theſe are good remainders " and the denizen or baſtard have only an eſtate tail to them and " the heirs of their body, becauſe they can have no other heirs " inheritable.

Cro. Eliz. 376. Baldwin v. Wiſeman. [Owen, 112. S. C. Gouldſh.

" One having iſſue two ſons *B.* and *C.*, and two daughters " deviſes lands to *C.* in tail, if he ſhould live to his age of twenty- " four years, upon condition that he ſhould pay 100*l.* to his two " daughters; and if *C.* died without heirs, then if *B.* did not pay " the ſaid 100*l.* that it ſhould remain to his daughters and their " heirs.

" heirs. And whether this was a condition for breach whereof " the heirs ſhould enter, or a limitation, that for non-payment " would carry the lands to the daughters, was the queſtion? " And it was adjudged a condition, and that for breach thereof " *B.* the heir ſhould enter. But this judgment being in *C.*, *B.* " was after reverſed in error in *B. R.*, as appears in *Rolle*, where " the caſe is put ſomewhat different; for there, after the de- " viſe to *C.* &c. it goes on, *and if* C. *dies before twenty-four*, " (not ſaying without heirs, which, in this caſe, would give him " an entail, the limitation over being to *B.* his brother, who would " be his heir for want of iſſue,) *then I will that* B. *my ſon and heir* " *ſhall have the ſaid lands to him and his heirs, he paying as* C. *ſhould* " *have done; and if* C. *and* B. *do not pay, then to the daughters*, &c. " it was held, that for non-payment by *C.*, *B.* ſhould be in by " limitation, and not by the condition, for then it would defeat " the portions to the daughters, and the future deviſe to them " too, and therefore the judgment which was given was re- " verſed. 152. pl. 90, S. C.] 1 Roll. Abr. 411. pl. 5.

" Copyholder ſurrenders to the uſe of *A.* and his heirs, upon " condition to pay 100*l.* to *B.*, and if he fails, that it ſhall be " to the uſe of *B.*: if this was a good limitation to *B.* ſo as there " ſhould be a fee upon a fee, was the queſtion? And *Beaumond* " thought, that it was good enough, and ſhould be as a uſe limited " upon a feoffment; ſo theſe executory uſes ariſe out of the firſt " ſurrender, and executory uſes may carry a fee after a fee as " well as executory deviſes. Cro. Eliz. 361. Paulter v. Cornhill. *Vide ſupra.*

" *A.* ſeiſed of lands in *London*, where by cuſtom they may de- " viſe in mortmain, erects an alms-houſe, &c., and then deviſes " the ſaid lands to fix perſons and their heirs and aſſigns, upon " condition and to the intent to pay out of the iſſues and profits " thereof certain annual ſums to the poor there, &c.; and if any " part of the ſaid purpoſes remain unperformed, then he deviſes " the ſaid lands to *B.* and the heirs male of his body, upon con- " dition and to the intent to perform all the ſaid truſts; and if he " fails for two months, then he deviſes the ſaid lands to the " mayor and commonalty of *London* upon the ſame conditions; " and if they fail, that then his heir ſhould enter and perform " the ſame; and dies. The deviſees enter, and for breach of the " condition, the heir enters, and then one *C.* enters, and gets a " bargain and ſale from the firſt deviſees of their parts, and levies " a fine with proclamations, and long after, the mayor and com- " monalty having notice of the will, entered, upon whom *C.* re- " entered, &c.; and the court held clearly that, admitting theſe li- " mitations good, they were barred by the fine and proclamations; " but they inclined, the mayor, &c. could take nothing by the " will, the deviſe to *B.* being but a poſſibility; and if the deviſe " over to the mayor, &c. ſhould be good, it would be a poſſibility " upon a poſſibility, which the law will not allow. But *quære*, " if there were twenty poſſibilities one after another, yet, if they " were limited to take effect within the compaſs of lives then in " being, or a reaſonable time after, if they might not be allow- " ed, Cro. Car. 575. 1 Jo. 452. Mayor and Commonalty of London v. Alfred. [*Vide* Fearne's C. R. 377. 4th edit.] 3 Mod. 29.

" ed, ſince then there could be no inconvenience urged there-
" from, which is the great argument upon which they have been
" condemned.

Hutton, 60. Howell v. Anger.

" One having iſſue two ſons, *A.* and *B.*, by his will deviſes
" *Blackacre* to *C.* his wife for life, and after her death to *B.* and
" his heirs in fee, under the conditions after declared, and de-
" viſes *Whiteacre* likewiſe to his ſaid wife for life, and after her
" death to *A.* and his heirs under the condition after limited;
" and if *C.* his wife died before the legacies paid, then he willed
" that they ſhould be paid by *A.* and *B.* out of the lands given
" them, and *if either of my ſons die before they enter, or before the*
" *legacies paid, then I will that the longer liver ſhall enjoy both parts*
" *to him and his heirs; and if both die before they enter, then my*
" *executors, or one of them, to take the profits till they be paid.* A
" year after the teſtator dies, *C* enters. *A.* by deed releaſes to
" *B.* all his right, *&c.* with warranty; *B.* deviſes *Blackacre* to *D.*
" his wife, and dies in the life of *C.*, and before the legacies
" paid; then *C.* dies, and *A.* enters into *Blackacre;* and if this
" entry was lawful, was the queſtion? One point was, if this
" limitation of a fee after a fee were good; and *Pell* and *Brown's*
" caſe was cited to ſhew that it was, and that it ſhould operate
" as a future executory deviſe; as, when one deviſes, that if
" his ſon and heir die before marriage, or twenty-one, that then
" *J. S.* ſhall have the land, this is good as an executory deviſe.
" But this point was not adjudged; becauſe they all agreed, that
" be it a condition or not, the releaſe of *A. has diſcharged it,* as

Co. 1048. Lampett's caſe. Cro. Eliz. 863. Brome v. Car.

" in *Lampett's* caſe, and that this *was without queſtion an intere*
" in *A.*, though not executed; and this releaſe with warranty
" barrs *A.* And the deviſe of *Blackacre* to *B.* is upon condition,
" and this deſcending upon *A.* is without queſtion barred by his
" releaſe. Note; theſe limitations ſeem to be all good for the

2 Leon. 68. 3 Leon. 115. Brian and Cawſen.

" reaſons mentioned in the preceding caſe: but *quære.*

" One having three ſons, *A.*, *B.*, and *C.*, and being ſeiſed of
" copyhold lands which he had ſurrendered to the uſe of his will,
" deviſes *Blackacre* to *A.*, *Whiteacre* to *B.*, and *Greenacre* to *C.*
" *and if the ſaid* A., B., *or* C. *live till they be of lawful age, and have*
" *iſſue of their bodies lawfully begotten, then I give the ſaid premiſes*
" *to them and their heirs in manner aforeſaid, to give and ſell at their*
" *pleaſure; but, if it fortune one of them to die without iſſue of his*
" *body lawfully begotten, then I will that the other brother or brothers*
" *have all the ſaid premiſes in manner aforeſaid; and if it fortune the*
" *third to die without iſſue in the like manner, then I will that the ſaid*
" *premiſes* be ſold by my executors, *and the money given to the poor.*
" The teſtator dies: *A.*, *B.*, and *C.* are admitted to their parts.
" *A.* attains full age, and hath iſſue: *A.* ſurrenders his part
" the whole to the uſe of *B.* and his heirs, who is admitted accor-
" ingly: *B.* attains full age: then *A.* dies, and *B.* dies without
" iſſue. It was adjudged, that no eſtate tail was created by his
" will, but the fee ſimple veſted and ſettled in them when they
" came to their lawful age and had iſſue; and that the words
" *if they live till,* &c. are words of condition, and no implicati-
"

" to make an eſtate tail, and then the diſpoſition over upon ſuch " condition, &c. viz. *if the third died without iſſue*, is void, being " not confined to any time certain; and therefore as to *C.*'s part, " he dying within age, and without iſſue, this came to *A.* and *B.*; " then *A.* living to full age and having iſſue, his ſurrender of " *Blackacre* and the moiety of *Greenacre* to *B.* was good; and " when *B.* after died without iſſue, though of full age, yet, as " to his own part, which was *Whiteacre* and the moiety of *Green-* " *acre*, this belonged to the heir at law of the deviſor (the ex- " ecutors who ſhould ſell being dead before). But, as to *Black-* " *acre* and the other moiety of *Greenacre*, theſe belonged to the " heirs of *B.*, as being *A.*'s part, who lived to twenty-one, and " had iſſue, and therefore had the fee, and by his ſurrender to " the uſe of *B.* made *B.* a good title thereto, which belonged to " his own heirs, and not to the heirs of the deviſor.

" One having three ſons, *A.*, *B.*, and *C.*, and alſo three daugh- Cro. Eliz. " ters, and being ſeiſed of *Blackacre*, *Whiteacre*, and *Greenacre*, 497. " deviſes all to his wife for life, and after her death that *Black-* Mo. pl. 656. " *acre* be to *A.*, *Whiteacre* to *B.*, and *Greenacre* to *C.*; and if Bacon v. " one or two of his ſons die, that then his or their parts ſhould Hill. " be to the ſurvivors; and deviſes to his three daughters 10*l.* each, " to be paid out of his lands by every of his ſons, as ſoon as they " ſhould enter their parts, after the death of the mother, provided " *that if it fortune any of my ſaid ſons to marry and have iſſue before* " *he enters his part, then I will, that his part ſhall remain to the heir* " *of his body and not to remain to his other brothers as aforeſaid.* " The teſtator dies; then the wife dies, and the ſons enter, and " after *B.* dies having iſſue the defendant; and then *A.* dies " having iſſue the plaintiff. It was adjudged for the plaintiffs, " for the firſt words gave them but an eſtate for life, and the " laſt clauſe gives no eſtate tail, unleſs they had iſſue and died " before entry, which is a condition precedent to the veſting of " the tail; and though 10*l.* a piece be deviſed to be paid out of *Supra.* " their parts; yet that ſhall not enlarge their eſtates by impli- " cation, againſt the expreſs words.

" *A.* ſeiſed of lands in fee, having a brother named *B.*, who 2 Keb. 189. " had iſſue *C.* and *D.* his ſons, and *E.* his daughter, by will de- 192. 261. " viſes to *B.* his brother, if he were living at the time of his de- Wright v. " ceaſe, and his heirs; and if *C.* were living at the time of his Hiccocks. " death, and *B.* then dead, then he deviſes to *C.* and his heirs; " and after deviſes to *D.* in the ſame form; and if no iſſue male " be left from *B.*, and that *E.* daughter of *B.* ſurvive, and outlive " *B.*, *C.*, and *D.*, and it ſhould happen ſhe only ſhould be alive at " the time of his death, then he gave to her and her heirs; *and if* " B., C., D., *and* E. *die, ſo as no iſſue remain to* B., *then I will that* " F. (*a ſtranger*) *ſhall inherit as aforeſaid*, be it that it happen my " *ſaid brother* B. *to die without iſſue, either before my death, or at* " *any time after*; and dies. *B.* ſurvived him, then *C.* died, leaving " iſſue two daughters, the plaintiffs, and after *B.* died, and if *D.* " or the daughters of *C.* ſhould have the land was the queſtion?

" and the better opinion ſeems for the daughters; for when it " was deviſed to *B.* and his heirs, if he were living at the time of " the death of *A.* the deviſor, and he was ſo living, though theſe " words give him a fee upon the happening of the contingency, " *viz.* his ſurviving *A.*, and ſo to the others; yet, by the words " after, if *B.*, *C.*, *D.*, and *E.* die without iſſue, either before his " death or after, generally, without confining ſuch dying without " iſſue to any time certain, theſe words, in a will, plainly ſhew " what heirs of *B.*, and ſo of the reſt, the teſtator meant, *viz.* the " iſſue of their bodies generally, and ſo make an eſtate in tail " general to *B.*; and, by conſequence, it muſt go to the daugh- " ters of *C.*, his ſon and heir, before it can go to *D.* or *E.*, the " youngeſt ſon and daughter of *B.*, or to *F.* And the words, *if* " *no iſſue male be left of* B., do not give an eſtate in tail male ſo " as to go to *D.*, the youngeſt ſon, upon the death of *C.* with- " out iſſue male of *B.*, and to be fulfilled in the life of *A.* the " teſtator before the deviſe to any of them can take effect; and, " by conſequence, cannot operate to qualify any eſtate before " given, becauſe no eſtate is before given that can take place till " after the death of *A.* the teſtator, though they operate to make " the veſting of the remainder to *E.* contingent, and to take only " upon failure of iſſue male of *B.* in the life of *A.* the teſtator; " and then the firſt deviſe to *B.* and his heirs, if he be living at " the time of the death of *A.* can be reſtrained and qualified " only by the laſt clauſe, which gives it to *K.* in caſe *B.*, *C.*, *D.*, " and *E.* die, ſo as no iſſue be left of *B.*, *be it that* B. *die without* " *iſſue, either before or after*, which words give an eſtate in tail ge- " neral to *B.* by implication, and, by conſequence, the daughters " of his eldeſt ſon are to be preferred, and *D.* and *E.* can only " come in after either, by virtue of the limitation made to them " immediately, or as the next branch of the iſſue of the body of " *B.* And if it had not been for the laſt clauſe, which governs " and goes through all the preceding limitations, then, by the firſt " clauſe, which gives it to *B.* and his heirs, if he were living at " the death of *A.*, the whole fee would have veſted in *B.* upon " the happening of that contingency, and, by conſequence, all " the limitations after which were to ariſe, but upon failure of " the firſt, would have been prevented and deſtroyed: and it is, " in effect, no more now than a deviſe to *B.* and his heirs, if " he ſurvive the teſtator; and if he die without iſſue, either in " the life of the teſtator or after his death, then to *F.*, &c. " which is a plain entail, and the remainders are all good, for all " the contingency that is in the caſe is precedent to the veſting of " any eſtate at all; and had it not been for the laſt words, *be it* " *that* B. *die without iſſue*, the limitation over to *F.* had been " totally void, and which-ſoever of the deviſees had been living " on *A.*'s death had taken the whole fee. And if the words, " *no male iſſue be left of* B., ſhould create an eſtate in tail male to " *B.*, then the words after, *be it that it happen* B. *to die with-* " *out iſſue, either before or after my death*, would not enlarge the

" eſtate

" eſtate in tail male before given, and make it an eſtate in " tail general to give it by way of remainder to the iſſue female " of *B.*, as has been adjudged; and ſo the iſſue female would be " quite excluded, which would be againſt the intent of the will, " which was, that *F.* ſhould not take till the failure of iſſue " of *B.* Dyer, 171. Mo. 13. Frencham's caſe.

" *A.*, ſeiſed in fee, makes a feoffment in fee to the uſe of him- " ſelf for life, remainder to the feoffees for 80 years, if *B.*, and " *C.* his wife ſo long live, and if *C.* ſurvive *B.*, then to the uſe " of *C.* for life, and after her death to the uſe of the firſt ſon of " *B.* and *C.* in tail; and for default of ſuch iſſue, to the uſe of " *D.* and *E.* and the heirs of their bodies, remainder to the right " heirs of *A.*; then *A.* dies, and *C.* dies, leaving a ſon, who dies " without iſſue, and thereupon *D.* and *E.* enter and make a leaſe " to the plaintiff, upon whom the defendant, as ſon and heir of " *A.*, enters: and if the remainder in tail to the firſt ſon of *B.* " and *C.*, and the remainder to *D.* and *E.* were executed, or were " contingent upon the eſtate for life to *C.* was the queſtion? and " adjudged, that they were executed and not contingent; for " though the eſtate for life to *C.* was contingent, *viz.* if ſhe ſur- " vived her huſband; yet this ſhall not hinder the veſting of the " remainders limited after, but they ſhall take place in the perſons " *in eſſe*; and when that contingency happens, they, being limited " by way of uſe, ſhall open to let in the contingent remainder to " the wife. And a caſe is there cited of the Earl of *Derby*, where " a feoffment was made to the uſe of *A.* in tail, remainder to the " feoffees for eighty years, if *B.* ſo long live; and after his de- " ceaſe, to the uſe of *C.* and the heirs male of his body, remain- " der to the uſe of *D.*; and adjudged, that the remainders veſted " preſently, and that the poſſibility of *B.*'s outliving the eighty " years, and ſo there would be no particular eſtate to ſupport " the remainders, which are not to take effect till his death, " that yet this poſſibility would not make the remainders con- " tingent. *Quære* of theſe caſes. Hutt. 118. Napper v. Saunders. Earl of Derby's caſe. [So, it was ſaid by Hale, C. J. in the caſe of Weale v. Lower. (Pollexf. 67.) that if a feoffment be made to the uſe of *A.* for 99 years, if he ſhall ſo long live, and after his death to the uſe of *B.* in fee, this ſhall not be contingent, but it ſhall be preſumed his life will not exceed 99 years; but that it had been otherwiſe, if it had been made but for 21 years.— In a caſe of this nature in Chancery, (Beverley v. Beverley, 2 Vern. 131.) where *A.* deviſed lands to *B.* his eldeſt ſon, for the term of 60 years, if he ſhould ſo long live, and from and after his deceaſe to his grandſon *D.* (ſon of the ſaid *B.*) in tail. *B.* and *D.* ſuffered a recovery; an objection was taken to the recovery, for that the deviſe to *B.* being only for 60 years if he ſhould ſo long live, and after his deceaſe to *D.*, the freehold during the life of *B.* was in abeyance. It was argued that the limitation of the eſtate-tail was good, executant on the term of 60 years; and Lord Derby's caſe was cited, as in point, that the deviſe over, from and immediately after the deceaſe of *B.*, ought to be intended of his dying within the term; which was highly preſumable, *B.* being then upwards of 40 years of age. But the court ſaid, it would be hard to make ſuch conſtruction on the words of the will, as to ſay, where land is limited to a man for 60 years, if he ſhall ſo long live, and from and after his deceaſe to another, that it muſt be meant from and after his deceaſe *within the term*; for ſuppoſe he out-lived the term, ſhould the remainder-man take in the lifetime of the firſt deviſee? That would be a conſtruction contrary to the words and intention of the teſtator. *Vide* Fearne's C. R. 24. 4th edit.]

" *A.*, ſeiſed in fee, having iſſue two ſons, *B.* and *C.*, deviſes lands " to *B.* for fifty years, if he ſhould ſo long live, and after the " determination thereof, then to the heirs male of the body of " *B.*; and for want of ſuch iſſue to *C.* in tail, remainder to his " own right heirs, and dies: *B.* enters, and ſuffers a common " recovery, to the uſe of himſelf for life, and to the heirs male 4 Mod 255. Goodright v. Coniſh.

" of his body, remainder to the defendant and his heirs, and then
" dies without iſſue: *C.* enters, and if *B.* had an eſtate-tail
" was the queſtion? for then the recovery barred that, and the
" remainder to *C.* It was argued for *C.*, that *B.* had no eſtate-
" tail; for, firſt, he having but an eſtate for years, this cannot ſo
" cloſe with the remainder to the heirs male of his body as to
" make an eſtate-tail in himſelf. Secondly, he ſhall not have an
" eſtate for life by implication to make out ſuch an entail, be-
" cauſe he hath an eſtate but for years by expreſs limitation; and
" without an apparent intent of the teſtator, no other eſtate ſhall
4 Leon. 21. " be raiſed by implication. Thirdly, this cannot be good by way
" of remainder to the heirs male of his body, becauſe this would
" be a contingent remainder of the freehold and inheritance
" which an eſtate for years is not ſufficient to ſupport. There-
" fore, Fourthly, this is an executory deviſe to the heirs male of
" the body of *B.*; as if one covenant to ſtand ſeiſed for twenty
" years, remainder to the heirs of the body of the covenantor,
" this is an executory remainder, and not to be barred by a
" common recovery. For the defendant it was urged, that
" ſuch conſtruction ought to be made, that all the will may
" take effect; and it is a known rule in law, that it ſhall never
" be conſtrued an executory deviſe, if it will admit of any other
" conſtruction; and therefore this ſhall be conſtrued an eſtate-
" tail in *B.* and an eſtate for life, raiſed by implication to him
" by reaſon of the words, *for want of ſuch iſſue*, which of them-
" ſelves make an eſtate-tail in a will. And there is no dif-
" ference, whether thoſe words follow an eſtate for life or years
" if the limitation be to the heirs. And now *B.*, being heir at
" law, ſo much of the old inheritable eſtate ſhall ariſe to him by
" implication as may make him tenant for life, and then he hath
" an eſtate-tail executed in him; and to conſtrue it an executory
" deviſe would be to introduce a perpetuity above the power of
" a common recovery to dock; and the court held—This could
" not be good as an executory deviſe, for then the limitation
" over would be void; (*quære* of this reaſon;) therefore it muſt be
" a contingent remainder, and then it is void, becauſe the eſtate
" for years is not ſufficient to ſupport it. Note; then it follows
" that afterwards judgment was given for the plaintiff, *viz.* for
" which proves, that they held it no eſtate-tail in *B.*; for then
" by the recovery, that and the remainder to *C.* would have been
" barred, and, by conſequence, it would have been adjudged for
" the defendant who claimed under the recovery. Secondly, this
" proves, that it was held an executory deviſe, if the reaſon
" there given be good, that then the remainder over would be
" void; which I ſhould think is a *non ſequitur*; for if it were an
" executory deviſe to the heirs male of the body of *B.*, yet
" would only give them an eſtate-tail, which will bear a remainder
" over; but, being a contingent remainder, and *B.* having only
" an eſtate for years, the recovery was a forfeiture of *B.*'s eſtate
" for years, whereof *C.*, who was next in remainder, for want of
" iſſue male of *B.*, may at any time take advantage by entry.
" T

Caſes in Parliament, 137. Lloyd and others v. Carew.

" The laſt caſe I ſhall here mention, to ſhew how far a limita-
" tion after a fee has been carried, was, in ſhort, but thus: *A.*
" and *B.*, two ſiſters, ſeiſed of lands in fee for 4000*l.* paid *A.* by
" *C.*; and in conſideration of a marriage intended, and after-
" wards had between *B.* and *C.* by leaſe and releaſe, convey all
" their lands to the uſe of *B.* and *C.* for their lives, remainder to
" their firſt and other ſons in tail male ſucceſſively, remainder to
" the daughters of *B.* and *C.* in tail, remainder to the right heirs
" of *C.*, provided that, if there be no iſſue between *B.* and *C.*
" living at the death of the ſurvivor of them, and that the heirs
" of *B.* ſhould, within twelve months after the death of *B.* and
" *C.*, dying without iſſue as aforeſaid, pay to the heirs or aſſigns
" of *C.* 4000*l.*, then the remainder in fee ſo limited to *C.* and
" his heirs ſhould ceaſe, and that then the premiſes ſhould remain
" to the right heirs of *B.* for ever. Afterwards *B.* and *C.*, for
" extinguiſhing any other right or title which *B.* or her heirs then
" had, or after might have, by any ſettlement, proviſo, *&c.* on
" payment of 4000*l.* or otherwiſe to the heirs of *C.* levy a fine
" of the ſaid lands to the uſe of *C.* and his heirs, and direct the
" truſtees of the firſt ſettlement to convey accordingly: then *C.*
" deviſes the ſaid lands to *D.* his brother, ſubject to his debts,
" which were near 5000*l.*, and after *B.* and *C.* die without iſſue,
" and *A.*, the ſiſter and heir of *B.*, brings a bill in Chancery
" againſt *D.*, the brother and heir of *C.*, and againſt the truſ-
" tees, to have the conveyance of the lands, on payment of
" 4000*l.*, purſuant to the proviſo. And this bill being diſmiſſed,
" an appeal was brought in parliament, and for the defendant or
" reſpondent it was inſiſted, that the proviſo was void, the fee
" being before limited to *C.* and his heirs, and ſo not capable of
" a further limitation, unleſs to happen in the life of one or more
" perſons in being at the time of the ſettlement, which is the
" furtheſt the judges have ever gone in allowing contingent limit-
" ations upon a fee: and if they ſhould be extended to contin-
" gencies to happen within twelve months after the death of one
" or more perſon or perſons in being, they may as well be ex-
" tended to contingencies to happen within 1000 years, and ſo all
" the inconveniencies of a perpetuity will be let in, and the
" owner of the fee ſimple, thus clogged, will be no more
" capable of providing for the neceſſities and accidents of his
" family, than a bare tenant for life. Secondly, if this limita-
" tion were good, then the eſtate limited to the heirs of *B.*
" were virtually in her, and her heirs muſt claim by deſcent
" from her and not as purchaſers; and then that eſtate is barred
" by the fine, the deſign of limiting ſuch power to the heirs not
" being to exclude the anceſtor; but becauſe the power could
" not, in its nature, be executed till after the death of the ance-
" ſtor, it being to take effect upon a contingency that was not to
" happen till after that time, and that, by this means, *C.* would
" not only have no portion with *B.*, but *D.*, his brother, would
" loſe all the money he paid for the debts of *C.*, which were
" charged on the ſaid lands. For the appellants it was urged,

" that

" that the proviſo was not void, that it was within the reaſon of
3 Chan. Ca. 31, 32. 36. " the contingent limitations allowed in the Duke of *Norfolk*'s
" caſe, where it is ſaid, that future intereſts, ſpringing truſts, or
" truſts executory, and remainders that are to ariſe upon contin-
" gencies, are quite out of the rule and reaſons of perpetui-
" ties, if they are not of remote conſideration, but ſuch as will
" ſpeedily wear out: that though there can be no remainders li-
" mited after a fee ſimple, yet there may a contingent fee ſimple
" ariſe out of the firſt fee: that the *ultimum quod ſit* of a fee upon
" a fee is not yet plainly determined; that there could not, in any
" reaſon, be any difference between a contingency to happen dur-
" ing a life or lives in being, and within one year after, the reaſon
" of allowing them to be good, if confined to lives in being, or
" upon their extinction, was becauſe no inconvenience could fol-
" low; and the ſame rule will hold to a year after: and that the
" true rule to ſet bounds to them is when they prove inconve-
" nient, and not otherwiſe: that this ſettlement was made by
" good advice. Secondly, that the fine could not bar the benefit of
" this proviſo, becauſe the ſame never was nor could be in *B.*
" who levied it; and the decree of diſmiſſion was reverſed.
" Note; Mr. *Pooley*, who argued this caſe, added alſo this reaſon
" that if the proviſo had been, that if *B.* die without iſſue living
" at the death of the ſurvivor of them, then if the heirs of *B.*
" do, upon the death of ſuch ſurvivor without iſſue, pay 1000 *l.* to
" the heirs of *C.*, then, *&c.*; this, you agree, had been good, but
" being extended to a year after, it is otherwiſe, and may as well
" be 4000 years after: to this he ſaid, if the proviſo had been
" ſo worded, it would have been impoſſible to have been per-
" formed; for then the heirs of *B.*, who could not be known till
" her death would have been obliged to have carried alway
" 4000 *l.* about them ready to pay, and to have the heirs of *C.*
" who likewiſe could not be known till his death, always ready
" to receive it upon the inſtant of the death of the ſurvivor.
" And it might happen, that neither the one who was ready to
" pay it, nor the other who was ready to receive it, might be
" heirs of *B.* and *C.*, and ſurely when the heirs of neither could
" be known till their deaths, twelve months was but a reaſon-
" able time to procure and pay ſo great a ſum as 4000 *l.* Which
" argument ſhews, that the limitation of a fee after a fee upon
" contingency, to happen within one or more life or lives in being
" or upon their deaths, being allowed to be good, may be ex-
" tended further, when, as the limitation may happen to be,
" would be inconvenient, and impoſſible to be performed within
" ſuch a time; and that inconvenience is to be the only bound to
" theſe limitations. But here it is ſo far from being inconvenient
" that it would be inconvenient and impoſſible to be performed
" otherwiſe.

1 Lev. 135. 1 Sid. 153. Raym. 162. 1 Keb. 567. &c. Snow v. Cutler.

" Huſband ſeiſed of lands to the uſe of himſelf and his wife
" and the heirs of the huſband, by will deviſes thus: *The land*
" *which are* A.*'s for life, I deviſe them to the heirs of the body of*
" *wife, if they ſhall be of the age of* 14 *years at her death.* The

" viſor dies without iſſue: the wife hath iſſue by a ſecond huſ-
" band: then ſhe and her huſband ſuffer a common recovery; and
" then the wife dies, the iſſue being about 14 years of age. And
" two queſtions are made: 1ſt, If this deviſe to the heirs of the
" body of the wife was good? And in this caſe the court was
" divided; for by two juſtices this is void, being a preſent deviſe
" to the heirs of the body of the wife, who being alive could not
" have heirs: and ſo it is, as if a deviſe were to the heirs of *J. S.*
" who is living, which is clearly void: And though *J. S.* had an
" eſtate for life, as the wife had here, yet the deviſe would not
" be good, becauſe it is not by way of a remainder, but is a
" diſtinct preſent deviſe. And it was ſaid, that this was a con-
" tingency upon a contingency, *viz.* If the wife ſhould have heirs
" of her body, and alſo if they ſhould be 14 years of age at her
" death; and therefore not to be allowed. But it was held by
" two other juſtices, (and, as it ſeems, it is the better opinion,) that
" the deviſe was good as an executory deviſe. They agreed to the
" caſe of the deviſe to the heirs of *J. S.* though he had an eſtate
" for life, becauſe intended a preſent deviſe without other words:
" but, when the intent appears, that it ſhall take effect *in futuro*,
" it is otherwiſe. And here the deviſor recites, that the lands
" were his wife's for her life, and therefore he did not intend the
" deviſe to take effect till after her death; as, when lands are de-
" viſed to *A.* after the death of *B.*, or to the heir of *J. S.* which
" ſhall be born, theſe are good executory deviſes, and the land
" ſhall deſcend in the mean time to the heirs at law of the de-
" viſor. So, a deviſe to a perſon that ſhall marry his daughter, *&c.*
" And in caſe of executory deviſes, it is not neceſſary there ſhould
" be a deviſee *in eſſe* at the death of the teſtator; and the contin-
" gency is frequent and ordinary, and confined to one life, and
" ſo not within the danger of a perpetuity, as it would be, if it
" were after ſuch a one's death without iſſue. And all the court
" held clearly, that if the deviſe were good at all, it muſt be as
" an executory deviſe, and not as a remainder; for though the
" wife hath an eſtate for life, yet this is a new original deviſe, to
" take effect after her death, and not as a remainder joined to her
" eſtate. Alſo, as to the ſecond point all held, that if this was
" an executory deviſe, it was not barred by the common recovery,
" according to *Pell* and *Brown*'s caſe; for it hath no exiſtence at
" all till the contingency happens, and therefore there can be no
" recompence in value; for a valuation cannot be put upon that
" which is not.

" Huſband ſeiſed of lands in fee, in right of his wife, he and
" his wife by indenture covenant to levy a fine to the uſe of the
" heirs of the huſband upon the body of the wife to be gotten,
" remainder to the right heirs of the huſband: the fine is levied
" accordingly, and after they have iſſue a ſon, who died without
" iſſue in the life of the baron and feme; and then the feme
" dies; and after the huſband dies without iſſue: and if the heirs
" of the huſband, or the heirs of the wife ſhould have the land,
" was the queſtion? And for the heirs of the huſband it was ar-
" gued

4 Mod. 153. Caſes in Parliament, 104. Davis v. Speed. [Fearne's C. R. 63. 428. S. C.]

" gued, that this ſettlement being by way of uſe, was like a will t
" be conſtrued according to the intent of the parties: and there
" the huſband would have an eſtate for life by implication, which
" being united to the eſtate limited to the heirs of his body, i
1 Mod. 98. " would make an eſtate-tail in him: and for this was cited *Pibu*
321. 159. " v. *Mitford*, where upon a covenant to ſtand ſeiſed to the uſe o
226. 237. " the heirs male of his body, on the body of his ſecond wife, it wa
2 Mod. 207. " adjudged, that this limitation carried an uſe to himſelf, in whom
1 Leon. 75. " all his heirs were included; and therefore, he having an eſtat
Raym. 228. " for life by implication, till the future uſe came *in eſſe*, made th
318. " whole an eſtate-tail in himſelf: ſo here. And though th
3 Keb. 129. " eſtate here was the wife's, yet ſuch uſe to the huſband migh
139. " well ariſe by implication, becauſe both joined in the deed an
1 Ro. Rep. " fine, though it could not reſult back to the huſband, becauſ
240. " he had none before. Beſides, it was urged, that he had an eſtat
" for life as tenant by the curteſy. 2dly, If no eſtate ariſes to th
" huſband by implication, yet it ſhould be good to the heirs of hi
" body by way of ſpringing uſe, and the eſtate, in the mean time
" ſhould remain in the feme and her huſband, till the death of th
" huſband: and that it was no more, than if the deed had de
" clared the uſe after 20 years, or other future time, to the heir
" of the body of the huſband. But on the other hand it was ar
" gued and adjudged, that here being no particular eſtate to ſup
" port this laſt remainder, it was void, and then the fine was t
" the uſe of the wife and her heirs, ſhe being owner of the eſtate
" that here was no particular eſtate was plain, becauſe the heir
" of the body of the huſband were limited to take preſently, an
" that during his life they cannot do. 2dly, If it was intended th
" heirs of the body of the huſband ſhould take *in futuro*, that ther
" muſt be an eſtate ſomewhere to ſupport the limitation till
" could take effect: that here was no ſuch eſtate to the huſban
" expreſſed; and implied it could not be, for if any eſtate ſhou
" ariſe by implication, it muſt be to the wife who was owner
" the whole; and then, ſhe dying before her huſband, there aga
" an eſtate was wanted to ſupport the remainders during his lif
" That this was a caſe of a deed executed in the life of the pa
" ties, and not of a will where large allowances are made in f
" vour of ſuppoſed intentions by reaſon of perſons being ſurpri
" by ſickneſs and wanting counſel; but the rules of law alwa
" govern in conſtruction of deeds. That the notion of a ſprin
" ing contingent uſe is hardly intelligible in itſelf, and by
" means applicable in this caſe; becauſe no words here have
" relation to a future time or contingency; and to allow ſuch
" mitations in deeds, would make them as uncertain as wills, cr
" ate intentions not expreſſed, raiſe uſes by implications never i
" tended, and in ſhort deſtroy all the difference between good a
" bad conveyances; produce a confuſion in property, and rend
" all purchaſes unſafe and precarious. And therefore the jud
" ment for the heirs of the wife was affirmed.

Vau 259. " One having iſſue a ſon who was heir apparent, and t
261. 270. " daughters, deviſes in theſe words, *If it happen my ſon* B. *and*
271. " *t*

" *two daughters to die without iſſue of their bodies lawfully begotten,* Gardner v.
" then all my lands ſhall be and remain to my nephew *D.* and Sheldon.
" his heirs for ever. The deviſor dies, and it was held, that
" here was no expreſs eſtate given; nor was there any by impli-
" cation; becauſe then it muſt be either a joint eſtate for life,
" with ſeveral inheritances in tail, or ſeveral eſtates-tail in ſuc-
" ceſſion one after another. The laſt it cannot be, becauſe un-
" certain which ſhall take firſt, which next. And the firſt it ſhall
" not be, becauſe the heir at law ſhall not be diſinherited without
" a neceſſary implication, which in this caſe there is not: for it is
" only a deſignation and appointment of the time when the land
" ſhall come to the nephew; as if he had deviſed thus: *I leave my*
" *land to deſcend, or I give my land to my ſon and his heirs, till he and*
" *my two daughters die without iſſue, or ſo long as any heirs of the*
" *body of him and my two daughters ſhall be living, and then, or for*
" *want of ſuch heirs, I deviſe the ſame to my nephew:* this is good
" as a future and executory deviſe, and in the meantime the land
" ſhall deſcend to the heir at law, he having made no diſpoſition
" thereof. So, a deviſe that *J. S.* ſhall have his lands after 20
" years, *&c.* is good for the ſame reaſons.

" One by will deviſes thus: *I give to my daughter* A. *my lands* 2 Saund.
" *in* B., *if my ſon* C. *happen to have no iſſue male, after the death of* 111.
" *my wife; and if my ſon* C. *have iſſue male, then the ſaid* A. *to* 1 Sid. 445.
" *have* 5 l. *only, in lieu of the ſaid lands;* and dies: *C.* hath iſſue 2 Keb. 600.
" male: the wife dies: and after that, the iſſue male dies without Allen v.
" iſſue; and then *C.* dies: and one doubt was, if *A.* ſhould have Rivington.
" an eſtate for life by the deviſe, becauſe at the time of the death
" of the wife *C.* had iſſue male, though that iſſue after failed, *viz.*
" If this was a remainder to *A.*, or a contingent, or conditional
" deviſe? And it was ſaid, that if I deviſe lands to *J. S.* if my *Supra* 761.
" ſon die without iſſue, that this is a conditional deviſe, and *J. S.*
" hath nothing till the contingency happens. (But *quære* of that
" caſe, for that deviſe tends to a perpetuity, and therefore is not
" to be allowed?) And the court were of opinion, that the deviſe
" was conditional, and that *C.* having iſſue male at the time of
" the death of the wife, *A.* is only to have the 5 *l.* and not the
" land. Note alſo; *Keeling* was of opinion, that this was an
" eſtate-tail in *C.*; but *Twiſden contra*, that nothing was given to
" *C.* more than to a mere ſtranger. And this ſeems moſt com-
" ſonant to the caſes before mentioned. And then it was no
" more than an executory deviſe to *A.*, if the ſon died without
" iſſue, which gives no more eſtate to the ſon, than if he were a
" ſtranger; nor alters any eſtate which the law gives him, if he
" were heir at law. But by reaſon of the words, *If he have no*
" *iſſue male after the death of the wife; and if he have, then* A. *to*
" *have* 5 l. *only;* theſe words make the executory deviſe to *A.*
" conditional; and in this caſe the ſon having iſſue after the death
" of the wife, whereby the 5 *l.* became due, *A.* cannot after have
" the land, though that iſſue fails; becauſe a recompence was
" provided for each ſide of the contingency; and when one has

" taken

" taken place, the other is ſhut out, as if it had not been men-
" tioned.

2 Mod. 289. Taylor v. Byddall.

" *A.* hath iſſue *B.* her ſon by a firſt huſband, and *C.* and *D.*
" her ſon and daughter by *E.* a ſecond huſband. *F.* the brother
" of *A.* being ſeiſed in fee of lands, deviſes them to *A.* his ſiſter
" and heir for ſo long time, and until her ſon *C.* ſhould attain his
" full age of 21 years, and after he ſhall have attained his ſaid
" age, then to him and his heirs for ever; and if he die before
" his age of 21 years, then to the heirs of the body of *E.* and to
" their heirs for ever, as they ſhould attain their reſpective ages
" of 21 years. *F.* dies, and *C.* dies, and the queſtion was, if *B.*
" as heir to *A.*, or *D.* either as heir to *C.* her brother, or as heir
" of the body of *E.* ſhould have the land? And for *B.* it was ar-
" gued, that nothing veſted in *C.* till he attained 21, but the free-
" hold and inheritance in the mean time deſcended to the heir at
" law of *F.*, for *A.* had but an eſtate for years, *viz.* till *C.* attained
" 21: then *A.* having but an eſtate for years, and *C.* nothing till
" 21, the fee muſt in the mean time deſcend to the heir at law of
" *F.*, and there it ſhall continue, becauſe the contingency never
" happened, *C.* dying before 21. Alſo, the deviſe to *C.* being
" but contingent, *viz.* if he attained 21, the eſtate for years of *A.*
" was not ſufficient to ſupport it; and for that reaſon it was void.
" And *D.* cannot take as heir of *C.*, and then the land deſcends to
" the heir at law of *F.* 2dly, *D.* cannot take by the deviſe to the
" heirs of the body of *E.*, for admitting it to be an executory de-
" viſe, yet *E.* her father being alive when it was to veſt, there is
" no perſon within the deſcription to take it, for *non eſt hæres vi-*
" *ventis;* and there alſo it deſcends to the heir of *F.*, which is
" the plaintiff. But for *D.* the defendant it was argued, that the
" fee veſted preſently in *C.*, there being only an eſtate for years in
" *A.;* and they relied upon *Boraſton*'s caſe, where there was a li-

3 Co. 19. Boraſton's caſe.

" deviſe: and there, from *C.* it deſcended to *D.* as his ſiſter and
" heir. 2dly, If not as heir to him, yet as heir of the body of
" *E.* by way of executory deviſe, which needs no particular eſtate
" to ſupport it; for though *E.* her father was living at the death
" of *C.*, yet he was dead before *D.* attained 21, when only ſhe was
" to take; and the eſtate in the mean time deſcends to the heir at
" law of the deviſor; and without making it an executory devi-
" it would be void, being limited after the fee to *C.*, and there-
" fore it cannot be good as a remainder, but the eſtate of *C.* which
" was veſted being now diveſted by virtue of the original condi-
" tion, he dying before 21, it returns to the heir at law of the de-
" viſor till the full age of the heir of *E.*, and until *E.*'s death
" though it be after their full age, and then it is carried over to
" the heir of *C.* by virtue of the executory deviſe.

Cro. Eliz. 668. Smith v. Warren.

" *A.* tenant for life levies a fine *come ceo*, &c. to the reverſio-
" er, to the uſe of the conuſee and his heirs, upon condition to
" pay to *A.* 4 *l.* annually, and that for default of payment it ſhall
" be to the uſe of *A.* for life: the conuſee makes a feoffment over
" and then there is a default in payment of the 4 *l.* And if
" this feoffment the future uſe was deſtroyed, was the queſtion

" A

" And *per cur.*—It is not: for this is a charge or burden upon the " lands, which goes with the lands into whoſe hands ſoever they " come. And one judge thought that it was a condition, being " to ariſe to the conuſee himſelf who levied the fine; but if it had " been to have ariſen to a ſtranger upon condition, the non-per- " formance thereof would have created a ſpringing uſe to him, " for it is merely a tie and charge upon the land which is not de- " ſtroyed by the feoffment."

## (E) Of Remainders that ariſe on Conditions precedent or ſubſequent.

' IT is a maxim frequently urged in our books, That a remainder cannot be limited to begin upon a condition annexed to the ' firſt eſtate, but that for breach of the condition the feoffor or ' leſſor muſt enter, and by that entry, the firſt eſtate being deter- ' mined, the remainder is deſtroyed, becauſe it cannot take effect ' at the inſtant of the determination of the particular eſtate. For ' the remainder paſſing out of the feoffor or leſſor at the ſame time ' that the particular eſtate is created, and being to take effect in ' virtue of the firſt livery, when the feoffor or leſſor re-enters for ' the condition broken, that deſtroys the force of the firſt livery, ' being an act of equal notoriety therewith, and then the remain- ' der which was to take effect thereby can never ariſe, becauſe ' there wants the ſolemnity required by law for that purpoſe.'

[1 Br. 155. a. pl. 83. 253. a. pl. 18. Perk. ſect. 831. Litt. ſect. 721. Co. Litt. 378. Co. 86. 88. Plow. 25. 29. 33. a. 35. 10 Co. 86. b. Dr. and Student. Lib. 2. c. 20. 23. fol. 192. 206. Roll. Abr. 474.]

" But, becauſe the reaſoning holds only where livery of ſeiſin " is requiſite, and yet the law ſeems to be the ſame in other caſes " where no livery is requiſite, as upon a leaſe for years, grant of " an advowſon, common, rent *in eſſe*, &c. therefore it will be " neceſſary to conſider the following diſtinctions, for the better " explanation and underſtanding hereof:

" 1ſt, The firſt diſtinction to be obſerved, is between a condi- " tion and a limitation: and in caſe of the condition, when it pre- " cedes the veſting of the remainder as the cauſe thereof, and is " annexed to the firſt eſtate; and where it is annexed to the firſt " eſtate abſolutely without any regard to the remainder.

" 2d, Between a deed and a will, where in both the ſame words " of condition are made uſe of for the veſting of the remainder.

" 3d, Between a limitation over in ſuch caſe of a will, and " where no limitation is made over.

" 4th, Between remainders that are to ariſe upon conditions " agreeable to the rules of law, and ſuch as are to ariſe upon " conditions repugnant and againſt the rules of the law.

" 5th, Between ſuch words as actually make a condition, and " ſuch as are only deſcriptive of the time and manner when and " how the remainders are to ariſe and take place.

' 1. Between

'1. Between a Condition and a Limitation, and in caſe of the 'Condition when it precedes the veſting of the Remainder a 'the Cauſe thereof, and is annexed to the firſt Eſtate; and 'when it is annexed abſolutely without any Regard to the 'Remainder.'

Co. Litt. 201. 214. 10 Co. 42. Plow. 27. (a) Moor, 292. Co. Litt. 214. Poph. 99. Plow. 413. Cro. Eliz. 414. 10 Co. 41.

"As to the firſt diſtinction between a condition and a limit-"ation," 'a condition is properly ſuch, as goes in abridgment 'and reſtraint of the eſtate firſt given, upon ſomething to be done 'or not done by the perſon who takes the eſtate, or by him who 'makes the eſtate, or to happen during the continuance of the 'eſtate. (a) A limitation is ſuch as limits and circumſcribes the 'eſtate to continue ſo long only, and no longer, than till ſuch a 'thing happens, or till ſuch a thing done or not done by the per-'ſon who takes the eſtate, or any other; ſo that upon the happen-'ing, performance, or non-performance thereof, the eſtate *ipſo* '*facto* determines and expires as certainly as if it had been made 'for life or years; and upon ſuch an eſtate a remainder may be 'limited, as well as after an eſtate for life or years,' "as has "appeared already in part, and will ſo more fully hereafter.

"But in caſe of the condition when a remainder limited there-"after ſhall be good, and when not, depends upon the difference "firſt mentioned: in the one inſtance, the remainder can never "take effect by reaſon of the condition, but in the other, the re-"mainder takes effect preſently, and thereby deſtroys the con-"dition."

Perk. ſect. 830. Co. Litt. 214.

'Therefore, if a man makes a leaſe for life or years of lands, or 'grants an advowſon, common, rent *in eſſe*, &c. to one for life or 'years, upon condition, that if the leſſee or grantee do not pay 'ſuch a ſum of money, that then his eſtate ſhall ceaſe, and that it 'ſhall remain to *B.* for life, years, or in fee; this remainder is void 'for theſe reaſons. Firſt, Becauſe it does not veſt as a remain-'der preſently, but is to ariſe upon breach of the condition only. 'Secondly, Upon breach of the condition it cannot veſt, becauſe 'none can take advantage of the breach thereof, but only the 'party from whom the condition moves, and his heirs. Thirdly, 'When they have taken advantage thereof by entry or claim, the 'particular eſtate is thereby determined, and the leſſor or grantor 'in of his firſt eſtate, as it were *ab initio*, by title paramount the 'eſtate given or granted; and then if the remainder cannot vest 'at the inſtant of the determination of the particular eſtate, it can 'never after take effect, and by conſequence is defeated and 'gone.'

Cro. Eliz. 360. Cogan v. Cogan. [*Vide* Fearne's C. R. 395. &c.]

"This caſe, though I do not find it *in terminis* in the books "ſeems to be well warranted by the caſe following," 'where 'A. ſeiſed of lands in fee, let them to *B.* for life, remainder 'to *C.* for life, provided that if *A.* hath iſſue a ſon during his 'life, who ſhould live to the age of five years, that then the eſtate 'limited to *C.* ſhould ceaſe, and that it ſhould remain to ſuch ſon 'in tail: *A.* hath iſſue a ſon, who lived to the ſaid age, and if the

'remainder limited to *C.* ſhould ceaſe, and the remainder to the 'ſon be good, was the queſtion. And *per totam curiam* it was 'adjudged, that the remainder to the ſon was void: wherein it 'appears *firſt*, That this was properly a condition, becauſe upon 'the happening thereof it was to ſhorten and abridge the eſtate 'before given. *Secondly*, This caſe proves the law to be the ſame 'in caſe of things which lie in grant, as of thoſe which lie in 'livery; for here it was not the particular eſtate that was to ceaſe 'upon the condition, but the remainder, and that lies in grant. 'Thirdly, Though the condition here was not annexed to the firſt 'eſtate, yet it was annexed to the eſtate immediately preceding 'the remainder to the ſon; and ſo to this purpoſe is the ſame as 'if it had been for life, upon ſuch condition to ceaſe and remain 'over. *Fourthly*, It appears that the remainder was not to begin 'but upon the condition performed, and ſo the condition pre-'ceded the veſting of the remainder. *Fifthly*, This caſe proves, 'that none ſhall take advantage of a condition but the leſſor and 'his heirs, and therefore the remainder to the ſon who was a ſtran-'ger could not ariſe thereby. *Sixthly*, That this remainder being 'limited to begin upon a condition precedent, whereof none can 'take advantage but the leſſor and his heirs. is for ever defeated 'and deſtroyed, becauſe it cannot take effect according to the 'terms limited for veſting thereof.

'But now, if one makes a leaſe for life or years, upon condi-'tion to pay ſo much at a day certain, or reſerving rent, and for 'default of payment a re-entry, remainder after the death of the 'leſſee, or after the years, to *B.* for life or in fee; or, if one 'makes a leaſe to *A.* for life, remainder to *B.* in fee, rendering 'rent, with clauſe of re-entry for default of payment by the tenant 'for life, and to retain during his life; in theſe caſes the remain-'der veſts preſently in *B.*, and has no dependance on the condi-'tion for its taking effect. But, if the condition ſhould be broken, 'or the rent arrear, *B.* cannot enter, being a ſtranger; and if the 'leſſor ſhould enter, he would be in of his firſt eſtate by title 'paramount the remainder, and then the particular eſtate being 'determined before the remainder could take effect, the remainder 'would thereby be deſtroyed. But this would be unreaſonable 'that he ſhould deſtroy the remainder which was well veſted by 'his own grant; and ſince every man's grant ſhall be conſtrued 'ſtrongeſt againſt himſelf, and this muſt be to ſupport and make 'good the eſtate he has parted with; therefore by ſuch remainder 'over the condition is deſtroyed, and the power of re-entry gone, 'and then the firſt eſtate is abſolute, with the remainder over; 'and the leſſor has no remedy for the money or the rent, but in 'a court of equity.'

Perk. ſect. 831. Co. Litt. 214. 338. Co. 40. Roll. Abr. 472. Cro. Eliz. 727. 792. Dyer, 127. Doct. & Stud. l. 2. c. 21. [Fearne's C. R. 405. &c.]

'2. Diſtinction between a Deed and a Will, when in both the 'ſame Words of Condition are made uſe of for veſting the 'Remainder.

'Here we muſt obſerve, that though in caſe of a deed, either the condition deſtroys the remainder, or the re-

'mainder the condition, as appears before, yet in a will it is 'otherwiſe.

29 Aſſ. pl 17. Perk. ſect. 563. Plow. 412. Dyer, 127. 10 Co. 40. Roll. Abr. 407. 474.

'Thus, one ſeiſed of lands in fee, deviſeable by cuſtom, by 'will deviſed them to *J. S.* a clerk, upon condition that he ſhould 'be a chaplain, and ſing for the ſoul of the deviſor all his life, 'and that after his death the land ſhould remain to *J. D.* mayor 'of *S* and his ſucceſſors, to find a chaplain perpetually to ſing 'for the ſoul of the deviſor, and dies. *J. S.* being of the age of 'twenty-four years enters, and holds the land for ſix years, and 'is not a chaplain; the heir of the deviſor ouſts him; then *J. S.* 'brings an aſſiſe, and upon the pleading thereto by the heir, and 'all this matter found, the aſſiſe went for the plaintiff; whence 'my Lord *Coke* infers, *that this was no limitation*, becauſe then the 'eſtate of *J. S.* would have been *ipſo facto* determined, and the 'eſtate caſt upon *J. D.* and then *J. S.* could not have recovered; 'ſecondly, That this being a condition, *J. D.* in remainder could 'not enter for breach thereof; and, *thirdly*, Since it was adjudged 'likewiſe againſt the heir that he could not enter for the condition 'broken, therefore the condition by the limitation of the remain- 'der over muſt be deſtroyed. But *Perkins* in citing this caſe 'holds, that for breach of the condition the heir might enter, and 'yet that the remainder ſhould not be defeated thereby, but that 'after the death of *J. S.* it ſhould well take effect; and with him 'agrees *Dyer* in a like caſe, and takes the diverſity between a *re- 'mainder* by *deed* with *livery*, and a *remainder* by *will*; for in caſe 'of the *deed*, the entry for the condition broken *defeats the livery*, 'and, by conſequence, *the remainder* which depends thereon; 'but in caſe of a *will* the *remainder is good*, though the particular 'eſtate never was good, or be defeated before the remainder can 'take effect, which muſt be as *an executory deviſe*, not as a *re- 'mainder*; for then it ought to veſt when the particular eſtate 'ends; and without queſtion, as *an executory deviſe*, ſuch limita- 'tion over *is good*; and therefore, where *Plowden* in citing this 'caſe holds it to be a *limitation*, and not a *condition*, becauſe then 'by the entry of the heir the remainder over would be defeated, 'this reaſon holds not, when by conſtruing it *an executory devi* 'it may be made good, and yet the condition be preſerved.

10 Co. 41. Dyer, 127. Roll. Abr. 472.

'So, where *A.*, ſeiſed of lands in fee, having iſſue three ſons 'B., C., and D., deviſes the lands to his wife for life, *ſub condi- 'tione quod ipſa educabit pueros teſtatoris in eruditione et bonis moribus* 'the remainder to *D.* his ſon in tail, and dies; the wife enters 'and breaks the condition: and if *B.*, as heir, ſhould enter for 'the condition broken, or if *D.* ſhould enter as by limitation, 'if the condition was deſtroyed by the limitation over, were the 'queſtions; *et per totam curiam*, as my Lord *Coke* cites it, it was 'held to be no limitation, becauſe there are expreſs words of con- 'dition; and if it be a condition, then the heir, by his entry for 'breach thereof, would defeat the remainder likewiſe, which is 'not reaſonable; therefore it was held, that by the limitation over 'the condition was deſtroyed. But in *Dyer*, which ſeems to be 'the ſame caſe, it was held *the condition was not deſtroyed*, but the

for breach thereof, the heir ſhould enter, and hold during the life of the wife, and yet that after her death *D.* ſhould have the land, which muſt be by way of *executory deviſe.*

But, however the law might have ſtood when deviſes of lands were not very frequent, it is now ſettled, that, in caſe of a will, the *deviſee in remainder ſhall enter for breach of the condition annexed to the firſt eſtate*, be it deviſed to a ſtranger, or to the heir himſelf. This conſtruction was introduced to ſupport the intent of the teſtator, which otherwiſe, in many caſes, would be totally fruſtrated, and his will ſet aſide: and, to make way for ſuch conſtruction, they held, that, by nonpayment of the ſum, or nonperformance of the thing directed to be done, *the eſtate of the firſt deviſee determined immediately without entry or claim*, and then *the remainder ſucceeded as if there had been no condition* at all; and ſo they changed the condition into a limitation, which determines the eſtate to the firſt, and caſts the poſſeſſion on the ſecond by way of *immediate remainder*. Another reaſon of this conſtruction might be, that ſeeing, by the limitation over, the land was given from the heir at law, and a new heir made, it was now more reaſonable, that this *hæres factus* ſhould take advantage of the condition, who was to have the benefit of the land, than the *hæres natus*, who, by ſuch limitation over, was excluded and ſhut out from inheriting the land; and ſince none can enter for breach of the condition but the heir, and now, by giving him the land, the deviſee is become heir thereof, therefore they conſtrued ſuch *hæres factus* to be the *heir who ſhould enter for breach of the condition.* And this was ſtill more reaſonable, when the firſt deviſee was himſelf heir at law, and was to perform the condition; for, otherwiſe, whether he performed it or not, the remainder could never take place, ſince none could take advantage of the breach thereof but he himſelf who was to perform it; and, by conſequence, the remainder, which was to ariſe upon the breach of ſuch condition, would be prevented and deſtroyed, and the intent of the teſtator eluded*.

*Vide* title Conditions, Letter (H). 2 Mod. 26.

* In other words, it is now agreed, that wherever in a deviſe a condition is annexed to a preceding eſtate, that condition ſhall operate as a limitation, circumſcribing the continuance and meaſure of the firſt eſtate; and that upon the breach or performance of it (as the caſe may be) the firſt eſtate ſhall *ipſo facto* determine and expire, without entry or claim; and the limitation over ſhall thereupon actually commence in poſſeſſion, and the perſon claiming under it, whether heir or ſtranger, ſhall have immediate right to the eſtate. Thus indeed is the teſtator's intention effectuated, by ſubſtantiating the remainder, though limited to a ſtranger; and enforcing the performance of the condition by the determination of the particular eſtate upon the breach of it; notwithſtanding that particular eſtate be limited to the heir himſelf. Plarne, 409. 4th edit. *Vide* Plow. 408. Scholaſtica's caſe, & *infra*, 811.

Therefore, where a copyholder in fee of lands, deſcendible in *Borough Engliſh*, having three ſons and a daughter, ſurrendered his land to the uſe of his will; and after by will deviſed his land to his eldeſt ſon in fee, (for ſo it was conſtrued,) paying to each of his brothers and his ſiſter 40*l.* within two years after his death, and died; the eldeſt ſon was admitted, and did not pay the money within the two years; the youngeſt ſon entered; it was adjudged, that his entry was lawful; for though in a will the word *paying* amounts to a condition, yet, if it ſhould be conſtrued a condition, in this caſe it would deſcend on the eldeſt ſon himſelf, who was to perform it, and alſo take advantage of the breach thereof; and then whether he performed it or not would

Welcock v. Hamond, 3 Co. 20. Cro. Eliz. 204. 2 Leon. 114. cited Cro. Jac. 592. Roll. Rep. 219. and in ſeveral modern books.

'be all one, ſince either way he was to have the land; and ſo the 'youngeſt children would be not only without remedy for their por- 'tions, but there would likewiſe be no penalty upon the eldeſt to 'enforce the payment thereof; which would fruſtrate the intent of 'the teſtator; therefore they conſtrued the deviſe to the eldeſt 'ſon paying, &c., to be a limitation to him till he made default 'of payment only, and no longer; and then by ſuch default, his 'eſtate ceaſing, the nature of the land revives and lets in the 'youngeſt ſon, who was heir by the cuſtom, ſince there was no 'limitation over.

Hainſworth v. Pretty, Cro. Eliz. 319. 833. Moor, pl. 891. Roll. Abr. 411. Vaugh. 271. 2 Mod. 26.

'So, where one, ſeiſed of lands in fee, having iſſue two ſons 'and a daughter, deviſed to his youngeſt ſon and daughter 20*l.* 'a-piece, to be paid by his eldeſt ſon; and deviſed his lands to 'his eldeſt ſon and his heirs, upon condition, that if he did not 'pay the ſaid ſums, that then the land ſhould remain to his young- 'eſt ſon and daughter, and their heirs, and died; the eldeſt ſon 'entered, and did not pay the money; it was adjudged that the 'youngeſt ſon and daughter ſhould have the land; for, *firſt*, 'this deviſe to the eldeſt ſon and heir, being no more than what 'the law gave him, without ſuch deviſe, was void. *Secondly*, if 'this ſhould be a condition, it would be defeated by the deſcent 'on the eldeſt ſon, who was to perform it. Therefore, *thirdly*, 'it was held to be a deviſe to the eldeſt ſon only, or no longer than 'till he failed to pay the ſaid ſums; and then to the youngeſt ſon 'and daughter, which gives them the land by way of *limitation*, 'upon his failing to pay the ſaid ſums. But *Vaughan*, in citing 'this caſe, holds, the deviſe to the eldeſt ſon being void, that then 'it was no more than if he had deviſed, that if his eldeſt ſon did 'not pay ſuch ſums, that then the land ſhould be to the legatees; 'which makes *a good future executory deviſe*, and the land in the 'mean time deſcends to the heir at law, as if no deviſe had been 'made thereof. This conſtruction is well warranted by the caſe, 'and anſwers the purpoſe for which it was cited by *Vaughan*, 'but the other conſtruction, in making it *an actual limitation*, is 'more natural and agreeable to the words and intent of the will.

Leon. 283. Jennor v. Hardie.

'One deviſes lands to *A.* his wife, upon condition that ſhe 'do not marry; and if ſhe marry or die, that then the land ſhall 'remain to *B.* in tail; and if *B.* die without iſſue in the life of '*A.* that then the land ſhall remain to *A.* to diſpoſe thereof at 'her pleaſure; and if *B.* ſurvive *A.*, and after die without 'iſſue, that then the land ſhall be divided betwixt the ſiſters of 'the deviſor, and dies: *B.* dies without iſſue, in the life of *A.*; 'it was adjudged, that *A.* had a fee by the words *to diſpoſe thereof 'at her pleaſure*; and that the remainder to the ſiſters was upon a 'contingent, which never happened, *viz. B.*'s ſurviving *A.*, but 'B. dying before *A.* the deviſe of the fee to *A.* was abſolute. 'And though it was doubted if a remainder might be limited to 'begin upon a condition precedent, annexed to the firſt eſtate, as 'in this caſe it was, yet, being in a will, it was held to be a new 'executory deviſe of the reverſion, if the eſtate had been defeated 'by the precedent condition, and not as a remainder; or at leaſt

'the

'the condition ſhould be conſtrued to amount to a limitation till 'ſhe married; and ſo the remainder would be made good thereby 'upon ſuch determinable particular eſtate.

One deviſes lands, deviſeable to *A.* for life, upon condition that Plow. 27. 414.
'if his heir, to whom the reverſion deſcends, diſturb *A.* or the 'executors of the deviſor of their adminiſtration, that then the 'land ſhall remain to the daughter of the deviſor and her heirs, 'and dies; *A.* dies; the daughter brings a formedon in re-'mainder againſt the ſon and heir of the deviſor, and alleges, 'that he diſturbed *A.* and the executors alſo; and iſſue was 'joined upon it; which proves that the limitation to the daugh-'ter was good as an executory deviſe, to take effect upon ſuch 'diſturbance; and the fee, in the mean time, deſcended to the 'heir; and the book adds, that this could not be a condition, be-'cauſe then, by the deſcent to the eldeſt ſon, who was to perform 'it, it would be deſtroyed.'

"This is true; but this in ſtrictneſs was no manner of condi-"tion, but only a deſignation of the time when, and the manner "how, the future executory deviſe to the daughters was to take "effect, as will appear hereafter.

"*Ceſtui que uſe* in fee before 27 *H.* 8. deviſes his lands to his Dyer, 117. b. Hubby's caſe.
"wife for life, *ita quod non faceret aut permitteret aliquod vaſtum*, "the remainder after her death to his ſecond ſon in tail, and "dies; and after the ſtatute, the wife commits waſte. A *quære* "is made, Whether the feoffees, or heir of the deviſor, or he in "remainder ſhould enter for the condition broken? And if, by "entry of the heir or feoffees, the remainder be deſtroyed? No "reſolution is given in it; but, by the laws beforementioned, it "ſeems clear, that if the heir does enter for the condition "broken, and hold during the life of the wife, yet after her "death the remainder to the ſecond ſon will be good, by way of "executory deviſe; for the remainder, not being to take effect "by expreſs words till after her death, he in remainder cannot "enter upon breach of the condition by making it a limitation, "till ſhe does waſte, and to veſt preſently upon ſuch waſte com-"mitted."

'*A.* having iſſue three ſons and two daughters, and the eldeſt Fry v. Porter, or Williams v. Fry. Vent. 199. 2 Lev. 21. Mod. 86. 300. 3 Keb. 756. 787.
'daughter having iſſue *B.*, and the youngeſt iſſue *C.*; *A.* by his 'will deviſes lands to his wife for life; and after her death to his 'grandchild *B.* and the heirs of her body; provided always, and 'upon condition, that ſhe marry with the conſent of *D.*, *E.*, and '*F.*, or the major part of them; and in caſe ſhe marries without 'ſuch conſent, or dies without iſſue, then he bequeathed the ſaid 'premiſes to *C.*, and died; *B.* married *G.* without conſent of 'any of the perſons named for that purpoſe, and thereupon *C.* 'entered upon her. It was held clearly to be a limitation to her 'till ſhe married without ſuch conſent, and not a condition; for 'then it would deſcend to the heir at law, and he, for breach 'thereof, might enter and defeat the limitation over; therefore it 'was conſtrued to be a limitation, and that the marriage, without 'ſuch conſent, determined her eſtate-tail, and caſt the poſſeſſion

' upon *C.* by way of immediate remainder.' " And it was ſaid, " that this had received as many reſolutions as ever any point did, " and nothing but the opinion *Co.* 10. 40. againſt it, which was " held not to be law; and that *Coke* himſelf was of another
2 Roll. Rep. 225. 1 Ventr. 203. 2 Mod. 26. " opinion in *Welcock*'s and *Hammond*'s caſe, where the doubt in " *Dyer*, 316. *fo.* 5. which was upon expreſs condition, was well " reſolved by conſtruing it to be a limitation. Alſo, admitting it " to be a condition, yet *C.*, who was the *hæres factus* by the li- " mitation of the remainder to her, ought to enter for breach " thereof."

2 Mod. 7. Shuttleworth v. Barber. ' One deviſes lands to *A.* his heir at law, and deviſes other ' lands to *B.* in fee, and if *A.* moleſt *B.*, by ſuit or otherwiſe, he ' ſhall loſe what is deviſed to him, and it ſhall go to *B.*, and dies: ' *A.* enters into the lands deviſed to *B.*, and claims them. It ' was held, *firſt*, that this was a ſufficient breach to give title to ' *B.* *Secondly*, that if this ſhould be a condition, it would, by the ' deſcent thereof to *A.* who was to perform it, and alſo to enter ' for the breach thereof, be merged and defeated; therefore it ' was held to be a *limitation* which determined the eſtate of *A.*, ' and caſt the poſſeſſion upon *B.* without entry.'

" And this conſtruction hath been made, not only in caſes of " laſt wills and teſtaments, but hath likewiſe obtained in con- " veyances to uſes, as appears by ſeveral caſes before men- " tioned."

Dyer, 314. pl. 96. ' So, where one levied a fine to the uſe of *A.* and *B.* his wife ' for their lives, and the life of the longer liver of them; re- ' mainder after their deaths for ſix months, to the uſe of the exe- ' cutors of *A.*, and after the ſix months ended, then to the uſe of ' *C.* and *D.* his wife, and the heirs of their two bodies; and for ' default of ſuch iſſue, to the uſe of *A.* and his heirs; provided ' that, if it happen the ſaid *A.*, at any time after, have iſſue of ' his body, or any wife of the ſaid *A.* at the time of his deceaſe, ' to be *enſient* with any iſſue begotten by the ſaid *A.*; that then, ' after ſuch iſſue had, and after 500 marks paid or tendered to *C.* ' and refuſed, within ſix months next after the birth of ſuch ' iſſue, that then the uſe of the ſaid lands, immediately after the ' deceaſe of the ſaid *A.* and *B.* and the ſaid ſix months, ſhall be ' to the ſaid *A.* and the heirs of his body; and, for default of ' ſuch iſſue, to the right heirs of *A.*; then *B.* dies, and *A.* takes ' another wife; and by *Plowden* and *Dyer*, till iſſue and the ſix ' months paſt, *A.* hath not any larger eſtate than he had before. ' But *quære*, if by the firſt limitation *A.* hath not the fee till iſſue, ' and then upon payment, or tender and refuſal of the 500 ' marks, and the ſix months paſt, the uſe limited to *C.* and *D.* in ' tail, with remainders to *A.* in fee, does not ceaſe and ſettle in *A.* ' in tail with remainder to him in fee as by limitation? For
Roll. Abr. 415. pl. 12. 469. Vent. 201. Spring v. Ceſar. Jon. 390. ** *Vide* ' where *A.* and *B.* joined in a fine to the uſe of *A.* in fee, if *B.* ' did not pay to *A.* 10*l.* before ſuch a day, and if he did, then to ' the uſe of *A.* for life, remainder to *B.* in fee; in this caſe ' it was held, that if *B.* did not pay the 10*l.* before the day, ' *A.* ſhould have the fee abſolutely; which proves that he ' had

'had it before *ſub modo*, or ſubject to be determined upon ſuch 'payment, and a uſe may well be limited to ceaſe in one, and to 'go over to another; and the ſtatute of 27 *H.* 8. *c.* 10. carries 'the poſſeſſion after it; and, in the firſt caſe, the uſe being ex- 'preſsly limited to *A.* in fee, muſt, as it ſeems, veſt in him till 'the contingency happens, which determines that uſe, and gives 'him another inſtead of it, to which the ſtatute carries the poſ- 'ſeſſion accordingly. But *quære.* Dver, 314. pl. 96. Moor, 99. pl. 243. & Ley, 54.

'One levies a fine, the conuſee grants and renders the lands to 'the conuſor in tail, upon condition that he and the heirs of his 'body ſhould bear the ſtandard of the conuſee when he went to 'battle, and if they failed, that it ſhould remain to a ſtranger in 'fee; this was held a good remainder, to begin upon ſuch con- 'dition; but *quære* of this caſe, unleſs it be intended by way of 'limitation of uſe, which may ceaſe in one, and be limited to 'another.' Plow. 34.

"*A.* by leaſe and releaſe ſettles lands to the uſe of himſelf for "life, remainder to *B.* for life, remainder to the firſt, ſecond, and "other ſons of *B.* in tail, remainder to *C.* for life, remainder to "his firſt, ſecond, and other ſons in tail; provided that if *B.* "married without the conſent of *A.* during his life, and after his "death, of *D.*, *E.*, and *F.*, then the uſes limited to *B.* and "his ſons to ceaſe, and then to the uſe of *C.* *B.* marries "without ſuch conſent, and *C.* enters, and upon a bill brought "in Chancery by *B.* to be relieved for want of notice of the ſettle- "ment, they were diſmiſſed to law. Which argues that the uſe to "*B.* and his ſons was determined by limitation, and the uſe in "remainder to *C.*, which carried the poſſeſſion after it, was well "veſted, and therefore they were ſent to law." 2 Chan. Caſ. 109. Booth v. Booth.

'Upon a writ of error out of *Ireland* the caſe was this: *A.* ſeiſed 'of lands in fee, and having iſſue only one daughter, named *B.*, 'by leaſe and releaſe conveys his lands to the uſe of himſelf for 'life, and after his death to the uſe of *B.* in tail, provided that ſhe 'married with the conſent of the truſtees, or the major part of 'them, ſome perſon of the family and name of *Fitzgerald*, or who 'ſhould take upon him that name immediately after the marriage; 'but if not, then the truſtees to raiſe a portion out of the ſaid 'lands for *B.*, and the lands to remain to *C.*; *A.* dies, and *B.* 'marries one who neither was nor took upon him the name of '*Fitzgerald*; and the only point on which judgment was there 'given, was the want of notice in *B.* of the ſettlement, without 'which, being heir at law, and ſo having a title by deſcent, ſhe 'was not bound *ex officio* to take notice of the condition. But this 'fully proves the point in queſtion, that if ſhe had had ſufficient 'notice of the condition, her breaking it had determined her 'eſtate, and caſt the poſſeſſion upon *C.* who was next in re- 'mainder.' 3 Mod. 28. Malone v. Fitzgerald.

'3. Diſtinction between a Limitation over in caſe of a Will, and 'where no Limitation is made over.

"The third diſtinction I obſerved, was between a limitation "over in caſe of a conditional deviſe in a will, and where no li- "mitation was made over upon breach of the condition; and both "parts of this diſtinction ſufficiently appear from the laws already "mentioned under the 1ſt and 2d head; I ſhall therefore only "add the two following caſes for further illuſtration thereof. "The firſt whereof was this:"

Cro. Eliz. 146. Crickmere v. Paterſon. Swinb. 115.

'*A.* ſeiſed of lands, and having iſſue two daughters only, deviſed 'lands to the eldeſt and her heirs, and that ſhe pay to her young- 'eſt ſiſter yearly 30 *l.* And *per cur.*—This was a condition, for 'otherwiſe the youngeſt ſiſter would have no remedy for the rent; 'and being a condition, it deſcended upon both the daughters as 'heirs, and for breach thereof the youngeſt might enter into a 'moiety of the land with her ſiſter; for there being no limitation 'over to the youngeſt for default of payment, if ſhe had not 'been equally heir with her ſiſter, ſhe would have been without 'remedy.

Cro. Jac. 56. Curtis v. Wolverſton. Poph. 11.

'So, where a copyholder in fee of lands in *Borough Engliſh*, 'having iſſue three ſons, *A.*, *B.*, and *C.*, ſurrendered his land to 'the uſe of his will, and after deviſed them to *B.* in fee, upon 'condition that he ſhould pay to his four ſiſters 20 *l.* a-piece at 'their full age, and died; *A.* the eldeſt ſon had iſſue two daugh- 'ters, and died; *B.* was admitted, and did not pay the 20 *l.* 'a-piece; *C.* the youngeſt ſon entered: it was objected, that this 'was a limitation to *B.* till he failed to pay, *&c.* and ſo ſhould go 'to the youngeſt ſon, who was inheritable by the cuſtom. But 'it was adjudged to be a condition, and that for breach thereof 'the daughters of *A.* the eldeſt ſon ſhould enter; but it ſeems 'that after ſuch entry the heir by cuſtom ſhall enter upon them. 'But *quære*, if the deviſe had been to the eldeſt ſon upon ſuch 'condition, this had been a limitation, which, upon non-payment, 'would have carried the land to the youngeſt ſon, who was heir 'by cuſtom; for otherwiſe, if it ſhould be a condition, by the de- 'ſcent to the eldeſt ſon, it would be merged and defeated. But '*quære*, if the land had been deſcendible to the eldeſt ſon as other 'inheritances at common law are, and ſuch conditional deviſe had 'been made thereof to the eldeſt ſon without any limitation over 'for default of payment, *quære* if in ſuch caſe the legatees had 'any other remedy than by bill in equity for their legacies, for 'the land not being given to them, it will be hard to maintain, 'that for breach of the condition the land ſhould go over to them; 'therefore in ſuch caſe it ſhould ſeem they have no remedy but 'in Chancery, where the eldeſt ſon will be looked upon as a 'truſtee for the payment of ſo much money to them.'

'4. Diſtinction

'4. Diſtinction between Remainders that are to ariſe upon Conditions agreeable to the Rules of Law, and ſuch as are to ariſe upon Conditions repugnant and againſt the Rules of Law.

"As to the firſt part hereof, how far remainders upon ſuch conditions, and ſo far as they may be called conditions, which do not go in reſtraint and abridgment of the firſt eſtate, are good, will appear under the 5th and laſt diſtinction. But as to the remainders that are to ariſe upon conditions repugnant, and againſt the rules of law, this has been already cleared in part under the firſt diſtinction, and will now fully appear by the caſes following:"

'Therefore, if one by his will, by covenant to ſtand ſeiſed, feoffment to uſes, or other conveyance whatſoever, gives or conveys lands to, or to the uſe of *A.* his eldeſt ſon, and the heirs male of his body, remainder to, or to the uſe of *B.* his ſecond ſon, and the heirs male of his body, and ſo to the third and other ſons in like manner; and after adds a proviſo, that if *A.* or his iſſue, or any other of his ſons in remainder, ſhall attempt to alien, *&c.* or ſhall alien, *&c.* by which any eſtate ſhall be barred, *&c.* that then immediately after ſuch attempt, and before any act executed, or immediately after ſuch alienation, the uſe and eſtate of him ſo attempting or aliening, *&c.* ſhall ceaſe as if he were naturally dead, and that then it ſhall remain immediately to ſuch perſons to whom it ought to come by the intent of the indenture or will, or to him in the next remainder, *&c.* In this caſe the remainders are actually veſted as remainders in all the ſons; but, as to their taking effect in poſſeſſion upon breach of the condition, or ſooner, or otherwiſe than they would have done if there had been no condition at all, the proviſo or condition is totally repugnant and againſt law; for be it either a condition or a limitation, it cannot carry over the eſtate to him in remainder upon breach thereof. For if it be a condition, then the donor and his heirs only can take advantage of the breach thereof, not thoſe in remainder who are ſtrangers; and if the donor or his heirs enter for breach of the condition, they thereby defeat not only the preſent eſtate, but all remainders dependant thereupon. If it be a limitation till they alien only, yet it is repugnant, that when by the alienation the eſtate is actually ſettled and veſted in the alienee, the ſame alienation ſhould at the ſame time veſt and ſettle the eſtate in another; and for the words *attempting, endeavouring, or going about to alien*, they are of too uncertain a ſignification to receive any countenance, and what ſhall be ſaid a ſufficient attempt, and what not, is hard to determine; beſides that, all ſuch clauſes tend to perpetuities, to fix eſtates in families unalienable, that they can upon no exigencies or emergencies whatſoever diſpoſe thereof, to provide for payment of their debts, their wives, or younger children; and alſo they deſtroy and enervate the force of fines and common recoveries, the great and common aſſurances, whereby men hold

1 Co. 83. Mo. pl. 831. 869. 6 Co. 40. 9 Co. 127. Cro. Eliz. 378. Cro. Jac. 698. 10 Co. 36. Mo. pl. 496. Swinb. 112.

'their

'their eſtates, and therefore with juſt reaſon all ſuch clauſes are
'exploded and diſallowed.

Cro. Jac. 61. 10 Co. 86. Moor, 772. Loveit v. Goddard.

'One deviſes lands to his ſon *A.* and the heirs male of his body,
'provided that if *A.* or any iſſue male of his body, alien, give, or
'grant the premiſes to any perſon for above twenty years, &c.
'that then the ſaid premiſes, *for default of ſuch iſſue male* of the
'body of *A.*, immediately upon every ſuch alienation, gift, or
'grant, ſhall remain and come to his (the teſtator's) ſon *B.*, and
'the heirs male of his body, &c. and dies; *A.* enters and makes
'a leaſe for a thouſand years, and dies without iſſue male, leaving
'*C.* his daughter and heir; *B.* enters upon her, *C.* re-enters.
'It was held *firſt*, That the remainder to *B.* was not to take effect
'but upon alienation and death without iſſue male, and not upon
'the death of *A.* without iſſue male only. *Secondly*, That the re-
'mainder being limited to take effect upon ſuch alienation ſhould
'never ariſe, becauſe by the alienation the land is given to another,
'and then it is repugnant to make the alienation to one ſufficient
'to carry the land to another.' "*Note*; This caſe appears in
"*Croke* to be adjudged in *C. B.* and *B. R.* for the daughter of *A.*,
"but in *Moore* it is ſaid, that in error afterwards brought in *B. R.*
"the judgment was reverſed, but no reaſons for the reverſal are
"there mentioned. This caſe agrees with the caſe of *Acton* v.
"*Hare* above mentioned, where it was holden, that without any
"attempt to alien, the remainder was not to ariſe; and upon that
"point only judgment was there given, without entering into the
"nature or validity of the limitation, which by the foregoing caſe
"appears to be clearly againſt the law."

Roll. Abr. 412. Skin v. Lady Bond.

'One deviſes lands to *A.* in tail, upon condition that he ſhall
'not alien, and that *if he dies without iſſue* it ſhall remain to *B.* in
'fee; after *A.* aliens, yet *B.* cannot enter for the condition
'broken, but the heir at common law, becauſe this is not a li-
'mitation, but a condition, by *Coke* and *Warburton*. But *quere*
'if *A.* after dies without iſſue, if *B.* may not enter; for though
'the heir enter for the condition broken, and hold till the eſtate-
'tail determined, yet the remainder to *B.* ſeems good by way of
'executory deviſe, to ariſe out of the reverſion veſted in the heir
'by his entry for breach of the condition, and not as an immedi-
'ate remainder, becauſe it is not to take effect till the death of *A.*
'without iſſue, and yet the eſtate-tail of *A.* by breach of the con-
'dition may determine long before.

Vent. 321. 3 Keb. 787. Piers v. Wynn. *& vide* Plow. 408. Moor, 543.

'One deviſes lands to *A.* and the heirs male of his body, pro-
'vided if he does attempt to alien, that then immediately his
'eſtate ſhall ceaſe, and *B.* ſhall enter: after *A.* makes a feoffment
'in fee, and thereupon *B.* enters; and it was adjudged in the
'grand ſeſſions againſt *B.*, whereupon he brought a writ of error.
'And *firſt* it was agreed, That tenant in tail could not be re-
'ſtrained from alienation by fine or recovery. *Secondly*, That a
'bare attempt would be no breach; but then it was argued, that
'he might be reſtrained from aliening by feoffment, or other act
'which would amount to a tort, and make a diſcontinuance, &c.

'that this proviſo imports as much; and therefore the feoffment 'was a breach, for that was an attempt, and more; and that 'therefore it ſhould determine the eſtate-tail *quaſi* by limitation, 'which would give an immediate title of entry to *B.* by executory 'deviſe, and that the current of authorities, ſince 10 *Co.* 40. are, 'that a condition in a will ſhall be taken as a limitation. But 'the whole court held the condition void, becauſe *non conſtat* what 'ſhall be adjudged an attempt, and how it ſhould be tried; and 'ſo the judgment was affirmed.

'But where one, having two ſons, deviſed *Blackacre* to his 'eldeſt in tail, and *Whiteacre* to his youngeſt ſon in tail, *proviſo 'ſemper* that if any of his children alien or demiſe any of his lands 'to them deviſed before they come to the age of thirty years, then 'the next brother ſhall enter; the eldeſt enters, and lets *Black-'acre* before his age of thirty years: this was held a good limit-'ation till they aliened, and that upon alienation it ſhould go to 'the other. But this caſe differs from the preceding caſes, for 'here was no total reſtraint of alienation, but only till they ar-'rived to ſuch an age as they might be preſumed to have full diſ-'cretion, and to know well what they did, which was but a rea-'ſonable reſtraint; but in that caſe where the younger brother 'entered into *Blackacre* by virtue of the limitation, and aliened 'it before his age of thirty, it was held, that the eldeſt brother 'could not enter into it again, becauſe by the entry of the 'younger brother that part was diſcharged of the limitation for 'ever.' 2 Leon. 38. Mo. 271. Spittle v. Davis.

"Theſe caſes being ſo adjudged, though none of them do in "expreſs terms deny *Scholaſtica*'s caſe to be law, yet the reſolu-"tion of that caſe can hardly ſtand, as it tends as directly to a "perpetuity as any of them. The caſe was this:—A man deviſed "lands to his eldeſt ſon in tail, remainder to his youngeſt ſon in "tail, remainder over in tail, remainder to his own right heirs; "and if any of the entails do wrong, vex, or moleſt any other of "them for the ſaid lands, or mortgage, bargain, and ſell the ſaid "lands, or otherwiſe incumber them, *&c.* that then every ſuch "perſon, and his and their heirs, ſhall forthwith be excluded and "diſcharged touching the ſaid entail; and that the conveyance of "the entail of the ſaid lands againſt him or them ſhall be of no "force, but that it ſhall deſcend and come to the party next in tail "to him, as if ſuch diſorderous perſon had never been mentioned "in the will. The eldeſt ſon enters and avoids a fine, and ſuffers "a common recovery, and the youngeſt ſon enters upon him. "It was adjudged that his entry was lawful, and that the eſtate "of every one in remainder was ſubject to the limitation to ceaſe "by alienation. And that the next in remainder might enter; "for that it was not a condition, becauſe then it would deſcend to "the eldeſt ſon himſelf, and by his alienation would paſs extin-"guiſhed in the land; but being a limitation, it is as if it were "deviſed to every of them till they aliened, and ſo by alienation "their eſtate *ipſo facto* determines, and is caſt upon him in the re-"mainder before entry. And for conſtruction of the condition Plow. 401. Newis v. Lark, or Scholaſtica's caſe. Mo. 543. pl. 721.

"by

" by a limitation in a will, this caſe ſeems to have led the way
" to all the caſes that have followed upon it. But for the nature
" of the condition, all the caſes before mentioned ſeem to condemn
10 Co. 42. " it. And my Lord *Coke* ſays, that a contrary judgment was given
[*Vide* Bate- " in the ſame caſe afterwards by *Popham* and two juſtices, though
manv. Allen, " *Moor* in reporting the ſame caſe mentions it to have been ad-
Cro. Eliz. " judged by *Popham* and two juſtices, according to the reſolution
437. and " in the Commentaries. But the caſe at this day by good opinion
Fearne's " is held to be no law, as being introductive of a perpetuity which
C. R. 386. " the law condemns."
4th edit.]

1 P. Wms. 104 2 Vern. 635. Collins v. Plummer.

Upon a marriage ſettlement *A.* is made tenant for life, remainder to the heirs of his body by his wife *Jane;* and in the ſame deed *A.* covenants not to ſuffer a recovery, but that the lands ſhall be enjoyed according to theſe limitations; *A.* notwithſtanding his covenant ſuffers a recovery, and deviſes the lands. It was held in Chancery, that *A.* being tenant in tail, and as ſuch having power to ſuffer a recovery, the lands deviſed ſhould not be affected, but that the covenant was good, and ſhould therefore bind his aſſets.

' 5. Diſtinction between ſuch Words as actually make a Condition,
' and ſuch as are only deſcriptive of the Time and Manner when
' and how the Remainders are to ariſe.

" The fifth and laſt diſtinction I ſhall mention is, between ſuch
" words as actually make a condition, and ſuch as are only de-
" ſcriptive of the time when, and manner how, the remainders are
" to ariſe and take place. And this is the more neceſſary, becauſe
" in ſeveral of the foregoing and other caſes great diſputes have
" ariſen, when the word condition has been in the deed or will,
" though in reality there has been no manner of condition at all; for
" a condition, as appears before, properly and ſtrictly taken must
" go in reſtraint and abridgment of the eſtate firſt given, other-
" wiſe it is no condition, but only a modus or particular qualifi-
" cation whereby ſuch a perſon is to entitle himſelf to the eſtate
" in remainder, and has no manner of relation to the firſt eſtate
" either to ſhorten or abridge it."

Plow. 23 to 29. Co. Litt. 378.

' Therefore, where one made a leaſe to *A.* for life, remainder
' to *B.* for life; and if it happen *B.* dies before *A.*, then the land
' to remain to *C.* for life; *B.* dies in the life of *A.*, and then *A.*
' dies, and if the remainder to *C.* was good, was the queſtion? It
' was argued that it was not, becauſe it was appointed to begin
' during the particular eſtate, where it ought to be limited to take
' effect after the particular eſtate ended; and therefore a leaſe for
' life to *A.*, remainder to *B.* for life, and if *A.* dies, that then it
' ſhall remain to *C.* in fee, this remainder is void, becauſe then it
' would ſubvert the remainder to *B.*, and therefore is repugnant
' to the eſtate firſt limited to *B.* So, a leaſe to two for their lives,
' remainder after the death of the firſt of them to *C.* in fee, is
' void, becauſe it would defeat the ſurvivorſhip given by the firſt
' words. So here, ſecondly, it was argued, That this remainder
' was

'was void, being to begin upon a condition, whereof none ſhould 'take advantage but the leſſor and his heirs. Thirdly, That this 'remainder, being to begin upon a condition precedent, did not 'paſs out of the leſſor at the time of the livery, as all remainders 'ought, and therefore alſo was void. But on the other ſide it 'was argued and *adjudged*, that *firſt*, Here was no repugnancy, 'for it was not intended that if *B.* died, living *A.*, that then *C.* 'ſhould have the land immediately, but that then it ſhould remain 'to *C.* as a remainder, *viz.* after the death of *A.*, and as *B.* would 'have had it, if he had lived. *Secondly*, That this was not a con-'dition, but a limitation when the remainder ſhould begin; for if 'it were a condition, it would go in reſtraint of the thing given 'upon ſomething to be done or not done by the particular tenant, 'which here it does not: therefore if one makes a leaſe to *A.* for 'life, upon condition that if *B.* marries the daughter of the leſſor 'during the eſtate for life, that then it ſhall remain to *B.*, this is 'no condition to defeat or abridge the eſtate of *A.*, but is only a 'limitation when and how the remainder to *B.* is to take effect. 'So, if a leaſe were made to *A.* for life, upon condition that if *B.* 'pay to the leſſor 20*l.*, that then after the death of *A.* the land 'ſhould remain to *B.*, this is good, becauſe it does not go in 'abridgment of the firſt eſtate; but if it was, that then imme-'diately upon ſuch payment the land ſhould remain to *B.*, this 'would be void, becauſe this would go in deſtruction of the firſt 'eſtate, without any thing to be done or not done by him, and of 'ſuch condition the leſſor and his heirs only can take advantage, 'not a ſtranger, and therefore the remainder to ariſe thereby is 'void. So, if a leaſe be made to two for their lives, upon condi-'tion that if one of them died within ſeven years, that then after 'the death of the other the land ſhould remain to a ſtranger in 'fee, this is a good remainder, being not to begin upon a condi-'tion, but upon a limitation or *modus* appointed by the leſſor. 'And they all agreed, that a remainder to begin upon an impoſ-'ſible or illegal limitation or condition would be void; as, upon 'a condition that if *A.* the firſt leſſee, or if *B.* kill a man, that 'then it ſhould remain to him, theſe remainders ſhall never ariſe. 'So the caſe of *Pleſington*, who made a leaſe for years upon con-'dition that if he aliened the reverſion, that then the leſſee ſhould 'have it to him and his heirs; this limitation was void, becauſe 'repugnant, that when he aliened the reverſion to one, the ſame 'alienation ſhould carry the land to another. Alſo, the better 'opinion ſeems, that the remainder paſſed out of the leſſor pre-'ſently, and is carried into abeyance, to be executed when the 'contingency happens.'

Plowd. 29. a. 34. a. b. Perk. ſect. 725. 729. Co. Litt. 378.

"But, though theſe words make no condition with regard to 'the precedent eſtate, yet as to the veſting of the eſtate in re-'mainder to which they are annexed, they may properly enough 'be called conditions precedent. Therefore where" '*A.* by his 'will deviſed lands to *B.* his ſecond ſon, and if he depart this 'world not having iſſue, then he willed that his land ſhould re-'main over to another, and died; *B.* had iſſue *C.*, and died; then

Leon. 285. 3 Leon. 106. Cro. Eliz. 26. Lee v. Vincent.

'C. died without iſſue; it was urged, that the remainder could
'not take effect, becauſe it was limited to take place on a condi-
'tion precedent, which in this caſe had not happened; for *B.* left
'iſſue, and ſo did not depart the world not having iſſue, as the
'words of the will are; yet, *per cur.* it was adjudged, That though
'literally he could not be ſaid to depart the world not having iſſue,
'yet, ſince that iſſue died without iſſue, by the intent of the will,
'and the conſtruction of law, he was dead without iſſue whenever
'the iſſue failed; as in a formedon in remainder or reverter,
'though the donee hath iſſue, yet, if after the eſtate-tail deter-
'mines for want of iſſue, the writ ſuppoſes that the donee died
'without iſſue; a *fortiori* in caſe of a will ſuch conſtruction ſhall
'be made to ſupport the intent of the teſtator.

Lev. 35. Vent. 229. Sid. 102. 1 Keb. 73. 78. 169. 246. 462. MSS. Goodyer v. Clerk.

'So, where *A.* upon marriage conveyed lands to the uſe of
'himſelf for life, remainder to his firſt and other ſons in tail male
'ſucceſſively; and if he dies without iſſue male, then to the uſe
'of the daughters for one hundred years, for raiſing 1500*l.* for
'their portions; *A.* had iſſue a ſon and a daughter, and died;
'and after the ſon died without iſſue; and if the daughter ſhould
'have the term was the queſtion? And it was argued, that ſhe
'ſhould not: becauſe *A.* did not die without iſſue male, for he
'left a ſon, though ſuch a ſon after died without iſſue; and it
'could not be intended that whenever the iſſue male failed, that
'the daughters ſhould have their portions, for that might be 100
'years after when all the daughters were dead; and ſuch intention
'would make it ill in its creation. But it was anſwered and ad-
'judged, that *quandocunque* the iſſue male failed, the huſband in
'this caſe may be ſaid to be dead without iſſue male; and the ex-
'pectation of ſuch a term in remainder is for their advantage in
'marriage; and ſuch a term may be as well created to ariſe upon
'failure of iſſue male, as a power to ſell upon failure of iſſue male
'which hath been adjudged to be good.' "*Note;* A caſe was
"cited 13 *Car.* 1. between *Brett* and *Pildredge*, where a father
"upon marriage of his daughter made a proviſion, that if his
"daughter died without iſſue within two years, that then her hu-
"band ſhould repay 500*l.* of her portion: the daughter had
"iſſue; and after, ſhe and the iſſue died within the two years.
"It was adjudged, that the huſband ſhould not repay the 500*l.*
"becauſe by the having of iſſue the condition was fulfilled. *Note*
"My Lord Chief Juſtice *Holt*, in the caſe next after mentioned,
"ſaid, that the principal caſe of *Goodyer* v. *Clerk* was not put right
"in any of the books but *Keble*, for the true caſe was, that the
"huſband before marriage, by a ſeparate deed, made a leaſe for
"100 years, to begin after his death without iſſue male on the
"body of his intended wife, in truſt, for raiſing portions for
"daughters; and after made a ſettlement by leaſe and releaſe, to
"the uſe of himſelf and his wife, and firſt and other ſons, in the
"uſual form, *&c.* And he ſaid, this term being not ſubſequent
"to nor depending upon the eſtates limited by the ſettlement, but
"precedent in its creation, could not be barred by any fine or
"common recovery under the ſettlement. And though he died
"

" not deny but ſuch leaſe was good, yet he thought it a very dan-
" gerous practice; and if ſuch leaſes were countenanced, no pur-
" chaſer under ſuch ſettlement would be ſafe. But note; though
" ſuch leaſe cannot be barred by a common recovery, becauſe be-
" ing precedent to the eſtate-tail, the recompence in value cannot
" extend to it, nor can he who recovers againſt the tenant in tail
" be ſuppoſed to have any right againſt the termor, who comes in
" paramount the eſtate-tail; yet it appears by the books, that
" *Manwood*, *Barnſley*, and *Twiſden* held, that if a common reco-
" very be againſt the tenant in tail, ſuch leſſee for years *in futuro*,
" or upon a contingency, ſhall not be admitted to falſify within
" 21 *H.* 8. *c.* 15. to defeat the recovery; and then it remains at
" common law, and his term is ſubject to the power of the tenant
" in tail, as it was before that ſtatute; which ſufficiently takes off
" the objection from the danger of introducing perpetuities by the
" allowing of ſuch leaſes. And in another book it is held, That if
" there be *A.* tenant in tail, remainder to *B.* in tail, and *B.* make a
" leaſe for years, or grant a rent-charge, ſuch leſſee or grantee
" cannot falſify a common recovery had againſt the firſt tenant in
" tail; becauſe he who ſuffered the recovery was not chargeable
" with the leaſe or rent. And though on the other hand it may
" be objected, that by this conſtruction all proviſions for daughters
" or younger children made by ſuch precedent leaſe for years may
" be defeated; to this it is anſwered, that the Court of Chancery
" will no doubt ſupport ſuch leaſes according to the truſt thereof
" declared for daughters or younger children, but no further; and
" when that is ſatisfied, the term will then fall of courſe for want
" of power to falſify by the common law, and a further ſupport
" in equity.

1 Keb. 247, 248. 463. 1 Sid. 102. Cro. Jac. 592. Sir T. Raym. 29. 1 Co. 62. b.

" One makes a ſettlement upon marriage to the uſe of himſelf
" for life, remainder to truſtees to ſupport the contingent re-
" mainders during his life, remainder to his wife for life for her
" jointure, remainder to his firſt and other ſons in tail male ſuc-
" ceſſively; and then follows this clauſe—And in default of ſuch
" iſſue, and in caſe he (the huſband) ſhall die or be dead without
" iſſue male of his body on the body of his wife born, or *in ventre*
" *ſa mere*, at the time of his death, having one or more daugh-
" ter or daughters, then to truſtees for 500 years, in truſt to
" raiſe portions for ſuch daughter or daughters, alſo yearly main-
" tenances to be paid half-yearly from the death of the wife.
" The huſband has iſſue male by his wife, and alſo daughters, and
" dies; then the iſſue male dies without iſſue; and if the term
" ſhould ariſe, was the queſtion? It was argued by Serjeant
" *Parker*, that it ſhould not, becauſe it was to ariſe upon a con-
" dition precedent; for the having no iſſue male was reſtrained
" to a particular time, *viz.* the time of his death, which here did
" not happen. He agreed, if it had been, that if he die without
" iſſue male generally, there, iſſue is *nomen collectivum*; and
" though he has iſſue, yet if ſuch iſſue male after die without
" iſſue, either in his life time or at any time after, yet the term
" ſhould ariſe, but not in this caſe, and cited the laws beforemen-
" tioned.

Trin. 1706. in B. R. Stroud v. Andrews. [S. C. Rep. temp. Holt, 625. and 11 Mod. 88. But the report here is apparently from a different hand, and is in ſome reſpects more full.]

" tioned. *Raymond* argued, that here was no contingency, but
" a plain limitation of the term after failure of iſſue male, when-
" ever that happened; for when he ſays *and in default of ſuch iſſue*,
" it is plain, if he had gone no further, it had been ſo then,
" when by thoſe words the term would have been well raiſed, the
" ſubſequent words, which are but tautology and a repetition of
" the ſame thing, ſhall not hinder it from riſing: for that would
" be to make one part of the deed deſtroy and ſubvert the other;
" and the words following, *and in caſe he ſhall die or be dead with-*
" *out iſſue male of his body on the body of his wife born*, if it had
" gone no further, are but a repetition of the former words, *and*
" *in default of ſuch iſſue*. But then, if the words, *or in ventre ſa*
" *mere at the time of his death*, ſhall be joined to all the foregoing
" words and be taken as part of them, then it deſtroys and con-
" tradicts them; for then all that is before ſpoken of iſſue
" male is to be confined to his death, as the operative words
" which govern and go through the whole ſentence; therefore,
" he argued, that the words, *at the time of his death*, ſhould be re-
" ſtrained and confined only to the words next immediately be-
" fore, *viz. or in ventre ſa mere*, for otherwiſe it is not to be
" known what he meant by *ventre ſa mere*, nor at what time ſuch
" iſſue male was to be *in ventre ſa mere*, for all iſſues are *in ventre*
" *ſa mere* at one time or other; therefore to make ſenſe of the
" deed, thoſe words muſt be reſtrained, and then the whole is
" conſiſtent and eaſy, and runs thus—*and in default of ſuch iſſue,*
" *and in caſe he ſhall die or be dead without iſſue male* generally, or
" *ſhall die or be dead without iſſue male in ventre ſa mere at the time*
" *of his death*; and then whether the iſſue male die at his death
" or being *in ventre ſa mere* at his death, and born after, die with-
" out iſſue male, the term ſhall ariſe, and no condition in it, but a
" plain limitation of a term in remainder. But my Lord Ch. J.
" *Holt* ſaid, that by ſuch conſtruction you deſtroy the laſt words
" which are reſtrictive and explanatory of the foregoing, and tie
" down to the time of his death. Alſo, the maintenances being
" appointed to be paid half-yearly from the death of the mother
" ſhew, that ſuch maintenances and term were only to ariſe in
" caſe of no iſſue male at the time of his death; for otherwiſe
" the intereſt being to be paid from the death of the mother
" in caſe there ſhould be a failure of iſſue male 40 or 50 years
" after, the intereſt or maintenance would be more than the prin-
" cipal, fortune, or portion; and he was ſo ſtrongly of this opi-
" nion, that this term was to ariſe upon a condition preceden
" which here was not performed, that he ſaid they might argue
" all the days of their lives, they ſhould never make him chang
2 Journ. 702. 5th Feb. 1706. " it. And accordingly, judgment was there given, that the ter
" ſhould not ariſe. But afterwards, upon a writ of error brough
" in parliament, that judgment was reverſed.

Holt v. Burleigh, Paſch. 18 May, 1710. " *A.* makes a ſettlement upon the marriage of his ſon with on
" *B.* to the uſe of the ſon for life, remainder to truſtees t
" ſupport, *&c.* remainder to the firſt and other ſons in the uſu
" form, and adds this proviſo, *viz. Provided that, if the ſaid*
" *ſha*

" *ſhall happen to ſurvive her huſband, not having iſſue of their two* [Pr. Ch. 293. S. C. 2 Vern. 651. S. C.]
" *bodies lawfully begotten, then ſhe, the ſaid* B., *ſhould have power to*
" *ſell and diſpoſe of ſuch part of the lands as ſhe ſhould think fit.* The
" huſband dies, leaving iſſue; ſome years after that iſſue dies
" without iſſue; and then the wife ſells the lands in queſtion to
" the defendants, againſt whom the heir at law of the huſband
" brought this bill to have a diſcovery of the deeds and writings;
" and inſiſted that the wife had no power to ſell theſe lands, be-
" cauſe the condition was not performed; for the huſband left
" iſſue, and ſo ſhe did not ſurvive him, not having iſſue. But my
" Lord Chancellour ſaid, that when an eſtate is made to one and
" the heirs of his body, and in caſe he die without iſſue, to go
" over to another, that limitation over is good, though he dies
" leaving iſſue, which iſſue afterwards dies without iſſue. And
" that is a ſtronger caſe than this; for if he leaves iſſue, he can-
" not be properly ſaid to die without iſſue, though that iſſue after
" fails; becauſe death is a ſingle act, and to be performed but
" once; but here, ſurviving is a continuing act, and ſhe ſurvives
" her huſband as much a year after, as ſhe did the firſt moment;
" and therefore, if the iſſue fails during her life, ſhe actually ſur-
" vives without iſſue, or not having iſſue, becauſe the iſſue fails
" during her ſurvivorſhip, which continues after the failure of
" iſſue. And this, he ſaid, was the plain natural meaning of the
" parties, as well as agreeable to the words, which were to give
" the wife a power to diſpoſe of ſo much of the lands, in caſe the
" iſſue to be provided for by that ſettlement failed during her life;
" and accordingly diſmiſſed the bill.

" One *Fletcher*, being poſſeſſed of a term for years, by his will Fletcher's caſe. Trin. 12th July 1709, in Ch. [1 Eq. Ca. Abr. 193. S. C. Fearne's Ex. Dev. 184. S. C.]
" deviſes it to his wife for life, and after her death to *Rebecca*
" *Fletcher* for life, and after her death to *Thomas Fletcher* and his
" children; and if it ſhall happen the ſaid *Thomas Fletcher* to
" die before the expiration of the ſaid term, not having iſſue of
" his body then living, then to go over to the now plaintiff for the
" reſidue of the term. The defendant's title was by an aſſign-
" ment from *Rebecca Fletcher*, and a releaſe from *Thomas Fletcher*,
" of all their eſtate, title, and intereſt reſpectively in and to
" the premiſes: the two life-eſtates were at an end: and *Thomas*
" *Fletcher* was dead without iſſue; and now the plaintiff brought
" this bill to have an aſſignment of the reſidue of the term, pur-
" ſuant to the will. All that was inſiſted on for the defendant to
" difference this caſe from the Duke of *Norfolk*'s caſe of a term,
" and from *Pell* and *Brown*'s caſe of a fee, was, that this con-
" tingency of his dying without iſſue then living was not con-
" fined to his death, but that the word then living ſhould relate
" to the words before the expiration of the term; and ſo this
" went further than any of the caſes had ever yet been carried,
" for he might have iſſue for ſeveral generations, and yet, if
" that iſſue failed at any time before the expiration of the term,
" then it was to go over; and this in a long term plainly tended
" to a perpetuity, and therefore ought not to be allowed; but
" that, by the deviſe to *Thomas* and his children, and the words

" if he die without iſſue, the whole term and intereſt was veſted
" in him, and he might diſpoſe thereof as he thought fit. And
" that it could not be reſtrained by the words *then living*, for they
" related only to the expiration of the term, *&c.*; ſo the re-
" mainder over to the plaintiff was void. But it was decreed to
" be a good remainder to the plaintiff, by way of executory de-
" viſe; and that the words *then living* muſt relate to the time of
" his death, for otherwiſe there would be no difference between
" this caſe and the common limitation of a term to one and the
" heirs of his body, and if he die without iſſue, to remain to an-
" other, which is void; for there it muſt likewiſe be intended if
" he die without iſſue before the expiration of the term, becauſe
" when the term is expired, nothing remains to limit over: but,
" here, being limited over upon this contingency, *viz. If he die*
" *without iſſue then living*, viz. *at the time of his death*, it is good,
" becauſe the contingency muſt happen within the compaſs of
" one life, or not at all, and will be certainly known at his death.
" And this caſe differs in nothing material from the Duke of
" *Norfolk*'s caſe.

Corbett v. Maidwell, Trin. 1710. in Chancery. [1 Eq. Ca. Abr. 337. S. C. 1 Salk. 159. S. C. 2 Vern. 640. 655. S. C. 3 Ch. Caſ. 290. S. C.

Although this caſe, and the caſes on which it was founded, have been conſtantly received as the law of the court, yet judges in later times have expreſſed their opinion of the inconvenience attending theſe determinations, and have anxiouſly ſought for circumſtances to diſtinguiſh the modern caſes from them.

Butler v. Duncombe, 1 P. Wms

" In this caſe it was ſaid by my Lord Chancellour to have been
" decreed in this court, and ſeveral caſes cited for it, that where
" an eſtate is limited to a man for life, remainder to his wife for
" life, remainder to truſtees for a term of years, upon truſt out
" of the rents and profits, or by mortgage or ſale to raiſe portions
" for daughters of that marriage, to be paid at their age of
" 18 years, or day of marriage, which ſhould firſt happen, that
" theſe portions were abſolutely due and veſted at eighteen or
" marriage, though in the life of the father and mother; and
" that the term for raiſing them ſhould be ſold in the lifetime of
" the father and mother, and this court would warrant the title.
" So, if the truſt of the term were limited upon a condition pre-
" cedent, as if it was declared, that in caſe he ſhould die without
" iſſue male on the body of his ſaid wife, leaving daughters, that
" then the truſtees ſhould, out of the rents, *&c.* raiſe and pay
" portions to ſuch daughters at eighteen or marriage, *&c.* that in
" caſe the mother died without iſſue male, leaving daughters, who
" attained eighteen or were married in the father's lifetime, that
" ſuch term in remainder ſhould be ſold preſently, and the por-
" tions raiſed. So, where even the term itſelf was to ariſe upon
" ſuch condition precedent, or, after a limitation to the firſt and
" other ſons or before, it were limited, that in caſe he ſhould die
" without iſſue male on the body of his wife, leaving daughters,
" then to truſtees for a term of years, in truſt to raiſe portions for
" daughters, payable at eighteen or marriage, yet after the death
" of the wife without iſſue male, ſuch term ſhall be ſold to raiſe
" the portions in the father's lifetime. The reaſons of which
" reſolutions, he ſaid, were, becauſe the death of the wife, which
" was all that was contingent in that caſe, had happened; that
" was now become impoſſible he ſhould die leaving iſſue male by
" her, and then it was no more than if it had been limited when
" he ſhall die, or after his death. And the reaſon of the con-

" com

" coming into this at firſt was, to promote ſuitable matches, and " that women might have their portions when they were likely to " do them moſt ſervice; though he ſaid, if it had been *res inte-* " *gra*, he ſhould not have decreed it ſo.

448. Sandys v. Sandys, *Id.* 707. Rereſby v. Newland, 2 P. Wms. 93. Ravenhill v. Danſey, *Id.* 179. Brome v. Berkley, *Id.* 484. Evelyn v. Evelyn, *Id.* 679. Hebblethwaite v. Cartwright, Ca. temp. Talb. 31. Stanley v. Stanley, 1 Atk. 549. Hall v. Carter, 2 Atk. 354. Stevens v. Dethick, 3 Atk. 39. Lyon v. Duke of Chandois, *Id.* 416. Goodall v Rivers, Moſ. 395. Churchman v. Harvey, Ambl. 335. Smith v. Evans, *Id.* 633. Conway v. Conway, 3 Br. Ch. Rep. 267.]

## (F) Of Croſs Remainders, or thoſe ariſing by Implication and Conſtruction of Law.

" THE laſt thing to be treated of under this head is, concerning " remainders ariſing by implication or conſtruction of law, " and therein of croſs remainders. But theſe being already " ſettled under the head of *Deviſes*, as being allowable only in " laſt wills and teſtaments, I ſhall paſs them by."

*A.* having iſſue five ſons, his wife being *enſient*, deviſed two-thirds of his lands to his four younger ſons, and the child *in ventre ſa mere* if he were a ſon, and their heirs; and (*a*) if they all died without iſſue male of their bodies, or any of them, that the lands ſhould revert to the right heirs of the deviſor. By this deviſe the younger ſons are tenants in tail in poſſeſſion, with croſs remainders in tail to each other, and no part ſhall revert to the heirs of the deviſor till all the younger ſons be dead without iſſue male of their bodies.

Dyer, 303. (*a*) That each ſhall be heir to the other, makes croſs remainders. Hob. 33. & *vide* Cro. Jac. 260. 656. 695. Bulſt. 62. Owen, 25. And. 38. Savil, 92. Moor, 637. Raym. 455. Vent. 224.

But, where one having iſſue three ſons, *A.*, *B.*, and *C.*, deviſes one houſe to *A.* and his heirs, another houſe to *B.* and his heirs, and a third houſe to *C.* and his heirs, provided that if all his ſaid children ſhould die without iſſue, that then all the ſaid meſſuages ſhould remain and be to his wife and her heirs; it was held by three judges, that upon the death of one of the ſons without iſſue, the wife might enter, and that here there were no croſs remainders from one ſon to another, becauſe being deviſed to them ſeverally by expreſs limitation, there ſhall be no greater eſtate to them by implication. But *Lee*, Ch. J. doubted; and *Doddridge*, J. ſaid, that though perhaps croſs remainders may be by *implication* where there is a deviſe to (*b*) two ſeveral perſons, yet not ſo if to more; for when one dies there cannot be ſeveral eſtates by moieties to ſeveral perſons, and when another dies, remainder again to another, becauſe of the uncertainty and inconvenience; and that it was never ſeen in any book, where an eſtate is limited to divers, that there could be croſs remainders.

Cro. Jac. 655. 2 Roll. Rep. 281. Gilbert v. Witty. Cart. 173. S. C. cited and admitted to be law.

(*b*) As in 4 Leon. 14. [*Vide infr.*]

One ſeiſed of lands in fee, by his will in writing deviſes *Blackacre* to *A.* his daughter and her heirs, and *Whiteacre* to his daughter *B.* and her heirs: and if ſhe die before the age of ſixteen years, living *A.*, then *A.* ſhall have *Whiteacre* to her and her heirs; and if *A.* die, having no iſſue, living *B.*, then *B.* ſhall have the part of

Dyer, 330. Benl. 212. Roll. Abr. 839. Vaugh. 267. Clatche's caſe.

*A.* to her and her heirs; and if both die, having no iſſue, then to *J. S.* and his heirs, and dies; *B.* attains her age of ſixteen years, and then dies without iſſue in the life of *A.* And firſt it was held by three juſtices againſt *Dyer*, That the daughters had an eſtate-tail upon the whole will, and not a fee determinable upon a contingent ſubſequent. Secondly, That by the words, *if both die without iſſue*, no croſs remainders in tail were created by implication, but that upon *B.*'s death without iſſue, after ſixteen, *J. S.* ſhould have her part preſently without ſtaying till the death of *A.* without iſſue.

Raym. 452. Skin. 17. pl. 19. 2 Jon. 172. 2 Show. 136. pl. 115. Pollex. 434. S. C. Holmes v. Meynell, & *vide* 2 Vern. 545. 3 Mod. 107.

*A.* ſeiſed of lands in fee, by his will deviſes all his lands in the county of ——— to his two daughters *B.* and *C.* and their heirs, equally to be divided betwixt them; and in caſe they happen to die without iſſue, then he deviſes the ſaid lands to his nephew *J. S.*, and the heirs male of his body, and dies. It was adjudged, that upon the death of *B.* one of the daughters, the other ſiſter took her moiety as a croſs remainder.

Cro. Jac. 655. Vent. 224. Raym. 455. Fitzg. 97.

It hath been ſaid in a great variety of caſes, that croſs remainders can never ariſe between more than two, from the great confuſion it would otherwiſe create.

Shaw v. Weigh, 2 Jon. 82. [This doctrine, that there cannot be croſs remainders created between more than two perſons, ſeems exploded. The rule now ſettled is, that where they are to be raiſed between *two*, the preſumption ſhall be in favour of them; but where between *more than two*, it ſhall be againſt them. But it being only a preſumption, it may in either caſe be rebutted by circumſtances of plain, manifeſt intention. The words "*in default of iſſue*," and a deviſe over of all the teſtator's eſtates, have been holden to raiſe croſs remainders. Phipard v. Mansfield, Cowp. 800. Comber v. Hill, *infra*. Atherton v. Pye, 4 Term Rep. 710. Wright v. Holford, Cowp. 31. S. C. by the name of Wright v. Engleſield, Ambl. 468. and by the name of Wright v. Lord Cadogan, 6 Br. P. C. 156. Holmes v. Meynell, *ſupra*. Marryatt v. Townly, 1 Vez. 102. The diſpoſition of the courts to preſume againſt croſs remainders, aroſe from their diſlike to the ſplitting of tenures. 1 Vez. 164-5.]

Co. Lit. 25. Roll. Abr. 837. 2 Show. 136. pl. 115.

It is clearly agreed, that croſs remainders can only ariſe in laſt wills, and are not to be allowed of in any deed or conveyance (*a*).

[(*a*) This doctrine is not correctly ſtated, nor is it ſuprorted by the authorities to which it appeals. Croſs remainders, it is true, cannot ariſe in a deed by implication, Cole v. Levingſton, 1 Ventr. 224. Doe v. Dorvell, 5 Term Rep. 521. but they may be raiſed in a deed, where they are limited in expreſs, though perhaps rather informal, terms. Doe v. Wainewright, 5 Term Rep. 427. Indeed, in executory articles, Lord Camden went farther; for in the caſe of articles upon a marriage to lay out the wife's fortune, to the uſe of all the children of the marriage as tenants in common and of their reſpective heirs, and for default of ſuch children and their iſſue, to the uſe of the ſurvivor of the huſband and wife; his Lordſhip held, that there were croſs remainders. Twiſden v. Birt, Nolan's edit. of Strange, vol. 2. 970. note (3), S. C. Ambl. 663. by the name of Twiſden v. Locke.]

2 Stra. 969. Ca. temp. Hardw. 22. 2 Barnard. B. R. 367. 443. 2 Kel. 188. Comber v. Hill. Paſch. 7 G. 2. in *B. R.* and M. 8 G. 2. a like caſe in

*Richard Holden* ſeiſed in fee, and having iſſue a ſon and three grandchildren, by his will deviſed part of his eſtate to his wife for her life, and the reverſion of ſuch part expectant on her death, and all other his freehold tenements, *&c.* he gave to his ſon *Richard Holden* for life, and after his death to his firſt and other ſons ſucceſſively in tail male; and for default of ſuch iſſue, and after the determination of the ſaid eſtates, he gave the premiſes to his grandſon *Richard Holden*, and his grand-daughter *Elizabeth Holden* to be equally divided between them, and to the heirs of their reſpective bodies iſſuing; *and for default of ſuch iſſue* he gave the premiſ

premiſes to his grand-daughter *Anne* in fee: the teſtator died ſeiſed, *Richard* the ſon died without iſſue male, whereupon *Elizabeth* and the grandſon entered, and *Elizabeth* died without iſſue generally: *Anne Holden* married *John Jervis*; and the queſtion was, Whether there were croſs remainders between *Elizabeth* and *Richard* the grandſon, or whether the moiety of *Elizabeth* ſhould go to *Anne* or *Richard*? And it was reſolved, That there were no croſs remainders between them, becauſe here are no expreſs words, nor is there a neceſſary implication, without either of which croſs remainders cannot be raiſed; that the words, *and for default of ſuch iſſue*, being relative to what goes before, mean only, and for default of heirs of their reſpective bodies, and then it is no more than as if it had been a deviſe of the moiety to *Richard* and the heirs of his body, and of the other moiety to *Elizabeth* and the heirs of her body, and for default of heirs of their reſpective bodies, remainder over; in which caſe there could be no doubt. And it was held, that this caſe differed from the caſe *ſupra* of *Holmes* and *Meynell*, the word *reſpective* being wanting in that caſe, and the firſt deviſees were the teſtator's daughters, and the remainder-man only a nephew, whereas in the preſent caſe *Anne* was as near to the teſtator as *Richard*.

B. R. between Brown v. Williams. 2 Str. 996.

[Davenport v. Oldys, 1 Atk. 579. Cowp. 799. Marryatt v. Townly. 1 Vez. 102.]

[*R. H.* deviſed to his ſix nieces to be equally divided between them, ſhare and ſhare alike, as tenants in common, *&c.* and of the ſeveral and reſpective heirs of the body and bodies of all ſuch and every his ſaid nieces; and in caſe one or more of his ſaid ſix nieces ſhould happen to die without iſſue of her or their bodies, then he gave, *&c.* the ſhare or ſhares of her or them ſo dying without iſſue to the ſurvivor or ſurvivors of them his ſaid ſix nieces, ſhare and ſhare alike, as tenants in common, *&c.* and to the ſeveral and reſpective heirs of the body and bodies of ſuch ſurvivor or ſurvivors of them; and if all his ſaid nieces ſhould die without iſſue, then he gave, *&c.* all the ſame manors, *&c.* unto his own right heirs for ever. It was admitted, that the original ſhare went to the ſurvivors by way of croſs remainders, but it was inſiſted that the ſhares which the two laſt dying nieces took by way of accruer did not ſurvive.]

Leach v. Jackſon, *coram* Lord Apſley, Tr. 11 G. 3. in Chancery. Nolan's edit. of Strange's Reports, vol. 2. 970, note (3).

## (G) "Of veſted Remainders, and of the particular "Eſtate to ſupport them in their Creation; how "long it muſt continue; and when by Determin- "ation, Grant, or Refuſal thereof, the Remainder "is diſcontinued, barred, or deſtroyed, and when "not.

AS to a veſted remainder, we are to conſider, 1*ſt*, The nature of a remainder veſted, that there muſt be a particular eſtate to ſupport it in its creation; wherein to conſider, 1*ſt*, What eſtate is ſufficient for that purpoſe, when it muſt begin, and how long it muſt continue. 2*dly*, When by determination,

" grant, or refuſal thereof, the remainder is diſcontinued, barred,
" or deſtroyed, and when not; and therein of the remedies for
" him in the remainder or reverſion by entry, action, or reſceit.
" 3*dly*, Where the remainder or reverſion ſhall be ſubject to the
" acts or charges of the particular tenant, and where and how
" the charges of him in the remainder or reverſion ſhall take
" place.

" It has already appeared what eſtate is ſufficient to ſupport
" contingent remainders, and what not. As to remainders which
" veſt preſently, though there muſt be a particular eſtate to
" diſtinguiſh them to be remainders, yet, as to ſupporting them,
" there needs none; becauſe they veſt preſently and certainly as
" remainders in the perſon to whom they are limited. And I
" find only one eſtate whereon it is held no remainder can de-
" pend; and that is an eſtate at will; for if ſuch eſtate be made
8 Co. 75. " with remainder over, the remainder is void. The reaſon ſeems,
" becauſe by the limitation over the will is inſtantly determined,
" and then the remainder cannot be good for want of a particu-
" lar eſtate whereon to depend; and in poſſeſſion it cannot be
" good, becauſe it was limited as a remainder.

Co. Litt. 21. b. Godb. 19, 20. " A remainder may be limited upon a gift in frank-marriage
" either to the donees themſelves, or to a ſtranger. But the di-
" verſity taken in the books is, that if the remainder be limited
" over in fee, then is the frank-marriage deſtroyed, and the donees
" have no eſtate-tail but only for life; becauſe by the limitation over
" of the fee, the tenure of the donor, which is inſeparable to
" frank-marriage, is deſtroyed, and then the words of the gift
" carry but an eſtate for life. But, if the remainder were limited
" over in tail only, or for any leſs eſtate, yet the frank-marriage
" continues; becauſe the tenure by reaſon of the reverſion left in
" the donor continues.

Co. Lit. 54. b. Dyer, 310 a. Cro. Eliz. 491. 3 Leon. 22. " If one make a leaſe to *A.* for life, remainder to him for years;
" or to *A.* for his own life, remainder to him for the life of *B.*
" theſe are good remainders, and both eſtates are veſted in *A.*
" for though he can have no benefit of the remainder in his own
" perſon, yet he may give, grant, deviſe, or aſſign either eſtate,
" and a greater eſtate may ſupport a leſs, as in thoſe caſes, but
" not *è converſo*; therefore, if one makes a leaſe to *A.* for years,
" remainder to him for life, the leaſe for years is drowned.

" Another rule is, that the remainder muſt be limited and
" given out at the ſame time that the particular eſtate is created;
" for otherwiſe the reverſion ſettles immediately in the leſſor or
" feoffor, and draws to it the rents and ſervices, and then the re-
Doct. & Student, lib. 2. c. 20. 1 Bro. 253. pl. 45. Plow. 25. b. 2 Roll. Abr. 415. pl. 8. " mainder limited after comes too late. Therefore, if one makes
" a leaſe for life, and after confirms his eſtate for life, remainder
" after his death to another, this remainder is void; becauſe the
" confirmation gave no new eſtate to the firſt leſſee, or any way
" enlarged his old eſtate, but he continued tenant only for his
" own life, as he was before, and then the remainder cannot be
" good, becauſe it was limited after the particular eſtate had
" taken effect, whereby a reverſion was veſted and ſettled in the
" leſſor.

" leſſor: and as a grant of the reverſion it is not good, becauſe " not ſo intended. And ſome of the books add another reaſon " that it cannot be good as a grant of the reverſion, becauſe he " was not party to the deed, and unleſs it be by way of remain- " der, none can take, but thoſe who are parties to the deed. " But *Littleton* ſeems to reject this reaſon, where he holds, that Lit. Sect. " in ſuch caſe, if the tenant for life accepts the deed of confirm- 573. Co. " ation, the remainder is thereby in him, to whom it is limited; Lit. 317. " becauſe ſuch acceptance is an agreement and attornment in Plow. 160. b. " law of the tenant for life; though without the deed he in re- Dyer, 126. b. " mainder cannot maintain an action of waſte, or have any other " benefit againſt the tenant for life. But this reaſon ſeems rather " to prove, that the deed operates as a grant of the reverſion to " which attornment is requiſite; for to a remainder there needs " none, becauſe it takes effect by the ſame deed, and at the ſame " time with the particular eſtate; and therefore his advice is for " him that is to have the remainder, to get another part of the " indenture to himſelf.

" If the leſſor diſſeiſe his tenant for life, and after make a new Plow. 25. b. " leaſe to him for life, remainder over, this remainder is void; Godb. 355. " becauſe the tenant for life is remitted to his firſt eſtate for life, " which was long before the remainder was appointed, and then, " as a remainder, it cannot be good, becauſe there was no parti- " cular eſtate created at the ſame time with it. So, if the heir " endow his mother, remainder over, the remainder is void, " though livery be made; becauſe the dower hath relation to the " death of the huſband which was before the appointment of " the remainder. But, if the leſſor diſſeiſe his leſſee for life, and " make a leaſe to a ſtranger for the life of the firſt leſſee, re- " mainder over, and then the firſt leſſee enter and be remitted; " yet the remainder continues good; becauſe it was well veſted " before the entry and remitter.

" If a leaſe be made to *A.* for life of *B.*, and after the leſſor Doct. & " confirm the land to *A.* for his own life, remainder over, this is Stud. lib. 2. " a good remainder; becauſe, by the confirmation, the eſtate of c. 20. 1 Bro. " *A.* was enlarged and made abſolute for his own life, which be- 253. pl. 45. " fore was determinable upon the death of *B.*; and by ſuch con- 2 Roll. Abr. " firmation a new eſtate being created, a remainder may be li- 415. pl. 8. " mited upon it, as it might at making the leaſe. So, if con- " firmation be to the tenant for life in tail, with remainder over, " this is good for the ſame reaſon; becauſe the eſtate for life is " enlarged to an eſtate in tail, upon which a remainder may be " limited, as it might upon the firſt making of ſuch eſtate.

" So, if a woman be tenant for life, and the leſſor confirm the Cro. Car. " eſtate of the huſband and wife for their two lives; this con- 478. " firmation enures to the huſband by way of remainder for life, Dyer, 126. " or, at leaſt, by way of increaſe and enlargement of the eſtate Lit. ſect. " of the huſband, and the eſtate for life of the wife continues 525. " diſtinct. But ſome call this a reverſion in the huſband, and not Co. Lit. 299. " a remainder, becauſe the eſtate of the wife is not enlarged there- 1 Lev. 81. Plow. 11. b. 1 Sid. 83. " by;

" by; and this remainder did not paſs till after the reverſion
" veſted and ſettled in the leſſor.

1 Saund. 149. 1 Sid. 360. 2 Keb. 341. Wade v. Batch.

" *A.* copyholder for life, remainder to *B.* in fee: *B.* ſurrenders
" this copyhold to the uſe of *A.* for life, remainder after his de-
" ceaſe to the uſe of *B.* and *C.* his wife for their lives, and the life
" of the longer liver of them, remainder to the uſe of the right heirs
" of *B.* It was argued, that this ſurrender to the uſe of *A.* for life
" was void; becauſe he had an eſtate for life before, and then the
" remainders limited thereon are void alſo; and then the ſur-
" render enures to the uſe of *B.* and his heirs, as it was before,
" and *C.* took nothing by it. And though a leaſe to *A.* for life,
" remainder to *B.* for the life of *A.* of lands at common law be
" good, becauſe *A.* may forfeit his eſtate for life, whereof *B.* ſhall
" take advantage and hold during the life of *A.*; yet it is other-
" wiſe in caſe of copyholds; for there the lord of the manor
" ſhall take advantage of the forfeiture, and hold during the life
" of the particular tenant, and not he in reverſion or remainder.
" And ſo here, the firſt eſtate being void, to give *A.* any benefit,
" the remainder muſt be void too. On the other ſide it was ar-
" gued, that if the eſtate limited to *A.* was void, yet the limit-
" ation to *B.* and his wife was good by way of preſent eſtate and
" ſurrender of the remainder, as a grant of the reverſion *cum*
Cro. Eliz. 323. Dyer, 367.
" *poſt mortem* of the tenant for life *acciderit* hath been conſtrued
" a good grant *in præſenti* of the reverſion; and the words *cum*
" *poſt mortem* refer to the having the land in poſſeſſion. So, here,
" *B.* and *C.* ſhall have the land for their lives in poſſeſſion after
" the death of *A.*, as by a mediate ſettlement, and not by way of
" remainder. And ſo was the opinion of the whole court as
" *Saunders* reports it; and that it was not good by way of re-
" mainder. But *Siderfin* reports it to be held by three juſtices
" good by way of remainder: and the reaſon there given for it
" is, becauſe, ſay they, the continuance of the particular eſtate
" *in eſſe* is not always neceſſary, as, if a rent be granted to the
" tenant of the land for life, remainder over, this is good. So,
" an eſtate limited to an infant, remainder over, and the infant at
Co. Lit. 298. 2 Brownl. 155.
" full age diſagrees to the eſtate for life. So, they thought, if a
" copyholder in fee ſurrenders to the uſe of the lord for life, re-
" mainder over, this is good. So, if tenant for life, and he in
" the reverſion grant their eſtate to the tenant himſelf for life,
2 Roll. Abr. 415. pl. 2, 3. Dyer, 140. b. pl. 41. held this remainder of the rent not good, becauſe the particular eſtates ſuſpended are as ſoon as granted.
" remainder over, this is good. But *quære*, if theſe caſes war-
" rant ſuch conſtruction; for in the caſe of the rent, though be-
" tween the parties it merges preſently in the land as ſoon as
" granted, yet, as to all ſtrangers, it hath continuance, and the
" grantee himſelf hath a continuing benefit by way of exonera-
" tion of his eſtate therefrom. As to the caſe of the infant,
" though he refuſes at full age, yet that ſhall not divert the re-
" mainder, which was once well veſted by good title, but he in
" remainder ſhall enter preſently, as in his remainder upon ſuch
" refuſal; becauſe there was a good eſtate to ſupport it in its
" creation. As to the caſe of the ſurrender to the lord, he hath
" benefit

" benefit by actual poſſeſſion of the land during the eſtate thereby " ſurrendered, and may grant it out again for his own life, " though, whilſt it is in his own poſſeſſion, he cannot properly " be called a copyholder thereof, becauſe he cannot be ſaid to " hold of himſelf. And as to the laſt caſe, if it were barely by way " of grant, it cannot be good, becauſe the freehold cannot paſs " without livery; and if livery were made by parol, it then " amounts to a ſurrender of his eſtate for life; and a new eſtate " for life is created by the ſame livery, upon which a remainder " may be limited, as it might have been at firſt. But, if it were " by deed and livery, it ſhould ſeem it cannot be good; becauſe " then every one paſſing only his own eſtate, the tenant for life " cannot give an eſtate to himſelf; but by his joining in the " deed and acceptance thereof, this may, as appears before, " amount to an attornment, and then the grant, as to the other, " will paſs the reverſion. But in the principal caſe, the ſurrender " by him in remainder cannot paſs the reverſion, becauſe he has " it not as a reverſion, but as a remainder. And for the ſame " reaſon the acceptance of the particular tenant cannot amount " to an attornment, (if it were neceſſary, which, in caſe of a co- " pyhold being an eſtate at will only ſeems not requiſite,) be- " cauſe no reverſion is granted or ſurrendered; and then his " eſtate continuing in all reſpects the ſame as it was before the " remainder, as a remainder it cannot be good, though by way of " preſent grant, to take effect in poſſeſſion after the death of *A.*, " it may.

But Co. Lit. 298. a. *contra*, that it is good, and veſts in an inſtant, and the ſuſpenſion in judgment of law grows after. So, thoſe books hold the remainder of a ſeigniory granted in ſuch manner void for the ſame reaſon; and becauſe no *formedon in remainder* lies without alleging the eſplees in the particular tenant. *Ideo quære.*

" *A.* tenant in tail, remainder to *B.* in tail: *B.* by indenture " enrolled for 20*l.* bargains and ſells the lands, and all his eſtate, " right, title, *&c.* to *C.* during the life of *A.*, remainder to the " queen, her heirs and ſucceſſors. This remainder was held void; " 1*ſt*, becauſe there was no particular eſtate; for the grant " to *C.* was abſolutely void, becauſe it can never take effect in " poſſeſſion, nor can *C.* have any benefit by it, *A.* having an eſtate " tail therein, which is ſubject to no forfeiture to let in the remain- " der, and his entry into religion, which is a foreign poſſibility, " and againſt law likewiſe, ſhall never be preſumed. 2*dly*, *B.* hav- " ing granted *totum ſtatum ſuum* to *C.*, left nothing in him to limit " over, and therefore the remainder is void, either becauſe *C.* took " nothing, and then a remainder cannot be without a particular " eſtate, or, if *C.* took any thing, he took the whole, and nothing " remained to limit over to the queen; and, by conſequence, ſuch " remainder is void. And as a grant of the reverſion it cannot " operate, becauſe *B.* had no reverſion, but a remainder only.

2 Co. 50*ſ* Mo. 342. Sir Hugh Chomley's caſe.

" Huſband makes a feoffment in fee to the uſe of himſelf for life, " remainder after the death of his wife to *B.*, and dies; then the " wife dies; and if this remainder to *B.* was good, was the queſtion. " The court ſeemed to be of opinion that it was not; becauſe, " during the life of the wife, it did not veſt: and admitting that " the wife had an eſtate for life by a former conveyance, as the " caſe in fact was, yet that could not ſupport a remainder which " was created at the ſame time with it. On the other ſide it was " argued,

Sir T. Jo. 124. Key v. Gamble.

" argued, that here was no contingency but a remainder veſted,
" and a difference was taken between a remainder at common
" law and by the ſtatute of uſes. This is the caſe *verbatim* as it
" is reported; but no judgment was given. But it ſeems the re-
" mainder muſt be contingent, and upon the wife's ſurviving her
" huſband became void; becauſe by his death the particular
" eſtate was determined, and yet the remainder could not then
" take effect; and the eſtate of the wife by a former convey-
" ance could be of no regard, if it had had continuance, as it
" had not, being, by the feoffment, diveſted and put to a right.

Co. Litt. 298. a. " My Lord *Coke* lays down for a rule, that when the particular
" eſtate and remainder depend both upon one title, there, the de-
" feating of the particular eſtate is a defeating of the remainder
" alſo; but, when the particular eſtate is defeatable only, and the
" remainder by good title, there, though the particular eſtate be
" defeated, yet the remainder continues good: as, if *A.* be leſſee
" for life, and the leſſor diſſeiſe him, and make a leaſe to *B.* for
" the life of *A.*, remainder to *C.* in fee; though *A.* enter, and
" defeat the eſtate for life, yet the remainder to *C.* being once
" well veſted ſhall not be defeated; for it would be unreaſonable,
" that the leſſor ſhould have the land again, and contrary to his
" own livery. And in this caſe the remainder depends upon the
" ſame life it did at firſt, though that eſtate for life be in another
" perſon. And he there put alſo the caſe of the infant before-
" mentioned, diſagreeing at full age.

Co. Litt. 298. a. " If one grant a rent to *A.* for the life of *B.*, remainder to the
" heirs of the body of *B.*, this is a good remainder; becauſe it
" takes effect at the inſtant of the determination of the particular
" eſtate, as all remainders ought, or during the particular eſtate.

Co. Litt. 298. a. " If one makes a leaſe to *A.* for the life of *B.*, remainder to *C.*
" in fee; *A.* dies; now till an occupant enters there is no parti-
" cular eſtate, and yet the remainder to *C.* continues good, be-
" cauſe it veſted in *C.* preſently by the firſt limitation; and the
" want of a tenant to the firſt eſtate ſhall not vitiate the eſtate to
" the ſecond, which was well veſted.

Mo. 664. Yelv. 9. Salter v. Bottler. " If rent be granted to *A.* for life of *B.*, remainder over;
" *A.* dies, he in remainder ſhall have the rent preſently; becauſe
" the eſtate for life in the rent determined by the death of *A.*, and
" there can be no occupant of a rent. But *Yelverton* holds, that
" in the caſe of tertenants they ſhall have the lands during the life
" of *B.* diſcharged of the rent, and this is ſufficient to ſupport the
" remainder.

Perk. ſect. 55. 567, 568, 569. 1 Bro. 235. pl. 5. Plowd. 35. a. 2 Roll. Abr. 415. pl. 4, 5, 6, 7. 417. pl. 9. 1 Roll. " If one grant a rent to the right heirs of *J. S.*, who is then
" living, remainder over, this whole grant is void; for *J. S.* can-
" not have heirs during his life, and ſo there is no perſon to take
" the particular eſtate, and without that there can be no remain-
" der; and therefore that is likewiſe void. So, if a leaſe be made
" to *J. S.* for life, where there is no ſuch perſon, remainder over
" the whole is void for the ſame reaſon. So, if a leaſe be made
" to a monk, or other perſon, who has no capacity by law to
" take, for life or years, remainder over, both are void. But

" all theſe caſes, if ſuch eſtate were deviſed by will, he in re- Rep. 138.
" mainder ſhould take preſently. So, if the firſt deviſee refuſe, or Swinb. 125.
" die in the lifetime of the deviſor, the remainder ſhall veſt in Mo. 519.
" poſſeſſion preſently. The reaſon of which difference is, be- 1 Leon. 195,
" cauſe in a will the intent of the deviſor is principally to be re- 196. 198.
" garded; and if the particular eſtate fails, the deviſe over ſhall 2 Bulſt. 292.
" be conſtrued as a new original deviſe to ſupport the intent of the Raym. 162.
" teſtator, and let in the *hæres factus* according to the eſtate there- Dyer, 122.
" by given him. But if one by his will deviſe, that his feoffees pl. 20. 127.
" ſhall make an eſtate to *A.* for life, remainder to *B.* in fee, if *A.* 310. pl. 79.
" refuſe, the feoffees ought to make an eſtate to another for the Plow. 244.
" life of *A.* with remainder to *B.* in fee. And ſo, if one de- 414. a.
" viſe, that his executors ſhall make ſuch eſtate, and *A.* refuſe, Godolph.
" yet *B.* ſhall not have the remainder preſently, becauſe here he 356.
" hath referred the eſtates to be made by the rules of the common (6). 357.
" law, and therefore they ought to be purſued. But *quære* in theſe (13). 358.
" caſes if the eſtates ought not to be made to *A.* purſuant to the (19). (25).
" will, which, though he refuſe, will, *nolens volens*, carry the eſtate 462. Cro.
" to him with remainders over, and then, if he after refuſe to Eliz. 423.
" take ſuch eſtate, the remainder will veſt in poſſeſſion preſently. Fuller v.
" But it is likewiſe held, that if a deviſe be to *A.* for five years, re- Fuller.
" mainder to *B.* in fee, and *A.* die in the lifetime of the de-
" viſor, that this ſhall deſcend to the heirs of the deviſor in the
" mean time, till the five years are paſt, and then *B.* ſhall have
" it, as by a new original deviſe. But *quære* in all caſes of wills,
" ſince the intent of the party is to be the principal guide, if it
" appears that the remainder is not to take effect till ſuch a de-
" terminate future time, why ſhould it not in the mean time de-
" ſcend to the heir at law, and ſo of the uſe, and when the time
" is expired take effect in the deviſee in remainder as a new ori-
" ginal executory deviſe?

" If one give lands to *A.* in tail, remainder to himſelf for life, 1 Bro. 253.
" or years, remainder to *B.* in fee; this remainder to himſelf is pl. 35.
" void; becauſe none can give lands to himſelf; and yet the re- Perk. ſect.
" mainder to *B.* is good, becauſe there is a particular eſtate to 566. 705.
" ſupport it. So, if the firſt remainder were to a monk or other Godolph.
" incapable perſon, remainder over, this laſt remainder is good, 359. (20).
" and ſhall take effect in poſſeſſion, upon the determination of the 1 Leon. 197,
" particular eſtate, without any regard to the meſne remainder, 198.
" which was void. But *quære*, if there be not a diverſity between 1 Bro. tit.
" ſuch remainder limited to himſelf by fine; for ſome of the Eſtates. pl.
" books ſeem to hold it good by eſtoppel in ſuch caſe; but how 23. 66.
" that can be I do not know; for eſtoppels are generally to con- Dyer, 309.
" clude the party to his prejudice, when he does a thing, or grants (69). pl.
" an eſtate he had no right to; yet, having ſo granted it, he ſhall 32. pl. 14.
" not afterwards be admitted to invalidate and make it void, by 2 Mod.
" ſaying he had no power to make it. 210. 1 Leon.
195, 196.
199, 200.

" Another diverſity is between a feoffment to uſes, and a co- 1 Co. 101. a.
" venant to ſtand ſeiſed to uſes; for if one makes a feoffment in 154. b.
" fee to the uſe of *A.* for life, remainder to the right heirs of Mo. 195.
520.

" *J. S.*

Plowd. 307. 2 Sid. 66. 157. 2 Lev. 77. 2 Mod. 209. Ld. Paget's caſe.

" *J. S.*, who is living, here, the remainder paſſes out of the " feoffor preſently, and is carried into abeyance, till the death " of *J. S.*; becauſe by the feoffment he departed with the whole " eſtate, and left nothing in him. But, in caſe of a covenant to " ſtand ſeiſed to ſuch uſes, nothing paſſes out of the covenantor, " but what can then veſt in the covenantees.

" So, if a feoffment be to the uſe of *A.* for life, remainder to *B.* " for life, remainder to *C.* in fee; if *A.* refuſe, *B.* ſhall take his " remainder in poſſeſſion preſently: but upon a covenant to ſtand " ſeiſed, if *A.* refuſe, *B.* ſhall not take preſently, but the covenant- " or himſelf ſhall retain it during the life of *A.* So, if the firſt eſtate " were void, as a covenant in conſideration of long acquaintance " to ſtand ſeiſed to the uſe of *A.* for life, and after his death, in " conſideration of conſanguinity, to the uſe of *B.* in tail, or fee; " here the firſt eſtate is void for want of a ſufficient conſideration " to raiſe the uſe to *A.* Yet *B.* ſhall have no uſe till the death " of *A.*; but the covenantor ſhall retain the land during the life " of *A.* The reaſon of which diverſity is, that in caſe of the " feoffment he diveſted himſelf of the whole eſtate, and there- " fore againſt his own ſolemn livery can have nothing further " therein; and the feoffees being only inſtruments, through " whom the eſtates were to paſs over to others, were to have no- " thing to their own uſe. And ſince *A.* refuſed, *B.* muſt take in " poſſeſſion preſently, becauſe no other can have it. But, in caſe " of the covenant to ſtand ſeiſed, the uſes being executory and " to ariſe out of the poſſeſſion of the covenantor, if one refuſe, " or the uſe limited to him be void, yet this cannot carry " the poſſeſſion to the other ſooner than was intended; becauſe " it is the conſideration that draws out the uſe, and that by the " terms of the covenantor himſelf begins not to operate as a con- " ſideration till after the death of *A.*; and the conſideration for

Ld. Paget's caſe, *ub. ſup.*

" each eſtate was ſeveral and independent. So, in the principal " caſe; there, *A.* covenanted by indenture with *B.* and *C.* that in " conſideration they with the rents and profits ſhould pay his " debts, and ſuch other ſums of money as he by his will ſhould " appoint, he and his heirs ſhould ſtand ſeiſed to the uſe of *B.* " and *C.* for 24 years; and after the end or expiration of ſaid " term, then to the uſe of *D.* his ſon in tail, *&c.* Then *A.* is " attainted of treaſon, and it was adjudged, 1*ſt*, that the limit- " ation to *B.* and *C.* was void for want of conſideration; becauſe " they were ſtrangers to the payment of his debts, and were to " pay them out of the rents and profits of the land limited to " them, which was no conſideration on their part, and therefore " could raiſe no uſe to them, as it would, if they had been " made executors, or were to have paid the debts out of their " own eſtates. 2*dly*, It was adjudged, that the limitation over,

Mo. 195. *contra*; but *quære*—If the difference upon the word *term* was not in the book unobſerved.

" being after the end or expiration of the term of 24 years, and " this term (which excludes the intereſt in the land) being void, " the uſe ſhall ariſe to *D.* in remainder preſently. But, if it had " been limited after the end or expiration of the 24 years, there, " though the term had been void, yet the remainder ſhould not

" have

" have taken place till the 24 years run out by effluxion of time; " becauſe each eſtate was executory, and to ariſe out of the eſtate " of the covenantor upon diſtinct conſiderations.

" If copyhold land be ſurrendered to the uſe of *A.* for life, re- " mainder to the uſe of *B.* for life; if *A.* commit a forfeiture, or " refuſe, *B.* ſhall not enter till his death, but the lord ſhall en- " ter, and hold during the life of *A.* So, in ſuch caſe, of a ſur- " render to the lord, *B.* ſhall not enter till *A*'s death, becauſe " his eſtate is by the cuſtom, and is not to begin till after the " death of *A.*, and no incident of the common law which veſts " it ſooner belongs to ſuch eſtates without ſpecial cuſtom; and " then the lord, from whom all theſe copyholds originally moved, " ſhall take advantage of ſuch forfeiture, refuſal, or ſurrender, as " a benefit not originally departed with, when he gave out the " lands. So, where *A.*, *B.*, and *C.*, copyholders for life ſucceſ- " ſively; *A.* takes a conveyance from the lord of the freehold and " inheritance; this does not diveſt the remainders to *B.* and *C.* " And yet they cannot enter till the death of *A.*; becauſe the " cuſtom was ſo, though the eſtate for life of *A.*, as copyhold, " was enfranchiſed and gone.

9 Co. 107. Margaret Podger's caſe. 1 Saund. 151. 2 Brownl. 154.

" If *A.* limits an eſtate to the uſe of himſelf for life, remainder " to his executors for twenty years, remainder to *B.* in tail; *A.* " is attainted of treaſon, ſo that he can make no executors by " which the remainder to them is become void; the remainder " to *B.* ſhall take effect in poſſeſſion preſently, without ſtaying " until the years run out by effluxion of time. So, if the re- " mainder had been to the adminiſtrators of *A.*, which had been " merely void for the time intervening after the death of *A.* till " adminiſtration granted; in ſuch caſe, the remainder to *B.* ſhould " veſt in poſſeſſion preſently upon the attainder of *A.*; becauſe " the intermediate remainder being void, the laſt remainder did " then depend immediately upon the particular eſtate, and upon " determination thereof takes effect in poſſeſſion.

1 Leon. 196-7. 2 Leon. 5. 3 Leon. 20. Moor, 100. Dyer, 309. Cranmer's caſe.

" Huſband, ſeiſed of lands in right of his wife, makes a feoff- " ment in fee to the uſe of himſelf and his wife for their lives, " remainder to the uſe of *C.* in tail, or in fee, and dies: the wife " refuſes the eſtate limited to her by the feoffment, and brings a " *cui in vitâ*, not againſt the heir of her huſband, but againſt *C.* " in the remainder; which proves, that upon ſuch refuſal the re- " mainders being by way of eſtate executed by feoffment veſted " preſently in *C.*

Plowd. 114. Amy Townſend's caſe. 1 Leon. 199.

" We come next to conſider by what means remainders or re- " verſions may be diſcontinued, barred, and deſtroyed, and by " what not; and therein of the remedies for him in the reverſion " or remainder by entry, action, or receit. And here it will " be neceſſary to diſtinguiſh between the acts of the tenant in " poſſeſſion ſolely, and the acts of the tenant in poſſeſſion jointly, " or with the concurrence of him in the remainder, or the re- " verſion; the acts of the tenant in poſſeſſion ſolely, or ſuch as are " done or ſuffered either by the tenant for life or years, or by the " tenant in tail. And of theſe, ſome only diveſt or diſplace the

" remainder

" remainder or reverſion, but make no bar or diſcontinuance
" ſome both diveſt and diſplace the remainder or reverſion, and
" alſo cauſe a bar or diſcontinuance: and ſome neither diveſt nor
" diſplace the remainder or reverſion, and by conſequence make
" no bar or diſcontinuance.

Co. Lit. 252. a. Lit. ſect. 611. Co. Lit. 327. b. Cro. Car. 157. 368. Plowd. 373. b. Cro. Eliz. 220. 1 Leon. 23. 214. 2 Inſt. 519. Cro. Eliz. 254. Saunders v. Tucker. 7 Eliz. Jones's caſe. Mo. pl. 192-3. Co. 78. 2 Brownl. 157. MS. and 1 Keb. 249. 543. Fryer v. Kenn. 1 Chan. Caſes, 279. 1 Leon. 40.

" As to the firſt—if tenant for life or years of lands, houſes,
" or other things which lie in livery, make a leaſe for life, a gift
" in tail, or a feoffment in fee, levy a fine, or ſuffer a common
" recovery thereof; theſe acts diveſt and diſplace the re-
" mainder or reverſion, but make no bar or diſcontinuance; for
" he in the remainder or reverſion may enter preſently for the
" forfeiture. But in caſe of the fine, if it be with proclamations,
" he in the remainder or reverſion muſt enter within five years
" after the fine levied, elſe he is barred during the life of the
" tenant for life; but after his death, he has other five years to
" make his entry, within which if he does not enter or claim, he
" is then barred for ever; becauſe his remainder or reverſion be-
" ing diſplaced and turned to a right, the operation of the ſtat.
" 4 *Hen.* 7. upon the fine bars ſuch right, if no entry or claim be
" made within five years; and here being two ſeveral rights, one
" to enter preſently for the forfeiture committed in levying the
" fine, and the other after the death of the tenant for life, when
" the title of him in remainder or reverſion falls into poſſeſſion;
" the words of the ſtatute have been expounded to give five years
" for the reſpective recovery of theſe ſeveral rights. But, in caſe
" of the feoffment or common recovery, if there be no fine, he in
" remainder or reverſion may enter at any time either during
" the life of the tenant for life by reaſon of the forfeiture, or at
" any time after his death in right of his remainder or reverſion.

3 Co. 77. Farmer's caſe.

" Leſſee, for years of ſome lands, and of others at will, and
" of others by copy of court roll, having alſo lands of inheritance
" in the ſame town, leaſes all to *A.* for life; and then levies a
" fine to *A.* of ſo many acres as included all the lands. Five
" years paſſed, he himſelf all the while continuing in poſſeſſion
" and paying the rent to the leſſor. *A.* dies; the leaſe for years
" expires: it was held by all the judges of *England*, except two,
" that the original leſſor was not barred: 1*ſt*, Becauſe without
" making ſuch leaſe for life, the leſſee for years, at will, or by
" copy of court roll, could not have levied ſuch fine to bar his
" leſſor by the intent of the ſtat. of 4 *Hen.* 7. 2*dly*, Though ſuch
" leaſe was a diſſeiſin and turned the reverſion of the leſſor to a
" right, yet being made by fraud and covin, that ſtatute never
" intended to eſtabliſh ſuch fines. And it has now been ad-
" judged, that if leſſee for years makes a feoffment, and levies a
" fine, and five years paſs, the leſſor ſhall have the other five
" years after the term expired to enter or make his claim, as
" well as when leſſee for life makes a feoffment, and levies a fine,
" for in that caſe he may have a writ of entry *in conſimili caſu*
" preſently, as here he may have aſſiſe, and therefore this differs
" from the caſe put in *Margaret Podger*'s caſe, that if leſſee for
" years be ouſted, and he in reverſion diſſeiſed, and the diſſeiſee
" lev

Sir T. Raym. 219. 1 Vent. 241. 2 Vent. 334. 2 Lev. 52. 3 Keb. 37. 110. Whalley v. Tancred.

" levy a fine with proclamations, and five years paſs, the leſſor is " for ever barred, becauſe his right firſt began upon the diſſeiſin, " and diſſeiſor comes in without the conſent of the leſſee for " years; and therefore if he can defend his poſſeſſion five years, " he ſhall hold out the leſſor for ever, who by not purſuing " his right within that time hath let in the fine which works the " bar by force of the ſtatute: but in this caſe all is tranſacted by " the means and with the privity of the leſſee, who is truſted " with the poſſeſſion. And though in *Farmer*'s caſe there were " many notorious circumſtances of fraud, yet it does not follow, " but that the law is the ſame where no ſuch evidence of fraud " appears. And it would be of dangerous conſequence to men's " inheritances if it ſhould be otherwiſe. But, where tenant for " life is diſſeiſed, and the diſſeiſor levies a fine, there, the right " of him in the remainder or reverſion does not begin till the " death of the leſſee, as it does, where the leſſee for life himſelf " levies a fine, or the leſſee for years makes a feoffment and levies " a fine; in which caſes, if he in the reverſion or remainder " ſhould be compellable to enter within the firſt five years, then, " if the leſſee for life or years ſhould have charged or incumbered " the land, they would hold it charged during the continuance of " the particular eſtate in right. And the reaſon of the forfeiture " in theſe caſes being the breach of truſt committed by the " tenants in poſſeſſion, it is reaſonable he in reverſion or re- " mainder ſhould have the ſame benefit where it is committed " by a tenant for years, or where by a tenant for life in poſſeſſion. " *Quære*, if the law be the ſame on fine levied by copyholder for " life or years; for if one ouſts the copyholder, this is a diſſeiſin " to the lord, and both he and the copyholder on fine with pro- Leon. 99. " clamations, and five years, ſhall be barred for their ſeveral in- " tereſts.

" If tenant for life and a ſtranger levy a fine *come ceo*, &c. 2 Lev. 202. " to him in the remainder for life, who accepts it; this is a for- Sir T. Jo. 65. " feiture of both their eſtates; the one by giving, and the other 3 Keb. 687. " by accepting, ſuch fine, which paſſed a greater eſtate than both 733. Smith v. Abell. " of them had; and therefore the remainder-man in fee may en- " ter; becauſe both are eſtopped by the fine. It was urged, in- " deed, that this was only the ſurrender of the firſt tenant for life, " and could be no eſtoppel, becauſe an intereſt paſſed; but the " fine purports the contrary, in giving a fee, and therefore eſtops " the parties to ſay againſt it.

" If there be *A.* leſſee for life, remainder to *B.* in tail, re- 1 Roll. Abr. " mainder to *A.* in fee; *B.* and *A.* make a feoffment in fee to *C.*, 854. pl. 5, " this diveſts the remainder to *B.* and his own remainder like- 6. Hiblyn v. " wiſe; but *B.* may enter for the forfeiture, becauſe his remainder Slack, 857. pl. 3. " hinders the cloſing of *A.*'s two eſtates, and then his eſtate for " life, which was diſtinct, is, by the feoffment, forfeited and " gone. But in this caſe, if *A.* had made a leaſe to *C.*, who af- " terwards makes a feoffment in fee to *D.*, and then *A.* had re- " leaſed all his right to *B.*, this had been no forfeiture to entitle " *B.* to an entry; becauſe *A.* did nothing to take out the re-

" mainder from *B.*, but the wrong and diſſeiſin was done imme-
" diately to *A.* himſelf, and his releaſe paſſed only his own right
" without affecting *B.*'s remainder.

1 Roll. Abr. 858. pl. 5 to 12. 15. 9 Co. 106. 2 Inſt. 118.

" If leſſee for life makes a feoffment in fee, he in the remainder
" or reverſion, be it for life, in tail, or in fee, may enter for the
" forfeiture; and if he in the firſt remainder does not enter, he
" in the ſecond or third remainder may enter to the uſe of the
" others, and by reaſon of his own intereſt; and ſo may the iſſue
" or heirs of any of thoſe in remainder after their deaths; for
" the feoffment diveſts their ſeveral remainders, and gives them
" title of entry in their turns.

9 Co. 104. Margaret Podger's caſe. 2 Brownl 234. 153. Meſme caſe, *per noſme* Bagnall v. Tucker.

" *A.* copyholder for life, remainder to *B.* for life, *A.* accepts a
" bargain and ſale of the freehold from the lord to him and his
" heirs, and then levies a fine with proclamations with five years;
" then *A.* dies. It was adjudged, that *B.* may lawfully enter,
" for the acceptance only of the freehold from the lord did not
" diveſt the remainder to *B.*, for *A.* was only paſſive in it, and
" accepted that which was lawful for him to take, and for the
" lord to grant; and then the remainder of *B.* not being turned
" to a right, the fine could not attach upon it. And though,
" as between the lord and *A.*, the copyhold was determined and
" enfranchiſed by the acceſſion of the freehold; yet, as to *B.*, it
" ſtill continued copyhold, and then the fine levied of the free-
" hold by *A.* could not bind the copyhold of *B.*, unleſs it had
" been turned to a right, any more than a fine levied of land
" ſhall be a bar to the rent iſſuing out of it; and *B.*'s remainder
" by the cuſtom not being to take effect till after the death of
" *A.*, he cannot enter ſooner, nor take advantage of the forfeiture.
" But, if ſuch fine had been levied after the death of *A.* and then
" five years had paſſed, this had barred the remainder of *B.* be-
" cauſe then his title came in poſſeſſion.

1 Leon. 40. Braybrook's caſe.

" *A.* tenant for life, remainder to *B.*, remainder to *C.* in fee:
" *B.* being in poſſeſſion levies a fine *come ceo*, &c. to a ſtranger;
" *A.* dies. It was agreed by the whole court, that by that fine
" the remainder in fee is not touched, or diſcontinued: but be-
" cauſe *B.* had done as much as in him lay for the diſpoſing of
" the fee-ſimple by the fine, and had taken that upon him, the
" ſame amounts to a forfeiture. *Quære* of this caſe, how *B.*
" could be in poſſeſſion unleſs by diſſeiſin of *A.*, and then that
" diſplaces all the remainders, and turns them to a right, which
" right, as to his remainder, being but for life, is forfeited by
" the fine, as it would be by a feoffment in ſuch caſe, though
Co. Litt. 251. b. " the fine or feoffment cannot touch or diſplace the remainder
" in fee, that being diveſted and diſplaced before. But, if the
" fine were levied by *B.* being in poſſeſſion of a remainder, as a
" remainder only, then indeed it does not diveſt or diſplace the
" remainder in fee, and yet amounts to a forfeiture; as a fine
" levied by tenant for life of rent, common, *&c.* or other things
" which lie in grant, would be. Wherein the fine differs from a
" grant by deed, though it be enrolled; for ſuch deed of things
" which lie in grant neither diſplaces the remainder, nor amounts
" to

" to a forfeiture of the particular eſtate. *Quære* the reaſon of " the diverſity. Co. Litt. 251. b.

" A right of a particular eſtate may be forfeited; and he who " hath but a right of a remainder or reverſion may take advantage " thereof: as, if leſſee for years be ouſted, or leſſee for life be " diſſeiſed, and levy a fine to a diſſeiſor, or a ſtranger; or, if the " leſſee for years bring an aſſize, or the leſſee for life a writ of " right, accept a fine *come ceo*, &c. of a ſtranger; theſe are for- " feitures of their ſeveral rights, for which he who hath but a " right of remainder or reverſion may enter preſently upon the " diſſeiſor. Co. Litt. 252. a. Co. 2. 55. 1 Leon 264.

" At the common law, if lands were given to one for life, re- " mainder to another in fee, and a ſtranger brought a feigned " action or *præcipe* againſt the tenant for life, who ſuffered judg- " ment to go againſt him by default or confeſſion, without pray- " ing in aid of him in the remainder, this diveſted the remainder, " and turned it to a right. And yet he in the remainder had no " remedy to recover it, unleſs he were once ſeiſed, as by entry " upon the tenant for life before ſuch recovery; in which caſe, " after his death, he might maintain a writ of right againſt the " recoveror upon ſuch ſeiſin. And whether any formedon in re- " mainder lay in ſuch caſe, the books are not agreed. But if ſuch " feigned *præcipe* were brought againſt tenant for life, and he let " judgment go by default, or confeſſion, without praying in aid of " him in the reverſion, this was a forfeiture of his eſtate for life. " And yet he in the reverſion had no other remedy but by a writ " of right. The reaſon ſeems to be, the credit which the law " gave to ſuch recoveries being had in courts of record; and be- " cauſe, for ought appeared to the contrary, the demandants might " have good title to the land; and therefore the law would not " ſuffer ſuch recoveries to be impeached, but in an action of an " higher nature, as the writ of right was. There were likewiſe " other acts of record by the tenant for life or years, which " amounted to a forfeiture of their eſtates: as, if tenant for life " in a feigned *præcipe* brought againſt him pleaded in chief, " vouched, or prayed in aid of a ſtranger, or in a writ of right. " So, if in a writ of entry *in caſu proviſo* by a ſtranger, ſup- " poſing the reverſion to be in him, the tenant for life confeſs " the action; or in waſte againſt him by a ſtranger plead *null* " *waſte*; ſo, if leſſee for years being ouſted bring aſſize or loſe in a " *præcipe*, and bring error for error in the proceſs; theſe and ſuch " like are agreed to be forfeitures of their eſtates. But, whether " he in the reverſion or remainder might enter, or were driven to " his writ of right, or what other remedy he had, does not ſeem " clear from the books: but the caſes where the tenant for life loſt " in a feigned *præcipe* by default or reddition, that is, confeſſion, " being the moſt frequent, and the proſecuting the writ of right " by thoſe in remainder or reverſion being both tedious and ex- " penſive, the firſt ſtatute that provided remedy in thoſe caſes was " the ſtatute of *W.* 2. *c.* 3., which gives power to him in the re- " verſion to come in before judgment, and pray to be received Co. Litt. 280, 281. a. 362. 2 Inſt. 345. Co. 88. 10 Co. 44, 45. 2 Leon. 64. 4 Leon. 129. Booth, 151. 60. 70. Brook, tit. Forfeit, 8. 1 Co. 15. 39. Ed. 3. 16. 24. Ed. 3. 68. 5. Aſſ. 2. 22. Aſſ. 31. Co. Litt. 251, 252. a.

" to defend his right; or, if he did not come in, and judgment
" was given by default or reddition, then the ſtatute gave him the
" writ of entry *ad comunem legem* againſt ſuch recoveror after
" the death of the tenant for life, wherein he might ſet forth his
" title; and if the tenant could ſhew no better title than only the
" recovery, that ſhould not avail him. So, where the recovery
" againſt the tenant for life was by *nihil dicit*, this being an equal
" miſchief was taken to be within the ſame ſtatute. And ſo was
" he in the remainder as well as he in the reverſion. But where
" the recovery was upon feint or feigned pleading of the tenant
" for life, this, not being within the ſtatute, was remedied by
" 13 *R.* 2. *c.* 17. which gives reſceit likewiſe in that caſe. But,
" to elude the force of this ſtatute, the tenant for life would con-
" trive to have the *præcipe* and recovery againſt him carried on ſo
" ſecretly, that he in the reverſion or remainder ſhould have no
" notice of it time enough to pray to be received, and then, if
" the recovery were againſt him upon feint or falſe pleading, this
" not being within the former ſtatute of *W.* 2. or remedied by
" this of *R.* 2. otherwiſe than by giving reſceit, which by ſuch
" ſecret recovery was prevented, he in the reverſion or remainder
" had no other remedy than what he had at common law be-
" fore either of the ſtatutes; therefore, to obviate this miſchief,
" another ſtatute was made, 32 *H.* 8. *c.* 31., which makes void
" all recoveries had by aſſent of the parties againſt tenant for
" term of life, unleſs it were by good title, or the aſſent of him
" in the remainder or reverſion. But the tenants for life found a
" way to get out of this ſtatute likewiſe, by making a feoffment
" in fee with warranty, and before he in the remainder or re-
" verſion could have notice to enter for the forfeiture, would
" cauſe a *præcipe* to be brought againſt the feoffee, and come in
" themſelves by way of voucher; and ſo the recovery, not being
" againſt the tenant for life, as the ſtatute ſpeaks, was out of the
1 Bend. 132. " ſtatute, and remained at common law. So, if ſuch tenant for
pl. 194. " life was not diſſeiſed, and a *præcipe* brought againſt the diſſeiſor
Co. 15. " by covin, and he vouched the tenant for life, and ſo a recovery
" was had; this likewiſe was out of the ſtatute; for which rea-
" ſons this ſtatute, being defective, was repealed, and another ſta-
" tute made, 14 *Eliz.* *c.* 8., which makes void all recoveries by
" agreement and covin had either againſt the tenant for life him-
" ſelf, or where he comes in by way of voucher only, unleſs he in
" the reverſion or remainder aſſent of record, *viz.* upon vouch-
Co. Litt. " er, aid prier, or reſceit. But if recovery be had againſt tenant
362. a. " for life without conſent or covin, though without title, this di-
1 Co. 15. " veſts the remainder or reverſion, ſo that they cannot enter
" within any of the ſtatutes, but remain yet at common law.
" And all theſe ſtatutes extend to all ſorts of tenants for life.

1 Co. 14. " *A.* tenant for life, remainder to *B.* in tail, remainder to *C.*
Mo. pl. 423. " in fee; *A.* by indenture inrolled in Chancery bargains and ſells
2 Leon. 60. " the lands to *D.* and his heirs, and then *D.* ſuffers a common
4 Leon. 123. " recovery with voucher of *A.* before the ſtatute 14 *Eliz.*, and
Co. Litt. " execution was had thereupon. Yet it was adjudged a for-
362. a. " feiture,

" feiture, for which he in the remainder might enter preſently " without aid of any of the ſtatutes; for a common recovery is " but a common aſſurance or conveyance, and, if no uſe be de- " clared, ſhall be to the uſe of tenant for life. And by the pro- " ceedings in it *conſtat curiæ*, that the recoveror hath no title. " And the ſuing of execution, which is but in purſuance and " contemplation of the firſt act, cannot be any bar to the entry of " him in the remainder or reverſion. Note; where tenant for " life bargains and ſells lands to *A.* and his heirs, and after levies " a fine *come ceo*, &c. to *A.*; this was held a forfeiture of the bar- " gainee, not of the bargainor, who at the time of the fine, " which alone made the forfeiture, had nothing to forfeit.

10 Co. 44, 45. 2 Co. 74. 5 Co. 40. Sir William Pelham's caſe. 1 Leon. 264.

" *A.* tenant for life, remainder to *B.* for life, *B.* reciting, that " he had an eſtate in fee, levies a fine *come ceo*, &c. to a ſtranger, " who brings *quid juris clamat* againſt *A.*, and *A.* makes de- " fault, and thereupon judgment was, that he ſhould attorn, " which he accordingly did. And the court held, that his " eſtate for life was not forfeited, becauſe the attornment " was by compulſion of the court upon his default of appear- " ance, and not voluntarily. And there two juſtices held, " that the eſtate of *B.* was not forfeited by the fine, becauſe " this made no diſcontinuance, and nothing paſſed by it, but " what he might lawfully grant. But two other juſtices held " the contrary, and that it is not the diſcontinuance only that " makes the forfeiture, but where he doth any thing in a court of " record whereby his will appears to diſinherit him in the re- " mainder or reverſion; as, praying in aid of a ſtranger, &c. " And this ſeems the better opinion. For attornment *in pais* to " the grant of a ſtranger works no forfeiture; but attornment of " record does, where *in quid juris clamat* the tenant for life " comes in, and ſubmits in court to attorn. But the attornment " in the principal caſe being by judgment of the court upon the " default makes the difference.

Cro. Eliz. 757. Hold v. Liſter. Co. Litt. 252. a. 2 Leon. 64. 66. 4 Leon. 129. 132.

" In *quid juris clamat* the tenant ſays, that he holds in tail of " the gift of one *A.*; the plaintiff ſays, that *A. ne dona pas*; and " upon iſſue it was found for the plaintiff. And *Brown* held, " that the plaintiff might enter preſently, becauſe by ſuch claim " the tenant for life had forfeited his eſtate; but whether the " plaintiff ſhould upon the verdict have judgment to recover the " land, was the doubt.

Mo. pl. 108.

" In an aſſize of freſh force by *A.* againſt *B.* and *C.*, it was " found, that one *D.* was ſeiſed of the lands in queſtion, and by " indenture made a leaſe for three years to *B.* at ſuch a rent; and " after by indenture inrolled, bargained, and ſold the reverſion to " the plaintiff *A.* and his heirs, who after, for rent arrear, " brought debt in *C. B.* againſt *B.*, and he pleaded, that after the " ſaid leaſe, and before the grant to *A.*, *A.* by deed inrolled ac- " cording to the cuſtom, bargained and ſold to him, upon which " they were at iſſue. And if this was a forfeiture of *B.*'s leaſe " was the queſtion, on which the jury doubted, and referred it " to the court; and it was adjudged to be a forfeiture.

Walſton Dixe's caſe. Moor, 211. pl. 352.

" It would be too large a field here to enter into all the caſes " and diverſities wherein the particular tenant ought to pray in aid " of or vouch him in the reverſion or remainder, and where he in " the reverſion or remainder may pray to be received, and where " not; and what acts of the particular tenant ſhall amount to a " forfeiture, whereof and when he in the remainder or reverſion " ſhall take advantage, and in what manner, *&c.* theſe being large " enough to make diſtinct heads of themſelves.

" I ſhall proceed therefore to the ſecond diverſity, to ſhew what " acts of the tenant in poſſeſſion make a diſcontinuance or bar of " the remainder or reverſion, and what not.

Co. Litt. 327. a. 3 Co. 85.

" If tenant in tail in poſſeſſion of lands, houſes, or other things, " which lie in livery, make a feoffment in fee, a gift in tail, or a " leaſe for another man's life, or levy a fine thereof; theſe acts " diveſt and diſplace the remainder or reverſion, and amount " to a diſcontinuance; for avoiding whereof, after the death of " the tenant in tail without iſſue, thoſe in reverſion or remainder " are put to their formedon, and cannot enter; becauſe then the " alienee might loſe the benefit of the warranty annexed to ſuch " alienation.

Co. Litt. 326. 2 Inſt. 342, 343. 681. 8 Co. 71.

" So, if a man ſeiſed of lands in tail, in fee, or for life, in " right of his wife, made a feoffment in fee, a gift in tail, or a " leaſe for another man's life; this diveſted the wife's eſtate, ſo " that after her huſband's death ſhe could not enter, but was " driven to her *cui in vitâ;* for the ſafeguard of the warranty " that might be annexed to ſuch alienation of the huſband made " a diſcontinuance of the wife's eſtate-tail, and of the reverſion " or remainders depending thereon, for avoiding whereof after her " huſband's death ſhe was driven to her *cui in vitâ*, and after her " death without iſſue, thoſe in remainder or reverſion to their ſe- " veral formedons.

" So, if in a *præcipe* brought againſt the huſband and wife of " the wife's lands, the huſband loſt by default, reddition, or *nihil* " *dicit*, if he were ſeiſed for life, or in tail, in her right, ſhe was " driven to her *cui in vitâ* after his death; but, if in fee, then " ſhe had no other remedy, but a writ of right after his death. " Which laſt caſe was remedied by the ſtatute of *W.* 2. *c.* 3. which " gives her a power to come in and pray to be received before " judgment, or to bring her *cui in vitâ* after his death. But ſo " an effectual remedy both for the wife and thoſe in remainder or " reverſion againſt all alienations of the huſband ſolely or joint- " with his wife, except it were by fine or common recovery " wherein both joined, and as well of lands given to them joint- " during the coverture, as of lands whereof the wife was ſole- " ſeiſed; and alſo for remedy againſt all recoveries by default, " reddition, *nihil dicit*, or feint pleader of the huſband, the ſtatute " of 32 *H.* 8. *c.* 28. gives the wife, and thoſe in remainder or re- " verſion, power to enter in their ſeveral turns; and ſo it does " their ſeveral iſſues or heirs, notwithſtanding any fine, feoffment " or other act, made, done, or ſuffered by the huſband only. " And yet, if the huſband and wife join in a feoffment of the " wife's

" wife's lands, this being in effect the feoffment of the huſband " only is within the relief of the ſtatute, ſo, if the lands were " given to the huſband and wife and their heirs during the co- " verture, all acts of the huſband to defeat this eſtate are equally " provided againſt by the equity of this act, as if the wife had " the ſole ſeiſure thereof. But, if the huſband levies a fine with " proclamations of his wife's lands, and dies, the wife or her " iſſue muſt enter within five years after his death, and thoſe in " remainder or reverſion within five years after the death of the " wife without iſſue, elſe they will be barred by another ſtatute, " *viz.* 4 *H.* 7. for ſuch fine makes a diſcontinuance of the wife's " eſtate, and of thoſe in remainder or reverſion at common law. " And though 32 *H.* 8. aids the diſcontinuance by giving them " an entry, yet it does not take away the bar which is wrought by " their laches upon the other ſtatute. Alſo the iſſue cannot enter " during the huſband's life, either by the common law or this " ſtatute.

" If tenant in tail in poſſeſſion ſuffers a common recovery, this " not only diveſts and diſplaces the eſtate-tail, and all remainders " and reverſions depending thereon, but alſo, by reaſon of the " ſuppoſed recompence, bars them for ever; as is confirmed by " every day's practice. But then he who ſuffers ſuch recovery " ought to be perfect tenant in tail, and alſo ſeiſed by force of the " tail.

" For, where huſband and wife were ſeiſed of lands to them " and the heirs of their two bodies, or to them and the heirs of " the body of the huſband with remainder over, and a ſtranger " brought a *præcipe* againſt the huſband only, who vouched over, " and thereupon a common recovery was had; the wife died; " and then the huſband died without iſſue; it was adjudged, that " this recovery ſhould not bind the remainder; for between the " huſband and wife are no moieties, nor has the huſband power " to ſever the jointure, or to diſpoſe of any part of the land with- " out his wife, ſo that the *præcipe*, being brought againſt him " only, the recompence cannot enure; becauſe the wife had a " joint eſtate with him at the time of the recovery, and did not " join; and to a moiety it cannot enure, becauſe here are no " moieties between the huſband and wife; and therefore the re- " compence, recovered by the huſband only, cannot enure to the " remainder, which depends upon a joint and undivided eſtate " made to the huſband and wife. And then the recovery, which " binds only in regard of the recompence in value, cannot in this " caſe bind either the iſſue, if there were any, or the remainder, " ſince neither of them can take advantage, or ſue execution of " the recompence in value. And though the huſband ſurvived, " this will not mend the caſe; becauſe the law is to judge of it " as it was at the time of the recovery, and not as it falls out by " an after accident. But, if the eſtate had been to the huſband " and wife, and the heirs of the body of the huſband, and he " had levied a fine, or made a feoffment in fee, and then come in " as vouchee in a common recovery, this had barred both the iſſue

3 Co. 6. Moor, 210. Owen v. Morgan.

3 Co. 6. Cupple-dike's caſe.

" in tail and him in the remainder; becauſe, by the feoffment " or fine, the whole eſtate was diſcontinued, and the feoffee " or conuſee ſole and perfect tenant to the *præcipe*: and then, " when the huſband came in only as vouchee, he came in in " privity and repreſentation of all the eſtates he ever had, and " was to make his defence by them, which if he does not, but " calls upon another to defend him, and that other undertakes it " accordingly, and by his miſbehaviour ſuffers the demandant to " get judgment, he is bound to make a recompence equal to " what the other loſt; and ſuch recompence, being to be in lieu " thereof, is to go in the ſame manner as the eſtate he was bound " to defend ſhould have done, and, by conſequence, to the iſſue, " and thoſe in remainder or reverſion; and then they having, in " ſuppoſition of law, a recompence equivalent to what they loſt, " have the effect of the firſt ſuppoſed warranty, and cannot im- " peach the recovery, or complain of any hardſhip done them. " But, if the huſband and wife had been jointly ſeiſed to them " and the heirs of their two bodies, with remainder over, and " the huſband had made ſuch feoffment, or levied ſuch fine, and " then come in as a vouchee; it ſeems doubtful, if the iſſue in " tail, or the remainder, ſhould be barred; becauſe the wife, hav- " ing a joint eſtate of inheritance with the huſband, was no " party to the voucher, and therefore the recompence could not " enure to the inheritance of the whole. And to a moiety it " could not, becauſe there are no moieties between them. *Quære* " *ergo.*

Plow. 8. Mauzell's caſe. Co. 3. 5. b. 58. Mo. 256. & Co. 77, 8.

" The tenant in tail at the time of the recovery, if the *præcipe* " be brought againſt himſelf, ought to be then ſeiſed by force of " the eſtate-tail in poſſeſſion, otherwiſe the recovery will be no bar " either to his iſſue or thoſe in remainder or reverſion; becauſe " the recompence in value, which cauſes the bar, will go in lieu " of the eſtate he then had, which was recovered, and not in lieu " of the eſtate-tail which then he had not, nor, by conſequence, " could loſe. Therefore, if tenant in tail be diſſeiſed, and the " diſſeiſor die ſeiſed, and his heir be in by deſcent, and then the " tenant in tail enter upon the heir and diſſeiſe him, and, upon a " *præcipe* brought againſt him, ſuffer a common recovery; or, if " the tenant in tail take back an eſtate in tail, or in fee, from the " diſſeiſor himſelf; or diſcontinue the eſtate-tail, and enter upon " the diſcontinuee, and then ſuffer ſuch common recovery on a " *præcipe* againſt himſelf; theſe recoveries bar neither the iſſue in " tail nor remainders; becauſe the recompence in value goes to " the eſtate which he had at the time of ſuffering ſuch recovery, " which not being the eſtate-tail, cannot be a bar to the eſtate- " tail, or the remainders or reverſion depending thereon. But, if " the *præcipe* had been brought againſt the diſcontinuee, diſ- " ſeiſor, *&c.* and the tenant in tail had come in by way of vouch- " er, and vouched over the common vouchee, and ſo a recovery " had been had, this would bar the eſtate-tail and remainders or " reverſions depending thereon: becauſe he, coming in only as " vouchee, comes in in privity and repreſentation of the eſtate-

" tail,

" tail, and for defence thereof, and cannot come in for any other " reſpect; and therefore the recompence in value which he recovers " againſt the common vouchee goes to that eſtate-tail, and the " remainders or reverſions depending thereon, and ſo makes good " the recovery againſt the tenant, none having any loſs but the " laſt vouchee, and that occaſioned by his own default or con- " tempt.

" Tenant in tail covenants to ſtand ſeiſed to the uſe of himſelf " for life, and after, to other uſes, which were totally void; be- " cauſe by ſuch covenant only he could diſpoſe of no more than " for his own life: and after a *præcipe* being brought againſt " him, and a common recovery had with ſingle voucher; it was " held, this recovery did not bar the remainder or reverſion, be- " cauſe by ſuch covenants *quoad* himſelf, the tenant in tail, was " not ſeiſed by force of the tail, and then the recompence could " not enure to the eſtate-tail and remainders. *Sed quære*, for *Moore* " reports the ſame caſe otherwiſe, becauſe, he ſays, he was tenant " in tail as he was before notwithſtanding ſuch covenant. Yelv. 51. Moor, pl. 940. Freſhwater v. Roſs. Moor, pl. 105. 2 Co. 52. Cro. Eliz. 279. 471. 895.

" Tenant in tail makes a leaſe for twenty-one years, and after " makes a feoffment in fee with letter of attorney to enter and " make livery; the attorney enters and ouſts the leſſee, and makes " livery accordingly: and this was held a diſcontinuance of the " eſtate-tail and remainders; for the leaſe being but for years, he " was ſeiſed by force of the tail; and though livery by him or his " attorney was a wrong to the termor by putting him out of poſ- " ſeſſion, yet ſuch livery gave away nothing from the termor, " who may re-enter when he will, but paſſed only the freehold " which the tenant in tail had or may give away by livery. But, " if tenant for life be with remainders in tail, and he in the re- " mainder in tail enter upon the leſſee for life, and diſſeiſe him, " and then make a feoffment in fee; or, if tenant in tail make a " leaſe for life, and after diſſeiſe the leſſee for life, and make a " feoffment in fee, and the leſſee die, and then the tenant in tail " die without iſſue; he in the reverſion or remainder may well en- " ter, becauſe the tenant in tail at the time of the feoffment was " not ſeiſed of the freehold and inheritance of the eſtate-tail, but " of another eſtate gained by diſſeiſin. But, in the firſt caſe, if " the tenant in tail after ſuch leaſe for years had only granted the " reverſion in fee, and the leaſe had expired; though the grantee " had entered in the life of the tenant in tail; yet this had " made no diſcontinuance, becauſe neither the leaſe for years, " nor the grant of the reverſion, diveſted any eſtate, but paſſed " only what the grantor might lawfully grant, *viz.* an eſtate for " his own life. Mo. pl. 226. Co. Litt. 347. a. b. 333. Sir T. Raym. 37. Co. Litt. 332. b. ſect. 619.

" If tenant in tail make a leaſe for the life of the leſſee, and " after grant the reverſion in fee, and the tenant for life attorn; " or, if he by indenture enrolled bargain and ſell the reverſion, " and then the tenant for life die, and the grantee enter in the " life of the tenant in tail; this is a diſcontinuance equivalent to " a feoffment, and puts the iſſue and thoſe in remainder or re- " verſion to their ſeveral formedons. And ſo it would be, if the Co. Litt. 333. ſect. 620, 621, 622. 339. ſect. 638.

" tenant for life ſurrendered to the grantee, or the grantee re-
" covered in waſte, or entered for a forfeiture in the life of the
" tenant in tail; the grantor by the attornment and entry comes
" in in continuance of the new reverſion, which was gained on
" making the leaſe for life. But, if the tenant in tail had died
" in the lifetime of the leſſee, and then the leſſee had died, and
" the grantee entered; yet the iſſue or thoſe in remainder or re-
" verſion might well enter upon him; becauſe there was no diſ-
" continuance executed in the life of the leſſee longer than for the
" life of the leſſee, and by his death, that being determined, the
" grantee, who *primâ facie* took only during the continuance there-
" of, has no right after the death of the tenant in tail to enter to
" enlarge the diſcontinuance. And though ſuch grant of the re-
" verſion were with warranty, yet it would be all one; for the
" eſtate itſelf to which the warranty was annexed being deter-
" mined, the warranty cannot have continuance or enlarge the
" eſtate. So, if after the death of the tenant in tail his iſſue
" had granted the reverſion, though with warranty, and the tenant
" for life had attorned, and died, and then the grantees entered;
" yet the iſſue of that iſſue, or thoſe in remainder or reverſion,
" might well enter upon him; becauſe the diſcontinuance was in
" effect but for life; and the iſſue who granted the reverſion not
" ſeiſed by force of the eſtate-tail.

Co. Litt. 333. b. " If tenant in tail make a leaſe for life, remainder over in fee,
" and die in the life of the leſſee for life; yet this is an abſolute
" diſcontinuance, and takes away the entry of the iſſue or thoſe
" in remainder or reverſion: becauſe the eſtate for life and re-
" mainders make but one eſtate, and all paſs by the ſame livery.
" So, if tenant in tail make a leaſe for life, and after releaſe to
" the leſſee and his heirs; this is an abſolute diſcontinuance, be-
" cauſe the whole fee is executed in the life of the tenant in tail.

Co. Litt. 265. a. b. 333. b. 339. a b. ſect. 637. 601. 640, 641. " It is a rule in our books, that the eſtate-tail cannot be diſcon-
" tinued but where he who makes the alienation was once ſeiſed
" by force of the tail, unleſs it be by reaſon of a warranty: as, if
" the grandfather tenant in tail be diſſeiſed by the father, who
" makes a feoffment in fee, and dies, and then the grandfather
" dies, the ſon may enter upon the feoffee, and by conſequence
" ſo may they in remainder or reverſion in their turns. For here
" can be no diſcontinuance of the eſtate-tail or remainders; be-
" cauſe the father who made the feoffment was not ſeiſed by force
" of the tail, but of the eſtate gained by the diſſeiſin. But, if the
" feoffment had been with warranty, this had wrought the effect
" of a diſcontinuance, and taken away the ſon's entry for pre-
" ſervation of the warranty, and to prevent circuity of action.
" So, if tenant in tail be diſſeiſed, and he or his iſſue after his
" death releaſe to the diſſeiſor with warranty; this in effect
" amounts to a diſcontinuance, and takes away the entry of thoſe
" who have right; which, without the warranty, it would not
" have done; and the iſſue, being never ſeiſed by force of the tail
" without ſuch warranty, could not by any means have diſcon-
" tinued the tail.

" Another

" Another rule is, that to make a diſcontinuance, the alienee " muſt be in by force of the alienation of the tenant in tail him- " ſelf, and not of any other. Therefore, if tenant in tail makes " a leaſe for life, and after grants the reverſion to *A.*, and the " leſſee attorns, and then *A.* grants this reverſion to *B.*, and the " leſſee attorns, and dies in the life of the tenant in tail; though " *B.* enters, yet this is no diſcontinuance, becauſe *B.* is not in of " the grant of the tenant in tail, but of *A.* his grantee. *Quære* " *rationem.* Co. Litt. 333. b.

" *A.* tenant in tail, remainder to *B.* in tail, reverſion to *A.* in " fee. *A.* by indenture enrolled bargains and ſells the lands to *C.* " and his heirs, and after levies a fine thereof to *C.* and his heirs. " *C.* enfeoffs *D.*, and then *A.* dies without iſſue, and *B.* enters. " It was adjudged, that by the bargain and ſale to *C.* he had only " an eſtate deſcendible to him and his heirs during the life of *A.*, " and alſo the reverſion in fee expectant upon the eſtate-tail of *B.* " 2*dly*, That the fine levied after made no diſcontinuance, not ſo " much as a diveſting or diſplacing of the remainder to *B.*, but " only enured to corroborate the eſtate of *C.*, and by force of " the ſtatutes 4 *H.* 7. and 32 *H.* 8. made it to have continuance " ſo long as *A.* ſhould have iſſue of his body: and that it operated " only as a releaſe or confirmation upon the eſtate, which paſſed " before by the bargain and ſale, and was guided by it. But, if " the fine had been levied before the bargain and ſale, or before " the enrolment of it, this had made a diſcontinuance of the " eſtate-tail and remainders. 3*dly*, It was adjudged, that the feoff- " ment of the conuſee made no diſcontinuance of the remainders " to *B.*, ſo as to take away his entry; for none can diſcontinue " the reverſion or remainders, but he only who hath the eſtate- " tail; and therefore if tenant in tail grant *totum ſtatum ſuum* to " one who makes a feoffment in fee, this will not take away the " entry of him in the reverſion or remainder: and here, the re- " mainder to *B.* was not ſo much as diveſted or diſplaced, for the " conuſee had but a fee determinable upon the death of *A.* with- " out iſſue, and alſo the reverſion in fee: and therefore when he " who had a fee, though it were determinable, gave a fee, this " did no wrong to the heirs of *A.*, nor by conſequence to *B.* in " remainder; as a feoffment by tenant for life or in tail does, " who, having no fee themſelves, cannot give a fee to others with- " out plucking it out of the reverſion or remainders: and therefore " in one caſe it is a forfeiture of the eſtate for life; and in the " other a diſcontinuance of the eſtate-tail and remainders. But " here it is no wrong or diſcontinuance to either, and therefore " the entry of *B.* in remainderl awful. 10 Co. 95. Edward v. Seymours, 1 Bulſt. 62. Meſme caſe, *per noſme* Heywood v. Smith.

" *A.* tenant in tail, remainder to *B.* in tail: *A.* makes a leaſe for " three lives, warranted by 32 *H.* 8., and dies without iſſue: the " warranty deſcends upon *B.* who was his heir. It was held, that " by the death of *A.* without iſſue, the leaſe for three lives was de- " termined, and was no diſcontinuance, nor could bind him in " the remainder; becauſe the eſtate out of which it was derived " was at an end, and then the leaſe to which the warranty was an- Cro. Eliz. 62. Keen v. Cope. 8 Co. 34. Co. Litt. 333. a. Vaugh. 383. accord. Cro. Car. 156.

" nexed

Salvin v. Clerk, Dyer, 48-9. *contr.*; but there, in the margin, is cited 1 Ed. 6. to be reſolved by all the juſtices, that ſuch leaſe ſhall not bind him in remainder. Hil. 40 Eliz. in C. B. Reeve v. Cox, adjudged accordingly, and 4 Mar. accord. *per cur.*

" nexed being determined, the warranty was determined alſo, and " cannot bar him in the remainders. And *Vaughan* ſays, that the " caſe of *Salvin* v. *Clerk*, in which it is reported, that ſuch leaſe is " a diſcontinuance, and that therefore a ſubſequent fine with " warranty by the tenant in tail, which on his death without iſſue " deſcended to him in the remainder whoſe eſtate was diſconti- " nued, was a bar of the remainders; *Vaughan* ſays, that this caſe " is all falſe and miſreported; for the leaſe being warranted by " 32 *H.* 8. was no diſcontinuance or tort; and then there was " no new reverſion gained to which the warranty could be an- " nexed; but being annexed to the eſtate-tail, determined with " it, as did the leaſe, and ſo could not touch him in the re- " mainder.

Cro. Car. 156. Salvin v. Clerk.

" Another point in *Salvin* v. *Clerk*'s caſe was this: *A.* tenant in " tail, remainder to *B.* in fee: *A.* makes a leaſe for three lives, " warranted by 32 *H.* 8. and after levies a fine with proclama- " tions, and dies without iſſue. Five years after his death elapſe, " and then the leaſe for three lives expires. *B.* and his heirs are " barred; becauſe the right to have formedon in remainder, ad- " mitting ſuch leaſe a diſcontinuance, or to enter, if it were not, " accrued immediately on the death of *A.* without iſſue; and he " had no other right after the determination of the leaſe for three " lives, than he had before; for by the death of *A.* without iſſue, " that leaſe, or the right of his continuance, was at an end. " And this differs from the caſe of a fine levied by tenant for " life; for there, he in the remainder or reverſion hath two titles, " one to enter preſently for the forfeiture, the other to enter " within five years after the death of the tenant for life, when the " remainder or reverſion falls into poſſeſſion: but here, he hath " but one title, *viz.* after the death of the tenant in tail without " iſſue, and therefore ought to have purſued it by entry or action " within five years after ſuch death without iſſue.

Godb. 9. pl. 12.

" *A.* tenant in tail, remainder to *B.* in fee. *A.* makes a leaſe " for three lives, warranted by 32 *H.* 8., and dies without iſſue; " and before any entry, *B.* grants his remainder by fine. And if " the conuſee might enter and avoid the leaſe, was the queſtion. " *Dyer* and *Mead* held he might; becauſe by the death of tenant " in tail without iſſue, the leaſe was not avoidable only, but abſo- " lutely void, the eſtate out of which it was derived being deter- " mined: and the leaſe being warranted by the ſtatute made no " diſcontinuance; for if it had, then ſuch grant of the remainder " before avoidance of the leaſe had eſtabliſhed and made it un- " avoidable.

Co. Litt. 339. ſect. 629.

" Another rule is, that none can diſcontinue an eſtate-tail " without he alſo diſcontinues the reverſion or remainder, for the " diſcontinuance working a wrong, and paſſing a larger eſtate " than the perſon who makes it has by law power to paſs, ſuch " eſtate muſt be made up out of the reverſion or remainder. If " therefore the reverſion or remainder be in ſuch perſon, that the

" tenant

" tenant in tail cannot draw it out; or, if he who takes the eſtate
" has already the reverſion or remainder, ſo that there is no oc-
" caſion to draw it out for making good the eſtate given him by
" the tenant, there, the alienation of the tenant in tail makes no
" diſcontinuance; becauſe for want of the reverſion or remainder
" he deals only with his own eſtate, and that being in tail, he can
" give no more thereof than for his own life only, and by con-
" ſequence after his death his iſſue may well enter.

" Therefore, if there be tenant in tail, remainder or reverſion
" to the king, and the tenant in tail make a feoffment in fee, a
" gift in tail, or a leaſe for life, this is no diſcontinuance; but
" after his death his iſſue may enter; for the remainder or re-
" verſion being in the king, the ſubject cannot by any act of his
" without title draw it forth, and then whatever eſtate he departs
" with muſt be wholly derived out of his own poſſeſſion, which
" being in tail only, he can diſpoſe no more thereof than for his
" own life only; and by conſequence after his death his iſſue
" may well enter. But, if ſuch tenant in tail had ſuffered a com-
" mon recovery, this in reſpect of the ſuppoſed recompence had
" barred the eſtate-tail, and all remainders depending thereon, ex-
" cept the remainders or reverſions to the king, which by ſuch feign-
" ed recovery and recompence could not be touched. So, if ſuch
" tenant in tail had levied a fine with proclamations after 4 *H.* 7.
" this had bound the iſſue by virtue of that ſtatute, but made no
" diſcontinuance either of the eſtates-tail, or the reverſion or re-
" mainder depending thereon; becauſe the reverſion or remainder
" in the king prevented ſuch diſcontinuance for the reaſons before
" given: and then thoſe in the intermediate reverſion or remain-
" der might enter after the death of the tenant in tail without
" iſſue, as if no ſuch fine had been levied. But now by 34 *H.* 8.
" *c.* 20. it is provided, that where the king gives or otherwiſe
" provides lands to one in tail, no feigned recovery by aſſent of
" parties had againſt ſuch tenant in tail of any lands, tenements,
" &c. whereof the reverſion or remainder at the time of ſuch re-
" covery is in the crown, ſhall bind or conclude the heirs in tail;
" but that after the death of ſuch tenant in tail, the heirs in tail
" may enter, the ſaid recovery or any other thing done or ſuffered
" by or againſt ſuch tenant in tail to the contrary notwithſtand-
" ing. Upon which laſt words this ſtatute has been likewiſe ex-
" tended to take off the force and effect of the fine levied by ſuch
" tenant in tail of the gift or proviſion of the king, ſo as that the
" ſame ſhall not bind the iſſue; though *Hobart* ſays, this was an
" oblique and indirect ſtrain upon the ſtatutes. For the ſtatute
" 32 *H.* 8. *c.* 36. which ſays, that that ſtatute ſhall not extend
" to fines levied by tenant in tail, the reverſion being in the
" crown, but that they ſhould be of like force as if the ſtatute
" had not been made; this did not at all mend the caſe of the
" iſſue in tail, and therefore that ſlip was helped by the judges
" upon the words of the following ſtatute of 34 *H.* 8.; upon con-
" ſtruction of which ſtatute it was alſo held, that all intermediate
" reverſions or remainders to common perſons depending on ſuch

Co. Litt. 372. b. 335. Dyer, 32. a. Plow. 555. a. Poph. 63. Brook, tit. Aſſurance, 6. tit. Fines levy, 121. tit. Diſcontinuance of Poſſeſſion, 2. tit. Recovery, 31. b. tit. Tail, 41. Bendlow, 223. Plow. 254.

Co. 878. Hob. 333. 2 Co. 19. Mo. pl. 259. Jackſon v. Darcy. 3 Leon. 57. & 4 Leon. 40. Meſme caſe. Co. Litt. 372, 373.

" eſtate-

" eſtate-tail of the gift or proviſion of the king, whereof the re-
" verſion or remainder was then in the king, were preſerved like-
" wiſe againſt ſuch feigned recovery by the tenant in tail in
" poſſeſſion; for their remainder or reverſion being barrable at
" common law, in regard the eſtate-tail whereon they depended
" was barred, now that ſtatute having made proviſion againſt
" barring ſuch eſtate-tail in poſſeſſion, by conſequence, preſerves
" alſo the remainders or reverſions depending thereon.

2 Co. 15. Mo. 195. Wiſeman's caſe. 2 Co. 52. Mo. 345. b. Sir Hugh Cholmley's caſe. Co. Litt. 372. Yelv. 149. Poole v. Needham, 2 Co. 41. 10 Co. 39. 1 Leon. 85. Cro. Car. 430.

" But this ſtat. 34 *H.* 8. extends only to eſtates-tail of the gift
" or proviſion of the king; therefore, if a common perſon by deed
" enrolled gives lands to *A.* in tail, remainder to *B.* in tail, re-
" mainder to the king in fee; or, if one who hath a remainder in
" fee, except upon an eſtate-tail of the gift of a common perſon
" by deed enrolled, grants ſuch remainder or reverſion to one for
" life, or in tail, remainder to the king in fee, and the tenant in
" tail in poſſeſſion after ſuffers a common recovery; this bars all
" but the remainders to the king, as it did at common law. So,
" if he levies a fine with proclamations, this binds the iſſue as it
" did before; but, neither the king, nor thoſe who have an in-
" termediate reverſion or remainder; becauſe it makes no diſ-
" continuance, as has been ſhewn.

Mo. pl. 665. Cro. Eliz. 595. Stratfield v. Dover.

" The king gave lands to one in tail, ſaving the reverſion to him-
" ſelf: the donee is diſſeiſed, and the diſſeiſor levies a fine with
" proclamations, and five years paſs. *Walmſley* held, this bound
" only the iſſue, in whoſe time the fine and non-claim was, and
" that his iſſue were at liberty to enter after his death by the ſta-
" tute 34 *H.* 8. And though my Lord *Coke* cites this caſe to be
" reſolved contrary, yet this is held in other books not to be law;
" for that would open an eaſy way to get out of the ſtatute; and
" therefore, where ſuch donee in tail, the reverſion being in the
" king, bargained and ſold the lands to one and his heirs, and
" died, and the vendee levied a fine, and five years paſſed with-
" out claim by the iſſue; yet the court ſeemed to be of opinion,
" that ſuch iſſue was not bound; and if it were, that yet clearly
" his iſſue would be at large, and not bound by the fine.

Co. Litt. 373. *contr.* 1 Sid. 166. 1 Keb. 620. Loyd v. Pollard.

Co. Litt. 372. b. and the books there cited.

" Other diverſities there are upon the ſaid ſtatute, which, being
" not to the preſent purpoſe, I ſhall paſs over, referring you to the
" books where they may be ſeen.

Co. Litt. 335. a. ſect. 629. 9 Ed. 4. 24. Plow. 559. 1 Co. 140.

" Another caſe wherein there can be no diſcontinuance of
" the eſtate-tail, unleſs the reverſion or remainder be alſo diſ-
" continued, is this: if tenant in tail enfeoffs him in the inter-
" mediate reverſion or remainder, this is no diſcontinuance, but
" that after his death the iſſue in tail may well enter; becauſe the
" livery being made to him who had the intermediate reverſion
" or remainder, cannot be ſuppoſed to give him what he had al-
" ready, or to draw out an eſtate from him only to give it him
" again *eo inſtanti*; therefore, ſuch livery being made of the poſ-
" ſeſſion can paſs only ſo much thereof as the tenant in poſſeſſion
" had power to depart with; and that being for his own life only
" leaves his iſſue at liberty to enter after his death. But, if *A.*
" were

" were tenant in tail, remainder to *B.* in tail, remainder or reverſion to *C.* in fee, and *A.* make a feoffment, gift in tail, or leaſe for life to *C.*, this diſcontinues the eſtate-tail and the remainders depending thereon; becauſe there is room for the tortious operation of the livery upon the firſt eſtates, before it comes to the laſt remainder or reverſion in fee; and whether that be diſcontinued or not, yet the force of the livery, reaching beyond the eſtate-tail in poſſeſſion, muſt be a diſcontinuance thereof, and of the next remainder depending thereon, ſince it can have no other effect.

" If tenant in tail make a leaſe for his own life, remainder to the donor in fee, this is no diſcontinuance; becauſe the leaſe for his own life being lawful, the limitation over to the donor, who had the fee before, could make no diſcontinuance. For that would be to make the limitation to him by way of remainder work ſtronger than an immediate feoffment to them: and then he having, in the leaſe for his own life, given away all that he had, the limitation over is void. But, if the leaſe had been for another man's life, with remainder to the donor in fee, this had been a diſcontinuance; becauſe ſuch leaſe, being more than he could lawfully make, plucked out of the reverſion of the donor to ſerve and apply ſuch leaſe; and then the limitation, which he afterwards makes to the donor, being derived out of ſuch new fee gained by the firſt livery, carries on the diſcontinuance as againſt the iſſue in tail. Dyer, 8. pl. 15.

" If tenant in tail enfeoff the donor and a ſtranger, this is a diſcontinuance of the whole land; becauſe they take as joint-tenants, whereof each is ſeiſed *per my et per tout.* Co. Litt. 335. a. Dyer, 12.

" Another way whereby thoſe in reverſion or remainder might at common law have remedy upon a recovery, with or without title had againſt tenant for life, in dower, or by the curteſy, if ſuch tenant, being empleaded, would not vouch or pray in aid of thoſe in remainder or reverſion, or they had no notice time enough to come in to pray to be received, was by bringing a writ of error to reverſe the judgment given againſt ſuch tenant for life, if there were error in it, not otherwiſe. But this they could not have till after the death of ſuch tenant for life, unleſs they came in by way of voucher, aid prier, or reſceit; for then being parties to the record might have had ſuch writ of error preſently. And when the ſtatute of *W.* 2. divided the fee conditional into a fee-tail whereon a reverſion or remainder might depend, the judges extended the remedy which the common law gave by writ of error to thoſe in remainder or reverſion expectant on ſuch eſtate-tail after the death of the tenant in tail without iſſue; but the judgment againſt the tenant for life diveſting the reverſion or remainder, ſo that he could not after grant or transfer it over to any perſon; and it being doubtful whether he could puniſh waſte after ſuch recovery had; therefore the ſtatute of 9 *R.* 2. *c.* 3. gave him in the reverſion or remainder expectant on ſuch eſtate for life a writ of error or attaint in the life of the tenant for life. Co. 3. 3-4. Fa R. 21 E. 99. d. Palm. 226. 229, 230. 245. 253, 254. 3 Co. 61. 2 Inſt. 345. 10 Co. 44. a. 1 Co. 84. 1 Roll. Rep. 301. &c.

" life. And if the judgment be reverſed, the tenant for life is " to be reſtored to the poſſeſſion and meſne profits, unleſs the " plaintiff in error can prove that he was of covin, and aſſent " that the demandant ſhould recover; for then reſtitution is to " be made of the poſſeſſion and meſne profits to the plaintiff in " error. And this proves that the parliament held ſuch covin or " recovery a forfeiture of the eſtate for life, otherwiſe it would " have been hard to have given the poſſeſſion and meſne profits " to him in the remainder or reverſion during the life of the " tenant for life. But though it was a forfeiture, yet, as it ap- " pears before, if it were not erroneous, no ſufficient remedy " was provided for him in the reverſion or remainder to take ad- " vantage thereof, till 32 *H.* 8. and 14 *Eliz.* And if it were er- " roneous, yet till this ſtatute he could not reverſe it, till after the " death of the tenant for life. But this ſtatute making no men- " tion of recoveries againſt tenant in tail, they remain ſtill as they " were after the making of the ſtatute *de donis*; and thoſe in re- " verſion or remainder expectant thereon can have no writ of " error of an erroneous judgment given againſt the tenant in tail, " till after his death without iſſue; nor can they be received upon " the ſtatute of *W.* 2. *c.* 3. which gives the reſceit, becauſe the " eſtate-tail is looked upon as an inheritance which by poſſibility " may endure for ever: and therefore during the continuance " of it thoſe in reverſion or remainder are little regarded.

" I ſhall put but one caſe to ſhew what is a ſufficient error for " thoſe in remainder or reverſion expectant upon an eſtate-tail to " take advantage of by writ of error, and how ſuch writ of error " may be barred or prevented by the tenant in tail.

Palm. 224. Darcy v. Jackſon. 1 Roll. Rep. 301. S.C. by the name of Holland v. Soe, 2 Roll. Rep. 85. S. C. *quoad* 1ſt part only.

" *A.* having iſſue three daughters, *B.*, *C*, and *D.*, makes a feoff- " ment to the uſe of himſelf for life, remainder to *B.* in tail, re- " mainder to himſelf in tail general, remainder to himſelf in fee; " and dies. *B.* enters, and takes huſband, and they both levy a fine " with warranty againſt *B.* and her heirs, *B.* being then within " age; and after a common recovery is ſuffered with voucher of " *B.* and her huſband, who appeared by attorney, and vouched " over the common vouchee; and ſo a common recovery is had, " and the uſe declared to the huſband and his heirs, *B.* being ſtill " under age: then *B.* dies without iſſue, and five years paſſed " after her death; and now a writ of error was brought by *C.* and " *D.* againſt one who claimed under the huſband to reverſe this " recovery, and be let in by their formedon in remainder to avoid " the diſcontinuance wrought by the fine for two parts of the " land; and, after argument, it was held by all the court,

1ſt point.

" 1*ſt*, That the appearance of an infant by attorney was error, " and as if the attorney had appeared without warrant; for an " infant cannot give him authority *ad perdendum et lucrandum* for " him as the warrant of attorney purports; but an infant might " always appear by guardian aſſigned either by the court or by " writ out of Chancery; and ſuch guardian hath his warrant from " the court, not from the infant, and ought to be one of an " eſtate; for if he miſbehaves himſelf, an action of deſceit lies

Palm. 225. 228. 244. 250, 251.

" againſt

" againſt him. And though *B.* here had a huſband, yet he can-
" not make an attorney for his wife in a matter which concerns
" her inheritance, for then he might defeat her of her inherit-
" ance, eſpecially in a common recovery, which is now but a com-
" mon aſſurance, and their coming in as vouchees makes it the
" ſtronger, for the vouchee loſes all the right to the land, and gives
" recompence to the tenant.

" 2*dly*, It was held by all but *Haughton*, Juſt. that though by 2d point.
" the fine the remainder was diſcontinued and put to a right, and 226. 229.
" the erroneous recovery was ſuffered after, yet thoſe who had 230. 245.
" ſuch right only at the time of the recovery ſhall have a writ of 246. 253.
" error to reverſe it; for as by ſuch recovery, if good, their right 254.
" ſhall be bound by reaſon of the recompence; ſo, if erroneous,
" they ſhall have error to reverſe it. And if it were otherwiſe,
" no common recovery would ever be reverſed, for they always
" make a feoffment in fee, or levy a fine firſt, in order to have
" double voucher; and thoſe in remainder or reverſion have pri-
" vity in right, though not in fact, by reaſon of the diſcontinu-
" ance; and as thoſe who have but a right of a remainder or re-
" verſion ſhall take advantage of the forfeiture of a right of a par-
" ticular eſtate, ſo ſhall thoſe who have but a right of a remainder
" or reverſion have error or attaint upon erroneous recovery had
" againſt one, who had but a right of an entail, 5 *Ed.* 3. 43. 6. 4.
" And by the voucher of the tenant in tail he comes in in privity
" of the eſtate-tail, and revives the remainders to give them the
" recompence in value, without which they would not be barred.
" And though here the plaintiffs cannot be reſtored to the land by
" the reverſal of the recovery, yet they will be reſtored to all they
" have loſt by it, *viz.* their right to have formedon in remainder
" to avoid the diſcontinuance wrought by the fine. They agreed, 216. 1 Co.
" if the remainder had not been *in eſſe* at the time of the recovery, 67. 7 Jac.
" but in abeyance only as to the right heirs of *J. S.*, there, Zouch v.
" though *J. S.* died after, yet his heir ſhould not have error of a Bamfield.
" recovery ſuffered by tenant in tail; 7 *Jac. Zouch* v. *Bamfield.*
" So, of a remainder to the eldeſt ſon of *A.*, who hath an eſtate
" for life; if *A.* ſuffers an erroneous recovery, a ſon born after
" ſhall not reverſe it; otherwiſe, when the remainder was *in eſſe*
" at the time of the recovery, as here, though turned to a right.
" But *Haughton*, Juſt. held, that the plaintiff having only right of 237. 251.
" a remainder in fact, ſhould not have a writ of error, unleſs their
" remainders had been turned to a right by diſſeiſin of the tenant
" in tail, or ſuch like tort; and that the privity of the remainders
" by the tenant in tail coming in as vouchee, was only reſtored to
" be barred and have recompence over, but not to be *de facto* re-
" ſtored to their eſtates.

" 3*dly*, It was held by all the court, that the infant appearing 3d point.
" in this caſe by attorney was ſuch an error as thoſe in remainder
" may take advantage of, though ſtrangers in blood; for this writ 226. 231.
" of error is not to reverſe the recovery for the infancy of the 207. 238.
" feme covert, but becauſe it was ſuffered by attorney without 246. 251.
" warrant, the infant having no power to make any warrant, and 254.

" there-

" therefore it was not voidable only, but abſolutely void: for the
" making of the warrant of attorney is an act of the party *in pais*,
" without examination of the juſtice, though the appearance by
3 Co. 30. b. " attorney after be recorded by the court. And upon ſhewing this
43 Eliz. " in a writ of error, the defendant muſt plead, that ſhe was of full
Hobby v. " age at the time of making the warrant, and the other muſt take
Daniel. " iſſue upon it, and ſo it ſhall be tried *per pais*, not by inſpection.
25 Eliz. " And caſes were cited, that thoſe in remainder may have error
B. R. " for the infancy of the tenant in poſſeſſion. But they agreed,
Roll. 407. " that for avoiding a feoffment made by the infant there ought to
Carney's " be privity of blood, and that privity in eſtate was not ſufficient:
caſe. " but here, by the voucher of the tenant in tail the remainders
3 Co. 43. " were ſo received for the ſake of the recompence in value, that
" they were *quaſi* parties to the record.

4th point. " *4thly*, It was held by all the court, that notwithſtanding the
" objection that the warranty upon the fine could not bind this
" title to the writ of error upon the recovery, being matter ſubſe-
227. 231. " quent and ſuffered after the warranty, that yet this warranty
235. 238. " deſcending on the plaintiffs in remainder was collateral for two
248. 252. " parts, and for theſe two parts barred them of their writ of
" error. For though the recovery was ſuffered after the war-
" ranty, yet their title to the remainders was prior to the war-
" ranty, and it is in virtue of that title they ſeek to reverſe the
" recovery. And by the deſcent of the warranty their title to the
" remainder was diveſted and turned to a right. But, if the re-
" mainder be barred, ſo is their title to a writ of error to be re-
" ſtored to that remainder; for the remainder being barred, which
" is the principal, the writ of error, which is but acceſſary and
" depending thereon, is barred likewiſe. And a caſe was cited,
" 7 & 8 *Jac.*, where father tenant for life, remainder to his ſon
" in fee, the father levied a fine with warranty to a ſtranger to
" the uſe of himſelf for life, remainder to his ſon for life, re-
" mainder over in fee, and died. It was reſolved, that becauſe
" the ſon had not entered in the life of his father, but ſuffered
" the warranty to deſcend upon him, that now this had cruſhed
" his right to the remainder in fee, and he muſt be contented
" with the eſtate for life. And though in the principal caſe, upon
" the recovery againſt the conuſee, he had judgment to recover
" in value againſt *B.*, and therefore (as objected) the warranty
" was executed and ſatisfied by the recompence in value, and that
" no revoucher can be; yet it was held, 1*ſt*, that it does not ap-
" pear that any actual recompence was had; 2*dly*, the vouche
" upon the recovery was no execution of the warranty, becauſe th
" recovery was part of the ſame aſſurance, and made in affirmanc
" of it; and therefore the warranty upon the fine continues ſti
" unſatisfied; 3*dly*, admitting it were ſatisfied, ſo that he coul
" not revouch, yet he may rebut by force of it; and here it
" pleaded by way of rebutter. Alſo it was held, that though b
" this writ of error the land is not directly demanded, yet it
" obliquely and by implication. And a return of all one's right
" the land will be a bar of a writ of error, and the warranty he
" may be pleaded for avoiding circuity of action.

" 5th

" *5thly*, It was held by all, that the fine with proclamations and five years non-claim after the death of *B.* without iſſue had been a bar of this writ of error, if it had been relied on; but there, defendant after he had pleaded the fine with proclamations concludes *unde petit*, &c. if againſt the fine containing ſuch warranty plaintiff ought to have a writ of error, and ſo hath relied upon the warranty, not upon the fine with proclamations; and he having election to rely either upon the one or the other, by relying upon the one hath waived the other, and therefore it ſhall be intended only a fine at common law without proclamations, which only diſcontinues, but does not bar any right. *Nota*—In this caſe it was after held by *Doddridge*, J. and *Leigh*, Chief Juſtice, that for ſo much of the eſtate as was limited in uſe to the feme, the warranty was extinguiſhed and gone, and ſo plaintiff had judgment for all the point of the warranty, being the only point wherein the court was againſt him. And if the warranty were out of the way he muſt have judgment for all. But *quære* here, for the uſe is to the huſband and his heirs, and the warranty was againſt the feme and her heirs, and therefore this ſeems a miſtake of putting the caſe. 5th point. 227. 232. 235. 240. 243. 247.

" As to ſuch acts of the tenant in poſſeſſion as work no diveſting or diſplacing of the remainders or reverſions, and, by conſequence, no bar or diſcontinuance, this has already appeared in part, and I ſhall only put two or three caſes more for further illuſtration thereof.

" If there be tenant for life, remainder to the king for life, remainder to another in fee, and the tenant for life make a feoffment in fee; this works no diveſting or diſplacing of the remainder to the king, nor, by conſequence, of the remainder depending thereon, but paſſeth only his own eſtate for life. And yet this amounts to a forfeiture whereof the king may take advantage; becauſe by making livery thereof in fee he hath done as much as in him lay to defeat and diſinherit the king of his remainders, which is always a ſufficient cauſe for the forfeiture of a particular eſtate. So, if the king make a leaſe for years, and the leſſee make a feoffment in fee, this is a forfeiture of the term; and yet the reverſion is not drawn out of the king. 1 Co. 76. b. Co. Litt. 251. a. Poph. 30.

" If tenant for life, the reverſion or remainder to the king be pleaded in a *præcipe*, and a recovery be had againſt him by aſſent, without title, this does not diveſt the remainder or reverſion of the king; becauſe being by aſſent, and without title, it is but in the nature of a conveyance, which cannot take away the king's inheritance. But, if ſuch recovery were upon good title and without covin, this would diveſt the king's remainders or reverſion, becauſe the judgment is matter of record, and no wrong is done to the king; as, if a diſſeiſor recovers againſt the tenant for life, and enters, by this he defeats the king's remainder. 1 Co. 16. 2 Co. 53.

15 Ed. 4. 9. Co. Litt. 251. 2 Leon. 61. 4 Leon. 126. Ca. 385. Co. Litt. 327. 332. a. ſect. 608. 615, 616, 617. Pop. 63.

" If tenant for life of rent or ſervices on a *præcipe* brought againſt him pleads to the right, or confeſſes the action, &c.; or grants them in fee; this is no forfeiture to him in the remainder or reverſion; becauſe they cannot by any act of the particular tenant be drawn out of him in the remainder or reverſion, or be conveyed for any longer time than ſuch particular tenant hath intereſt therein. Wherein there is a diverſity between land, houſes, and other things which lie in livery, as appears before, and rents, commons, advowſons, remainders, or other things, which lie in grant only. For if tenant in tail of ſuch things as lie in grant, by deed or fine grant them to one and his heirs, yet this is no diſcontinuance; but the iſſue in tail, or thoſe in remainder or reverſion, may diſtrain for the rent, uſe the common, preſent to the church, or enter into the land; or they may, if they will, admit themſelves out of poſſeſſion, and bring their formedon. But then, a lineal warranty with aſſets, or a collateral warranty without aſſets, will be a bar to them, and therefore it is more dangerous to bring ſuch action.

3 Co. 85. Co. Litt. 377.

" Another diverſity is, between ſuch things as lie in grant and are *in eſſe*, and ſuch things as lie in grant and are newly created: as, if tenant in tail of land grant thereout a rent, common, &c. to one and his heirs, yet this is abſolutely determined by the death of the tenant in tail upon the conſtruction of the ſtatute *de donis*.

Co. Litt. 330. ſect. 609, 610.

" If one let lands to *A.* for life, and *A.* let the ſame lands to *B.* for years, and after grant the reverſion; yet the grantee hath an eſtate but for term of life of the grantor; and there is no diveſting of the firſt reverſion, nor cauſe of forfeiture; becauſe by ſuch grant nothing paſſed but the eſtate which the grantor had. So, if *A.* had in this caſe releaſed or confirmed the land to *B.* and his heirs, yet he would have only an eſtate for the life of *A.*, and no forfeiture or diveſting of the firſt reverſion.

" I come now to conſider the acts of the tenant in poſſeſſion jointly or with the concurrence of him in the remainders or reverſion, whereof ſome diveſt and diſplace the remainder or reverſion, and cauſe a forfeiture and diſcontinuance, and ſome not.

1 Co. 76. Bredon's caſe. Hob. 227. 278. 6 Co. 15. a. Treport's caſe. Co. Litt. 302. b. 1 Roll. Abr. 855. pl. 7, 8.

" *A.* tenant for life, remainder to *B.* in tail, remainder to *C.* in tail, or in fee. *A.* and *B.* join in a fee *come ceo*, &c. to *D.* in fee, who grants and renders a rent-charge to *A.* for life: *B.* dies without iſſue: then *C.* enters; and *A.* diſtrains and avows for the rent. It was adjudged lawful; for this fine made no diſcontinuance either of the firſt or ſecond remainder, but each of them give only what he might lawfully give, *viz.* *A.* his eſtate for life, and *B.* a fee determinable upon his death without iſſue; and the remainder to *C.* was not diveſted or diſcontinued by the fine; and by conſequence no forfeiture of the eſtate for

" life was wrought, by reaſon he in the remainder in tail joined " therein. And there it was held, that, if need were, to prevent " a forfeiture, it ſhould be conſtrued firſt the grant of *B.* of his " remainder, and then the grant of *A.* of his eſtate for life. It " was likewiſe held in the ſame caſe, that if *A.* and *B.* had join- " ed in a feoffment by deed, this would be no diſcontinuance or " diveſting of the remainders or reverſion, but that each ſhould " be ſaid to paſs only what they might lawfully depart with: and " that if *B.* died without iſſue, yet the feoffee ſhould hold during " the life of *A.* But ſome books hold this caſe of the feoffment Sid. 83; " to be different from the fine, and though the fine makes no MS. " diſcontinuance, yet the feoffment, they think, does. And it was " held in the principal caſe, that if the feoffment were by parol, it " would operate as the ſurrender of *A.*, and the feoffment only " of *B.*, which would diſcontinue the eſtate-tail and remainder. " For in ſuch caſe it cannot enure otherwiſe; becauſe unleſs the " remainder comes into poſſeſſion by the acceſſion of the eſtate " for life, it would not paſs at all; for a remainder, as ſuch, can- " not paſs by parol without deed; and therefore to make *B.*'s " joining of any effect, it muſt be taken to be the ſurrender of " *A.*, and the feoffment of *B.* But a caſe was there cited, 41 *Ed.* 3. " 21 & 41 *Aſſ. pl.* 2. where *A.* was tenant for life, remainder to " *B.* in tail, and *A.* made a feoffment in fee to *B.* and his wife, " who ſurvived *B.*, this was held a forfeiture of *A.*'s eſtate for life, " and that *D.* in remainder might enter: becauſe between baron " and feme there are no moieties, and the wife ſurviving is in of " the whole by *A.* the feoffor, whoſe feoffment diveſted and diſ- " placed the remainder to *D.*, and, by conſequence, made a for- Co. Litt. " feiture of *A.*'s eſtate for life. So, where tenant for life, and 251. a. 302. " he in the remainder for life, join in a feoffment, though by Hob. 277. " deed, yet this is a forfeiture of both their eſtates, for which he Dyer, 339. a. " in the next remainder may enter preſently; becauſe both of 1 Leon. 262. " them joined in the tortious act which diveſted the remainders. 1 Roll. Abr. 855. pl. 8.

" If *A.* be tenant for life, remainder to *B.* in tail, remainder to 1 Co. 140. " *C.* in fee; *A.* make a feoffment in fee to *C.*; this diveſts and Pop. 84. " diſplaces the remainder of *B.*, and is a forfeiture for which he 1 Roll. Abr. " may enter. So, if *A.* were tenant for life, remainder to *B.* in 857. pl. 1, 2, " tail, remainder to *C.* in tail, remainder to *D.* in fee, and *A.* 4. " make a feoffment in fee to *B.*, who dies without iſſue, *C.* may " enter for the forfeiture; for the livery diveſted his remainder, " and *B.* could not diſpenſe with the forfeiture as to his own " eſtate. So, if *A.* be tenant for life, remainder to *B.* in tail, " and *B.* releaſe to *A.* in fee, and after *A.* make a feoffment in " fee, and then *B.* die; yet his iſſue may enter for the forfeiture: " for the releaſe did not mend at all the eſtate of *A.*; and though " it prevented *B.* himſelf from taking advantage of the forfeiture, " yet it could not bind his iſſue, or thoſe in remainder.

" Huſband tenant for life, remainder to his wife for life, re- 1 Leon. 36. " mainder to the heirs male of their two bodies, remainder to *A.* 1 Sid. 83. " in fee. The huſband and wife levy a fine with warranty, Raym. 36. 1 Keb. 76. &c.

Stephens v. Brittridge. " and die without iſſue:—the warranty deſcends upon *A.*: yet it " was adjudged, that neither the fine nor the deſcent of the war- " ranty upon *A.* barred or diſcontinued his remainder, becauſe " the eſtates of the huſband and wife for their ſeveral lives con- " tinued diſtinct, and were not merged in the remainder to " them in tail; and then not being ſeiſed by force of the tail, " their fine could make no diſcontinuance of the eſtate-tail or the " remainder, and, by conſequence, the warranty could not at- " tach upon *A.*, whoſe eſtate was not diveſted or turned to a " right. But in all theſe caſes the fine with proclamations binds " the iſſue by force of the *ſtat.* 4 *H.* 7. & 32 *H.* 8.

" *A.* tenant for life, and *B.* in remainder in tail levy a fine; " *B.* dies without iſſue, and if the conuſee ſhould hold during the " life of *A.*, was the queſtion. The court thought this caſe the " ſame with *Bredon*'s caſe. But *Hale* ſaid, the reaſons given in " *Bredon*'s caſe make againſt the reſolution; for where it is ſaid, " the remainder in tail paſſed firſt to avoid a forfeiture, he ſaid, " if it did, the freehold muſt then paſs to it by way of ſurrender, " and ſo drown; but they ſhall rather be conſtrued to paſs *inſimul* " *et uno flatu:* and he reſembled the principal caſe to a feoffment " by the huſband and wife of the wife's lands whereof the huſ- " band is entitled to be tenant by the curteſy; the heir of the " wife ſhall not avoid the feoffment during the life of the huſband. " But the caſe was ended by agreement.

Cro. Car. 285. Major v. Talbot. " Huſband and wife, ſeiſed of lands to them and the heirs of " the huſband, make a leaſe thereof to the defendant, who cove- " nants with them and each of them, and with the heirs and " aſſigns of the huſband, to do ſuch a thing upon the land. The " huſband and wife convey the reverſion to the plaintiff in fee, who " brings covenant, and concludes *unde actio accrevit* to him as " aſſignee of the huſband, without averring the wife to be dead. " And though it was urged, that he ought to have brought cove- " nant as aſſignee to both, having his eſtate as well from the wife, " who had an eſtate for life, as from the huſband who had the " fee, unleſs he had alleged the wife to be dead; yet it was held " well, being brought by the aſſignee of him who had the in- " heritance, and ſo no prejudice to any; and that the eſtate for " life being transferred with the fee was thereby drowned and " confounded, and ſo the action well brought as aſſignee of the " huſband.

Cro. Eliz. 827. Moor, pl. 870. Peck v. Channell. " *A.* tenant for life, remainder to *B.* in tail, remainder to *C.* in " fee. *A.* and *B.* intermarry, and after levy a fine *come ceo*, &c. " with remainder to *A.* for life, remainder to *B.* the huſband and " his heirs: then the huſband and wife ſuffer a common recovery " with ſingle voucher to the uſe of the huſband and his heirs, and " die without iſſue. *C.* enters within five years. And it was " adjudged clearly, 1*ſt*, That the fine levied by *A.* and *B.* made " no diſcontinuance, and they would not ſuffer it to be argued " for the reaſons in *Bredon*'s caſe; for none can diſcontinue an " eſtate-tail, but he who is ſeiſed thereof in poſſeſſion, or at leaſt " of

" of the freehold thereof. 2*dly*, It was adjudged, that the re-
" covery was no bar or diſcontinuance of the eſtate-tail or remain-
" ders, becauſe he who ſuffered it was not ſeiſed of the eſtate-tail
" at the time of the recovery; for by the fine an eſtate in fee de-
" terminable on *B.*'s death without iſſue paſſed, though there was
" no diſcontinuance; and by the render a new eſtate is given to
" the huſband, to which the recompence in value upon the reco-
" very enures, and not to the eſtate-tail, nor, by conſequence, to
" the remainders depending thereon. And this recovery was not
" within 32 *H.* 8. becauſe he in the remainder in tail joined with
" the tenant for life. But it was agreed, that the fine would
" have bound the iſſue, if there had been any, by virtue of the
" ſtatutes.

" *A.* tenant for life, remainder to *B.* for life, remainder to *C.* 1 Roll. Abr.
" in tail, remainder to *B.* in fee. *B.* levies a fine *come ceo*, &c. to 855. pl. 9.
" *D.*: this is a forfeiture of his remainder for life; ſo that after Owen, 146.
" the death of *A.*, *C.* may enter; for by this fine *B.* is eſtopped Styles, 192.
" to ſay that he did not paſs a fee in poſſeſſion without any fraction Garratt v.
" of eſtate. And therefore this differs from *Bredon*'s caſe, where Blizzard.
" the eſtate for life and remainders were immediate one to the 2 Mod. 114.
" other, which here they are not. *infra.*

" Feme tenant in tail general, remainder to the huſband and his Hob. 277.
" heirs during the life of *A.*, remainder to *A.* in fee. The huſ- 1 Roll. Abr.
" band and wife levy a fine *come ceo*, &c. to *D.* and *E.*, to the uſe 854.
" of the wife and her heirs; the huſband dies; the wife dies Earl of Clan-
" without iſſue; *A.* brings formedon againſt the heir of the wife, rickard's
" upon pretence that the fine levied by her being tenant in tail in caſe.
" poſſeſſion, was a diſcontinuance, and that the eſtate in remain-
" der of the huſband for the life of *A.* was merged and extin-
" guiſhed in the fee granted by the fine to *D.* and *E.*, ſo that upon
" the death of the wife without iſſue, the remainder to *A.* was to
" come into poſſeſſion. But it was held, that the eſtate-tail of
" the wife, and the remainder of the huſband for the life of *A.*
" were conveyed as two diſtinct eſtates in being to the conuſees,
" and that the eſtate for life was not extinguiſhed or involved in
" the eſtate-tail given by the fine; for then it muſt be either by
" ſurrender, forfeiture, or confirmation. By ſurrender it cannot
" be, becauſe it is ſubſequent to the eſtate-tail; by forfeiture it
" cannot be, becauſe the tenant for life gave not the fee alone,
" but gave only ſo much thereof as he had, and joined with the
" tenant in tail, who had power to give a fee during the eſtate-tail
" without wrong to any. And if need were, as in *Bredon*'s caſe,
" to avoid a diſcontinuance, they conſtrued the remainders in tail
" to paſs firſt; ſo here, to avoid a forfeiture, her eſtate for life
" may be ſaid to paſs firſt, though in the conuſee they both made
" but one entire eſtate. And if the fine were reverſed for the
" infancy of the wife, yet the conuſee ſhould hold the huſband's
" remainder for the life of *A.* So, if the fine were upon condi-
" tion, both eſtates on breach thereof ſhould be reſtored in the
" ſame plight as at firſt. But admitting it ſhould be taken as a
" diſcontinuance of the wife, being tenant in tail in poſſeſſion,

" and as the confirmation of the huſband in remainder, yet *A.* " can no more enter during the continuance of the eſtate, than if " the huſband had not joined in the fine, but had kept his right, " or had releaſed it to the diſcontinuee. For in ſuch caſe, every " one muſt ſue in their turn to avoid the diſcontinuance: firſt, " the iſſue, then, he in the firſt remainder, and after *A.* Though " the iſſue will not, or there be no iſſue, or the iſſue be bound, " and the huſband cannot by reaſon of his releaſe, yet it is all one " to *A.*, for his right does not begin till after the two foregoing " eſtates ended. But in *Bredon*'s caſe, if the tenant for life had " ſurrendered to him in the remainder in tail, and then he had " levied a fine, and died without iſſue, he in the next remainder " ſhould have had a formedon preſently, though the tenant for life " were living; becauſe by the ſurrender the eſtate for life was " abſolutely determined, but by his joining, as he did there, or, if " he had releaſed or confirmed the land to the conuſee, in ſuch " caſe, he ſhould have been ſaid to give only his own ſingle eſtate " for life, and he in the ſecond remainder ſhould not enter till " that determined. And therefore in the principal caſe it was " held, that no formedon lay during the life of *A.*

Cro. Eliz. 56. 1 Leon. 243. Trevilian v. Lane.

" *A.* tenant for life, remainder to *B.* in tail, remainder to *A.* " in fee. *A.* and *B.* make a leaſe for three lives by indenture to " *C.*, then *A.* dies, and *B.* grants the reverſion to *D.* in fee, to " the uſe of his laſt will, and by his will deviſes the reverſion for " years, and dies leaving iſſue. The three lives die; the deviſee " for years enters, and the iſſue of *B.* ouſts him. And it was ar- " gued, that this leaſe for three lives was a diſcontinuance, be- " cauſe, as it was ſaid, it was more than they could both make, " and ſo it was a tort; and the reverſion gained by tort, though " in whom the reverſion was might be a doubt. But it was ad- " judged no diſcontinuance, and that the entry of the iſſue was " lawful; for the leaſe being by indenture was the leaſe of *A.*, and " the confirmation of *B.*; but, if it had been without deed, then " it had been the ſurrender of *A.*, and the leaſe of *B.* only, be- " cauſe otherwiſe nothing could paſs from him, his remain- " der, as ſuch, not being transferable but by deed.

1 Leon. 127. Cro. Eliz. 135. Toft v. Tomkins.

" *A.* tenant for life, remainder to *B.* in tail. *A.* makes a " feoffment to the uſe of himſelf for life, remainder to *B.*; then " *A.* and *B.* enfeoff *D.* *Gaudy* and *Shute* held clearly, that this " was a diſcontinuance; for when *B.* enters to make the feoff- " ment, he is remitted by reaſon of the forfeiture committed be- " fore by *A.*, and then by ſuch remitter he gains the poſſeſſion, " and it is only his feoffment, and ſo it is a diſcontinuance; for " both cannot have the poſſeſſion. *Clench cont.* Becauſe the in- " tent of *B.*'s entry was only to join in the feoffment with *A.*, and " to paſs both their eſtates together, and not to take advantage " of the forfeiture; and therefore it was no diſcontinuance. " But the caſe was adjourned, and no judgment appears to be " given.

Dyer, 324. pl. 35.

" *A.* tenant for life, remainder to *B.* in tail. *A.* levies a fine " to the uſe of himſelf; then he and *B.* join in a feoffment by " letter

" letter of attorney. And it was held a diſcontinuance, becauſe " it was the feoffment of *B.*, and the confirmation of *A.* only.

" *A.* tenant for life, remainder to *B.* in tail, remainder to *C.* " in tail, or fee; a *præcipe* is brought againſt *A.* and *B.*, who both " vouch the common vouchee, and thereupon a common recovery " is had; yet this ſhall not bind the eſtate-tail or remainders, be- " cauſe *B.* in remainder is not tenant to the *præcipe*, but *A.* the " tenant for life only, and therefore the recompence in value can- " not go to *B.* in remainder only, he being never ſeiſed by force " of the tail; but ſhall go to them jointly according to the writ, " which was againſt them jointly, and ſuppoſed them joint- " tenants; and by conſequence can be no bar to the eſtate-tail " or remainder, whereof they were not jointly ſeiſed, but in re- " mainder one after another. Dyer, 252. 3 Co. 6. Kniveton's caſe. Cro. Eliz 670. Leach v. Cole.

" But in that caſe if *A.* only had been empleaded, and had " vouched *B.* in remainder in tail, and he the common voucher, " and ſo a common recovery were had; this had barred the eſtate- " tail, and all remainders or reverſions depending thereon; be- " cauſe there *A.* was ſole tenant to the *præcipe*, and by voucher " of him in the next remainder in tail he does his duty. And " if he in the next remainder in tail cannot defend the poſſeſ- " ſion, or call in one who will, he muſt be contented with the " recompence in value, which the court adjudges the laſt vouchee " to render to him according to the eſtate he hath loſt; and ſuch " recompence is to go over to thoſe in the future remainders, " whoſe eſtates are likewiſe by the judgment taken out of them " to make good the eſtate recovered. 10 Co. 43. 3 Co. 60. Cro. Eliz. 562. 570. Mo. pl. 953. Jenning's caſe. 10 Co. 39. b. Co. Litt. 362. a.

" *A.* tenant in tail, and *B.* in reverſion in fee, join in a leaſe " for life by deed, which is not warranted by 32 *H.* 8. then *B.* " deviſes his reverſion, and dies, and after *A.* dies without iſſue; " and the queſtion was, if this leaſe was a diſcontinuance of the " eſtate-tail and the reverſion; for then the deviſe of *B.* is " void, he having no reverſion, but only a right of a reverſion, " which is not deviſable. And three juſtices held this leaſe a " diſcontinuance, and, by conſequence, the deviſe to be void: " for the livery is made only by the tenant in tail; for he only " hath the immediate freehold, and his leaſe diſcontinues the " eſtate-tail and reverſion, and gains him a new fee during the " leaſe. And they held likewiſe, that it was a diſcontinuance " preſently or not at all; for the after-accident of the death of " the tenant in tail without iſſue could not make it a diſconti- " nuance of the reverſion, if it were not ſo upon making the " livery. But *Croke*, J. held it no diſcontinuance, 1*ſt*, becauſe it " ſhould be taken to be the leaſe of the tenant in tail during his " life, and the confirmation of him in the reverſion; and after " the death of the tenant in tail without iſſue, then it ſhould be " taken to be the leaſe of him in the reverſion only; 2*dly*, be- " cauſe their joining in ſuch leaſe ſhews they had no intent to " make any diſcontinuance to diveſt or diſplace the reverſion. " But by the other three juſtices it was adjudged to be a diſcon- " tinuance, and the deviſe void. Cro. Car. 387. 405. Baker v. Hacking.

2 Lev. 154. 2 Jon. 65. 2 Mod. 109. 3 Keb. 321. 580. 652. 681. &c. Piggott v. Lord Saliſbury.

" *A.* leſſee for years, remainder to *B.* wife of *C.* for life, remainder to *D.* in tail, remainder to *C.* huſband of *B.* for life, remainder to *B.* in fee; the huſband and wife, by fine *ſur conceſſit*, grant *tenementa prædicta et totum et quicquid habent in tenementis prædictis* to *E.* and his heirs for the life of the huſband and wife, and the longer liver of them, with warranty againſt them, and the ſurvivor of them: *A.* attorns; afterwards *F.* father of *D.*, and the huſband and wife, levy a fine *come ceo*, &c., with warranty ſeverally againſt *F.* and his heirs, which deſcended on *D.*: and if the fine *ſur conceſſit* by the huſband and wife ſhould enure to paſs an eſtate in poſſeſſion for their lives, and the life of the longer liver of them, then it was agreed by all that the remainder to *D.* was diſplaced, and then the warranty attaching upon him bound him: but, if it had paſſed only their ſeveral eſtates by fraction, *viz.* the eſtate of the wife in poſſeſſion, and the eſtate of the huſband, as a remainder, then there was no ſuch diveſting of *B.*'s remainder, as would let in the warranty upon him. But the better opinion ſeems, that by the grant of *tenementa prædicta* for the life of the huſband and wife, and the longer liver of them, an eſtate in poſſeſſion paſſeth for that time; and that the words *totum et quicquid habent*, &c. cannot be taken by way of reſtriction to qualify it, ſo as to paſs only their ſeveral eſtates by fractions, that being a diſtinct independent clauſe, and added by way of accumulation to include and take in whatever intent the firſt words might be thought inſufficient to carry; and then the remainder to *D.* was diſplaced, and the warranty of his father attaching upon him, bound his right. For they all agreed, that the firſt fine, though executory only at firſt, was well executed by the attornment of the leſſee for years; and though this fine *ſur conceſſit* be the moſt innocent of all others, and but as a grant of *totum ſtatum ſuum*, if there be proper words of reſtriction, yet with ſuch words it paſſes a fee as well as the fine *come ceo*, &c, which, if levied by tenant for life or years, is always a forfeiture of their eſtate, be the reſtriction what it will. And here they ought to have only granted *totum ſtatum ſuum et quicquid habent in tenementis prædictis*, without ſaying for what eſtate, or, if any eſtate were named, it ought to have been only for the joint lives of the huſband and wife, or for the life of the wife, and after the death of *D.* without iſſue, then for the life of the huſband: but as it is here, it paſſes an entire eſtate in poſſeſſion for a longer time than they had power to give it, and ſo diſplaces the remainder to *D.*, and lets in the warranty. And yet it was agreed by all, that the intent of the huſband and wife was only to paſs their ſeveral eſtates, becauſe otherwiſe *D.*, by his entry for the forfeiture, might not only have defeated the eſtate of *E.* the purchaſer, but might alſo (being in poſſeſſion) by a common recovery have barred the remainder in fee to the wife; to prevent which, as they thought, they contrived ſuch fine, *E.* having agreed to the purchaſe of the whole eſtate, and *D.* being only to join in the ſale when he came of age. Note—*Garratt* v. *Blizzard* (*ſupra*

" wa

" was cited and relied on; but the parties after agreed, and no " judgment was given.

" *A.*, by leaſe and releaſe on a marriage intended with *B.*, con- 2 Jo. 98.
" veys lands to the uſe of himſelf for 99 years, if he ſhould ſo 3 Keb. 822,
" long live, remainder to truſtees during his life to ſupport con- 2 MSS. 50.
" tingent remainders, remainder to *B.* for life for her jointure, Lane v.
" remainder to the firſt, ſecond, and other ſons in tail male ſuc- Vane.
" ceſſively, remainder to the heirs male of the body of *A.* on the
" body of *B.* to be begotten, remainder to the right heirs of *B.*;
" the marriage takes effect; and before the birth of any ſon, *A.*
" and *B.* mortgage the ſaid lands for 500 years to the plaintiff
" for ſecuring 1000*l.*, and then levy a fine *come ceo*, &c. to the
" plaintiff, in the firſt place for corroborating the term, and
" after to the uſe of the right heirs of *A.*; the truſtees enter
" for a forfeiture; then a ſon is born, after *A.* dies, and the
" truſtees continue poſſeſſion in right of the ſon; the plaintiffs
" enter, and *B.* is yet living. And if the plaintiffs ſhould hold
" during the life of *B.*, was the queſtion; for there was no
" endeavour to prove the contingent remainders deſtroyed, there
" being a ſufficient eſtate in the truſtees to preſerve them till
" they came *in eſſe*. For the plaintiffs it was argued, that they
" ſhould hold during the life of *B.*, for if the remainder in fee
" had been in a ſtranger, and *A.* and *B.* and that ſtranger had le-
" vied ſuch fine, this had been a forfeiture of *A.*'s eſtate, by rea-
" ſon of the intermediate remainder to the truſtees, who did not
" join; but it could be no forfeiture of *B.*'s eſtate for life, be-
" cauſe he in the remainder joined; and therefore they only
" paſſed what they lawfully might paſs, *viz.* their ſeveral eſtates.
" (1 *Co.* 76. 6 *Co.* 15.) And though both are conjoined in the
" conuſees, yet there being no forfeiture, ſurrender, or extin-
" tinguiſhment of *B.*'s eſtate for life, the eſtate of the conuſee
" ſhall open to let in the contingent remainders when they happen,
" as if no alienation had been made, there being a ſufficient eſtate
" to ſupport them. And if there was no forfeiture of the eſtate
" for life of *B.* upon levying the fine, the birth of the ſons after
" cannot make it ſo, that being matter *ex poſt facto*, and 1 *Co.* 76.
" *Engliſh*'s caſe was cited, where tenant for life and an infant in
" remainder joined in a fine, which was after reverſed for the
" infancy; yet the conuſee held during the life of the tenant for
" life. 2*dly*, Admitting the eſtate for life of *B.* could not revive
" and ſeparate from the inheritance to let in the contingent re-
" mainders when they happen, being conjoined in the conuſee;
" yet, after the death of *B.*, they may take place without any
" ſuch interpoſition; as if *A.* be tenant for life, the remainder to
" *B.* in fee, and *A.* be diſſeiſed, and releaſe to the diſſeiſor, he
" ſhall have the whole fee during the life of *A.*, and *B.* cannot
" defeat it or take out his remainder till *A.*'s death. So, if *A.* be Co. Litt.
" tenant for life, remainder to his firſt and other ſons in tail, 276.
" and before the birth of any ſon *A.* be diſſeiſed, and then after Hob. 278.
" a ſon be born, and *A.* releaſe to the diſſeiſor, he, by this, ſhall 1 Roll. Abr.
855.

" have

" have a fee till *A.*'s death, and then the ſon may defeat it by " entry; becauſe the right of *A.* ſupported it till it came *in eſſe*, " and then his releaſe after cannot deſtroy it. So here, the eſtate " for life of *B.* is virtually *in eſſe*, though being conjoined with " the remainder in fee in the conuſee it ſhould not ſurvive. But " in this caſe the remainder in fee being in the wife, ſhe has no " eſtate for life to forfeit or ſurrender, but has the whole fee in " her, ſubject to divide and let in the contingent remainders " when they happen, and ſhe has then no new eſtate but the " ſame ſhe had before, then joined, now divided, and therefore " the conuſee ſhall hold during her life. On the other ſide it " was argued for the defendant, that, till the contingent remain- " ders came *in eſſe*, the wife had the whole fee executed in her, " and no eſtate for life; for that was not to ariſe till the birth of " the ſons: and therefore, by her joining in the fine, could not " be granted or transferred over as any certain or fixed intereſt, " but, being in contingency, was extinguiſhed and deſtroyed by " the fine before it took effect; and therefore the eſtate of the " ſon ſhall be now in poſſeſſion diſcharged of it. And a caſe was " cited to be reſolved in Chancery by the Chancellour, *Hales* " Ch. J. *Wyld*, *Ellis* and *Wyndham*, *February* 1672, where *A.* con- " veyed lands to the uſe of himſelf for life, and after his death " and the death of *B.*, then to the uſe of *C.*, this limitation to " the uſe of *C.* was reſolved to be contingent, by reaſon that *B.* " had no eſtate, and he might ſurvive. And there it was agreed, " that if *C.* had levied a fine or made a feoffment, the eſtate to " *C.* could never veſt. But this caſe differs from *Bredon* and " *Treport*'s caſes; for in thoſe caſes there was an eſtate for life " *in eſſe*; but here there was none, but in contingency. But the " principal caſe was adjourned, and no judgment appears to be " given.

Smith *ex dem.* Dormer v. Packhurſt, 3 Atk. 135. 4 Br. P. C. 353. and 405. 18 Vin. Abr. 413. Fearne's C. R. 335. 4th edit. 2 Str. 1105. Andr. 315. S. C.

In the caſe of *Smith*, on the demiſe of *Dormer* v. *Packhurſt & al.* (commonly called by the name of *Dormer* and *Forteſcue*) there was a limitation in remainder (after ſeveral preceding eſtates for life and in tail) to the uſe of *A. for ninety-nine years, if he ſhould ſo long live*, and from and after *the death of* A., *or other ſooner determination of the eſtate limited to him for ninety-nine years*, to the uſe of truſtees and their heirs, during the life of the ſaid *A.*, upon truſt to preſerve contingent eſtates, *&c.* and for that purpoſe to make entries and bring actions, *&c.* but to permit the ſaid *A.* to receive the rents and profits, *&c.* during the term of his life; and after the end or other ſooner determination of the ſaid term, to the uſe of the firſt and other ſons of *A.* ſucceſſively in tail-male, with divers remainders over. By the expiration of all the preceding eſtates, *A.* came into poſſeſſion of the eſtate limited to him for ninety-nine years; and having a ſon, he, together with that ſon, when he came of age, levied a fine of the lands to make a tenant to the *præcipe*, and ſuffered a recovery of the ſame, in which the ſon was vouched. The ſon died without iſſue, and afterwards *A.* died without leaving any other ſon; the next ſurviving remainder-

man

man made his actual entry within five years, and the queſtion was, Whether the recovery had barred his remainder? This point depended entirely on another queſtion, Whether the freehold was in the truſtees during the life of *A.* or not? For if it was, the recovery was not well ſuffered for want of a good tenant to the *præcipe*, and conſequently did not bar the remainder; but if the truſtees had not the freehold, then it was in the ſon, and of courſe he was capable of making a good tenant to the *præcipe*, and the recovery in that caſe was well ſuffered; for the court held that the fine by leſſee for years, (*A.*) or the reverſioner, (the ſon) could only operate by way of eſtoppel, to bar the parties claiming under ſuch leſſee or reverſioner; but did not acquire the freehold, as a feoffment would have done.—To prove that the freehold was not in the truſtees, it was inſiſted, *firſt*, That the remainder to the truſtees was void in its creation, becauſe to commence after *A.*'s death, and then hold during his life, which was repugnant, and could never take effect at all. *Secondly*, If not void in its creation, it was a contingent remainder, becauſe it was uncertain whether it ever would take effect, as the term of ninety-nine years might not determine in *A.*'s lifetime. *Thirdly*, That if it was neither void nor contingent, yet it did not amount to a legal eſtate, but was only a right of entry.—But the court reſolved, that the remainder was not void in its creation, its commencement not being reſtrained to the death of *A.*, but limited from the death of *A.*, *or other ſooner determination of the eſtate for ninety-nine years*, and therefore might take effect by ſurrender, forfeiture, or effluxion of time, in *A.*'s lifetime. *Secondly*, That it was not a contingent remainder, being limited to perſons *in eſſe*, without any condition precedent to be performed; it did not depend on the death of *A.*, but on ſuch other events, (*viz.* forfeiture, ſurrender, *&c.*) as might determine the particular eſtate from the nature of the eſtate itſelf. *Thirdly*, That it was not a mere right of entry, but a legal eſtate; for a grantor cannot reſerve a right of entry to a ſtranger, nor can a right of entry ſubſiſt without an eſtate. Therefore the truſtees had the freehold for the life of *A.* And, upon the whole, the court held, that the fine and recovery did not bar the remainder.

" *A.* tenant for life of certain lands, remainder to his ſon *B.* in " tail. *A.* and *B.* join in a leaſe by indenture to *C.* for life, re- " mainder to *D.* for life, rendering 10*l. per annum* rent. *A.* " dies; *B.* accepts the rent from *C.*, and dies, having iſſue, who " alſo accepts the rent from *C.*, and then enters, and makes a " feoffment, and levies a fine to *J. S.*; then *C.* re-enters, and dies, " and *D.* enters as in his remainder. And the queſtion was, If " *J. S.* the purchaſer of the remainder might avoid this leaſe in " remainder to *D.*, or if the acceptance of the rent from *C.*, the " firſt tenant for life, had made good the remainder to *D.*, ſo " that he coming in under the iſſue of *B.*, who ſo accepted the re- " mainder, ſhould be bound by it? And it was adjudged, that the " leaſe in remainder to *D.* was good, and not avoidable by *J. S.* " the purchaſer; for the power to avoid this leaſe was only given " to the iſſue in tail in reſpect of his eſtate-tail, and when that by " the

Cro. Eliz. 253. 1 Leon. 243. Jeffery v. Coite.

" the fine is bound and gone, the purchaſer, who is a ſtranger to the
" eſtate-tail, and not in in privity thereof, cannot have the privileges
" annexed thereto, nor, by conſequence, can avoid the leaſe, which
" the iſſue in tail, as ſuch, only had a power to do.

Cro. Eliz. 90. Knight v. Fortipan.

" Copyhold was granted to one for life, remainder to an infant
" in fee; they both join in a ſurrender to one who was admitted
" tenant for life, and after the infant dies, and his heir enters.
" It was adjudged, that he might well enter without being put
" to his writ of *dum fuit infra ætatem*; for ſuch ſurrender was but
" a conveyance by matter *in pais*, which cannot bind an infant,
" but that he or his heirs may enter, or bring treſpaſs before
" admittance.

Cro. Car. 103. Holt v. Samback.

" *A.* tenant for life of certain lands, remainder to *B.* in tail male,
" remainder to *A.* in tail, remainder to *B.* in tail general, remainder
" to *A.* in fee. *A.* and *B.* join in a deed, whereby *A.* grants, and *B.*
" confirms to *C.* and his heirs a rent-charge of 10*l.* *per annum* out
" of the ſaid lands, *B.* being then within age; then *A.* and *B.* levy
" a fine of the ſame lands to the uſe of *A.* and his heirs, who en-
" feoffs the plaintiff, and dies, and *B.* hath iſſue yet living. And if
" the plaintiff was chargeable with this rent, was the queſtion. It
" was argued, that if a rent be granted by tenant for life, and con-
" firmed by him in the remainder in fee, being within age, that
" this iſſues out of the eſtate for life only, and is merely a void
" grant as to the remainder; ſo that if the tenant for life pur-
" chaſes the reverſion or remainder, and dies, this ſhall not bind
" the inheritance. And though he had made a feoffment over,
" yet a feoffee after his death ſhould avoid it. But here, becauſe
" *A.* was not only tenant for life, but had alſo a remainder in tail,
" and after that a remainder in fee, the rent is iſſuing out of all
" his eſtates; and though it were void as againſt *B.*, who was
" the next in remainder in tail, and confirmed it, by reaſon of his
" infancy, yet now that eſtate-tail of *B.* being bound by the fine,
" and the whole eſtate limited to the uſe of *A.* and his heirs, the
" court inclined that the rent had ſtill a continuance, and ſhould
" bind the plaintiff; for the privilege which the tenant in tail
" could have had of avoiding the rent by reaſon of his infancy
" ſhall not help the plaintiff, who comes in under all the eſtates of
" *A.*, which of themſelves would have been ſufficient to go
" through the whole grant of the remainder, were it not for
" the remainder in tail to *B.*, and that remainder is now by the
" fine barred and gone.

Mo. pl. 274.

" A caſe in effect was this: *A.* tenant for life, remainder to *B.* in
" tail, reverſion to *A.* in fee. *A.* grants a rent out of the lands,
" to begin after his death; then he and *B.* join in a fine to the
" uſe of *A.* for life, remainder to *B.* in tail, or in fee; then *A.*
" dies; yet the rent ſhall not charge the remainder of *B.*, for each
" paſſed their ſeveral eſtates only, *viz.* *A.* his eſtate for life, and
" reverſion in fee, and *B.* his remainder in tail; and there was
" no eſtoppel, becauſe a ſeveral intereſt paſſed from each of them;
" and then the remainder of *B.* is no more chargeable with this
" rent after the fine than it was before, he granting only his own
" remainder

" remainder diſtinct from what *A.* granted; and by conſequence, " none of the charges of *A.* can affect ſuch remainder after the " fine any more than they would have done before. But *quære*, " upon *B.*'s death without iſſue, if the rent ſhall not then take " effect, being well chargeable at firſt upon the reverſion " of *A.*?"

## (H) In what Caſes a Remainder or Reverſion ſhall be ſubject to the Acts or Charges of the particular Tenant.

" I Am now to conſider in what caſes the remainder or reverſion " ſhall be ſubject to the acts or charges of the particular " tenant, and in what not, (which has been partly treated of be- " fore,) and when, and how, the charges of him in the remain- " der or reverſion ſhall take place."

' *A.* tenant in tail, remainder to *B.* in tail; *B.* grants a rent- ' charge, *A.* ſuffers a common recovery, and dies without iſſue; ' the grantee of the rent-charge diſtrains the alienee of *A.*, and the ' diſtreſs was held unlawful; *firſt*. Becauſe the alienee comes in ' under the tenant in tail in poſſeſſion, whoſe eſtate was not ſub- ' ject to the charges of him in the remainder; for, if the tenant in ' tail in poſſeſſion had made only a feoffment in fee, or a leaſe ' for years firſt, and then after a feoffment in fee, and died with- ' out iſſue; yet, till the feoffment avoided, the leaſes or charges ' of him in the remainder ſhould not take place either againſt the ' leſſee or feoffee of the tenant in tail. *Secondly*, The reaſon that ' theſe leaſes or charges out of ſuch remainder are good, is for ' the poſſibility of the remainder coming into poſſeſſion; for of ' itſelf it is a thing not manurable or viſible, and, conſequently, ' not liable to any diſtreſs; and therefore, if it be deſtroyed be- ' fore it comes into poſſeſſion, the charges granted thereout muſt ' fall too, as the ſhadow fails with the ſubſtance. *Thirdly*, An- ' other reaſon is, that he who claims only out of ſuch remainder ' after an eſtate-tail, cannot falſify the recovery had againſt the ' tenant in tail, for the recovery bars the remainder itſelf; ſo that ' he cannot falſify or any way plead to defend his remainder, un- ' leſs he were vouched, nor, by conſequence, can thoſe who derive ' their intereſt under him.

Co. 62. Poph. 6. Moor, 154. 2 Co. 52. 6 Co. 42. Plow. 350.

' But, where *A.* was tenant for life, remainder to *B.* in tail, ' and *B.* granted a rent-charge, or made a leaſe for years, to be- ' gin after the death of the tenant for life; and *A.* the tenant for ' life, after ſuffered a common recovery, though with voucher of ' *B.* in the remainder in tail; yet the leaſe or rent ſhall take ' place according as they were made or granted; for there, ſuch a ' leſſee or grantee may falſify the recovery either by the common ' law or ſtatutes; for the tenant for life hath no power to bar the ' remainder, without the aſſent or concurrence of him in the re- ' mainder, as the tenant in tail in poſſeſſion hath; and his aſſent

Cro. Eliz. 718. Pledgard v. Lake. 1 Co. 62. Poph. 6.

' or

‘ or concurrence cannot operate to defeat his own acts, any more
‘ than a recovery againſt tenant in tail in poſſeſſion can defeat his
‘ own leaſes or grants; becauſe in both caſes the recoveror comes
‘ in by the tenant in tail, whether in poſſeſſion or remainder, who
‘ alone has power over the eſtate, and ſhall be bound by his own
‘ acts.

Co. 67. Co. Litt. 338. 7 Co. 65. 8 Co. 145. 9 Co. 107. Ld. Raym. 521.

‘ If *A.* be tenant for life, remainder to his firſt and other ſons
‘ in tail-male, remainder to *B.* in fee; and *A.* before the birth of
‘ any ſon make a leaſe for years, grant a rent-charge, acknowledge
‘ a ſtatute, *&c.* and afterwards ſurrender to him in the remain-
‘ der, or make a feoffment, or commit other forfeiture, for
‘ which he in the remainder enters; yet he ſhall hold the eſtate
‘ ſubject to the charges of the tenant for life; for theſe being his
‘ own acts to determine his eſtate, ſhall not turn to the prejudice
‘ of the leſſee or grantee, who is a ſtranger; but his eſtate for
‘ life ſhall to this purpoſe be ſtill ſaid to have continuance, though
‘ as to all other purpoſes it is determined; and therefore the
‘ contingent remainders not being to ariſe out of the eſtate for
‘ life, but depending thereon till they come *in eſſe*, are, by
‘ the determination thereof before they come *in eſſe*, deſtroyed
‘ and gone.

8 Co. 145. Davenport's caſe.

‘ So, where leſſee for years of an advowſon granted the next
‘ avoidance, and after ſurrendered the term to the leſſor, yet this
‘ ſhall not defeat the grantee of the next avoidance; becauſe the
‘ ſurrender was his own act, before which there was a good grant,
‘ and that ſhall bind him in the remainder, who to this purpoſe
‘ comes in under the eſtate of the grantor.

6 Co. 79. Ld. Abergaveny's caſe.

‘ So, where two joint-tenants for life were, and judgment in
‘ debt was given againſt one of them, and then he releaſed to the
‘ other joint-tenant, who died, and he in the reverſion entered;
‘ yet it was adjudged, that he ſhould hold a moiety ſubject to the
‘ judgment, during the life of the joint-tenant who releaſed; for,
‘ as to this purpoſe, the eſtate for life in a moiety hath ſtill con-
‘ tinuance, though to all other purpoſes the leſſor was in of his
‘ ancient reverſion for the whole, and the joint-tenant, to whom
‘ the releaſe was made, was in by the firſt leſſor, and not by him
‘ who made the releaſe.

Cro. Car. 101. Hutt. 91. Sir Edward Pete v. Pemberton.

‘ One ſeiſed of lands in fee grants thereout a rent-charge to
‘ *A.* for life, and after makes a leaſe to *A.* for 500 years of the
‘ ſame lands; then *A.* ſurrenders his leaſe to the leſſor, who
‘ accepts it; and after *A.* diſtrains, and avows for the rent. It
‘ was held that he might; becauſe by the leaſe for years the rent
‘ was only ſuſpended, and now, by the ſurrender of that leaſe the
‘ ſuſpenſion is taken off, and, by conſequence, the rent revived;
‘ as, if the leaſe for years had been made upon condition only, by
‘ breach of the condition, the leaſe being determined, the rent
‘ would revive; though as to any ſtranger, who might have pre-
‘ judice by ſuch ſurrender, the leaſe for years ſhall ſtill be ſaid
‘ to have continuance.

‘ Tenant

'Tenant for life of a copyhold, remainder in fee; he in remainder makes a leaſe by parol (which, as it ſeems, muſt be warranted by cuſtom); then the tenant for life, and he in the remainder, join in a ſurrender to the uſe of him in the remainder in fee, and the queſtion was, If this was a good leaſe, and ſhould take effect in the life of the tenant for life? And it was held, that it ſhould; for it was a good leaſe againſt him in the remainder; and by the ſurrender of the tenant for life, to the uſe of him in the remainder, his eſtate is merged in the fee, and cannot hinder the leaſe from taking effect, more than if he were dead; and the whole being in his hands can have no privilege ſevered from the inheritance; as if he in the remainder grant a rent-charge, and after the tenant for life ſurrender, the rent ſhall begin preſently. Cro. Eliz. 160. Dove v. Williot, & *vide* Co. Litt. 338. Cro. Eliz. 547.

'So, where one made a leaſe for years, and after granted the reverſion to another for years, to begin after the end or expiration of the firſt term; and then, during the continuance of the firſt term, made a leaſe for life to the firſt leſſee; whereupon the grantee for years of the reverſion brought an ejectment; it was held maintainable, becauſe the firſt leaſe for years being, by the taking ſuch leaſe for life, ſurrendered and gone, by the act and concurrence of the leſſee and leſſor, his grant of the reverſion comes next to take place. Plow. 198. Wrotſley's caſe.

'If a woman inheritrix takes huſband, and they have iſſue a ſon, and the huſband dies, and ſhe takes a ſecond huſband who lets the lands to one for life, and then the tenant for life ſurrenders his eſtate to the ſecond huſband; the ſon may enter upon the ſecond huſband during the life of the tenant for life; becauſe as to the ſon the eſtate for life is drowned, and, by conſequence, the inheritance, which the huſband gained wrongfully by making ſuch leaſe, is now by the ſurrender thereof vaniſhed and gone; and then the rightful inheritance falls upon the ſon, and he may enter as if no ſuch leaſe had been made, that which hindered his entry being taken out of the way. But, if a reverſion be granted with warranty, and the tenant for life ſurrender his eſtate for life to the grantee, yet ſhall not the grantee have execution in value upon the warranty againſt the grantor, during the life of the tenant for life. So, if the tenant for life ſurrender to him in the remainder, or reverſion, within age, yet he ſhall not have his age, becauſe in theſe caſes ſuch ſurrenders would work a prejudice to a third perſon, which the law will not allow; though when it is for the benefit of a third perſon, "he ſhall take advantage thereof, "as by the caſes before mentioned appears." Litt. ſect. 636. Co. Litt. 338.

*A.* ſeiſed of lands in fee makes a feoffment to the uſe of himſelf and the heirs male of his body; remainder in tail to ſeveral others, remainder to his own right heirs; *proviſo*, that if there ſhall be a failure of iſſue male of his body, and that *B.* be dead, and *C.* be married, or of the age of twenty-one years, then ſhe ſhall have 200*l. per ann.* for ten years; then *A.* dies, leaving *D.* his ſon, who makes a leaſe for one thouſand years, then levies a fine Mod. 108. Sir T. Raym. 236. 2 Lev. 28. 3 Keb. 274. 287. Benſon v. Baron Hudſon, S. C.

fine and ſuffers a recovery, and afterwards dies without iſſue male; and the contingencies all happened; and the queſtions were, *firſt*, If this rent was barred by the recovery? *ſecondly*, If the leaſe for one thouſand years was chargeable with it? And it was *adjudged per tot. cur.* that this recovery that barred all the remainders *did alſo bar this rent*, which was to ariſe out of them; for though it were to ariſe precedent to the remainders, yet it was ſubſequent to the eſtate-tail of him who ſuffered the recovery; and therefore being chargeable upon and to ariſe only out of theſe remainders, and they being barred by the recovery, ſo was this rent alſo, which was to ariſe thereout; and for the very ſame reaſons which are given in *Capell*'s caſe, which it was ſaid was the ſame caſe with this. *Secondly*, it was adjudged that this rent could not be chargeable upon the leaſe for one thouſand years; becauſe that was derived out of the eſtate-tail, which was precedent to and paramount the commencement of the rent; and the leſſee was in after the remainders barred by the recovery, in continuance of the firſt eſtate-tail; which leaſe being before the recovery, the recoveror took the eſtate ſubject thereto. And they agreed, that if a gift in tail be made, rendering rent, or upon condition of re-entry, that no recovery by the tenant in tail will bar the rent or the condition, they being coeval with the very eſtate-tail itſelf; and therefore the recoveror, who comes in, in continuance of the eſtate-tail, takes it ſubject to ſuch rent or condition; and yet, in this caſe of the rent, the reverſion is barred, though the rent continues as a rent-ſervice diſtrainable for at common law; but the condition they ſay muſt be a condition annexed to the rent, and not a collateral condition; for that will be barred with the reverſion by a common recovery.

## (I) To what Purpoſes the Remainder is accounted but as one with the particular Eſtate, and where they are regarded as ſeveral Eſtates.

Hob. 71. 'IF one make a leaſe to *A.* for life, remainder to *B.* for life, in tail, or in fee, and *A.* die; the law adjudges the freehold in *B.* preſently, and he is tenant to every *præcipe* till he diſclaims or diſagrees to it; for both the particular eſtate and remainder make but one degree, and a writ of entry *ſur diſſeiſin* may be brought againſt him in remainder after the particular eſtate ended, as well as it might againſt the particular tenant himſelf; and if there be tenant for life, remainder over of a ſeignory, and the tertenant alien in mortmain, they both ſhall have but one year and a day for entry; and if termor or guardian let for life, the remainder over, and he in the reverſion agree, he is diſſeiſor as well as the tenant for life.

Litt. ſect. 521. Co. Litt. 297. 'If a diſſeiſor make a leaſe for life, remainder over in fee, and the diſſeiſee releaſe to the tenant for life, this ſhall enure to him in the remainder, becauſe by the releaſe all his right is gone, but a confirmation only of the eſtate for life ſhall not enure

'him in the remainder, becauſe nothing is confirmed but the 'eſtate for life, and then the remainder lies open without any 'ſanction given to it. But in the other caſe, by the releaſe of 'the diſſeiſee to the tenant for life, all his right is gone, and the 'tenant for life doing wrong only during his own eſtate, the 'releaſe can extend only to cure that wrong, and therefore for 'the reſidue muſt fall into the remainder. So it is, if feoffee 'upon condition make a leaſe for life, remainder in fee, and the 'feoffor releaſe the condition to the leſſee for life, this ſhall enure 'alſo to him in remainder, becauſe the condition went to the 'whole eſtate, and therefore, being diſcharged, muſt exonerate 'the whole eſtate, whereof he in the remainder has part.

'If the diſſeiſee confirm the eſtate of him in the remainder, 'without any confirmation made to the tenant for life, yet the 'diſſeiſee cannot enter upon the tenant for life, becauſe the re- 'mainder is depending thereon; and if he ſhould defeat the 'eſtate for life, he muſt alſo defeat the remainder which he has 'confirmed; but this he cannot do, therefore neither can he de- 'feat the eſtate for life. Litt. ſect. 521.

'So, if a diſſeiſor make a leaſe for life, ſaving the reverſion to 'himſelf, and the diſſeiſee confirm the reverſion of the diſſeiſor 'only, yet he cannot enter upon the tenant for life, becauſe then 'he muſt draw out and defeat the reverſion likewiſe, which 'againſt his own confirmation he cannot do (and yet ſuch reverſion 'is not depending upon the eſtate for life, as the remainder is, 'but is paramount to it); for, if a diſſeiſor make a leaſe for life, 'and after levy a fine with proclamations, and five years paſs, ſo 'that the diſſeiſee is barred for the reverſion, he ſhall not enter 'upon the leſſee for life. Co. Litt. 298.

'If a reverſion or ſeignory be granted to one for life, remain- 'der to another in fee, attornment to the tenant for life is good 'to him in the remainder likewiſe, becauſe both make but one 'eſtate and degree; and for this reaſon it is, that if no attorn- 'ment be to the tenant for life, but after his death attornment is 'made to him in the remainder, this is void, becauſe both making 'but one eſtate, if the firſt be not completed, the other cannot 'take effect. Co. Litt. 310. 2 Co. 67.

'Admittance of the tenant for life of copyhold lands is alſo a 'good admittance of him in the remainder to all purpoſes, except 'the lord's fines, if there be a cuſtom for two ſeveral fines; and 'though the firſt tenant were only for years, yet admittance of 'him is ſuch an admittance of him in the remainder likewiſe, as 'ſhall make a *poſſeſſio fratris* of the remainder, and carry it to the 'ſiſter of the whole blood. Cro. Eliz. 504. 662. Moor, pl. 448. 658. Roll. Abr. 505. 4 Co. 22. Cro. Jac. 31. Mod. 102 120.

1 Vent. 260. 2 Lev. 107. [3 Keb. 263. 329. Gilb. Ten. 194. Watkins's edit.]

'Cuſtom of a manor was, that upon ſurrender of copyhold 'land made to one and his heirs, if three proclamations paſſed, 'and he did not come in to be admitted, the lord ſhould have it as 'forfeited; and there a ſurrender was made to the uſe of *A.* for 'life, Cro. Eliz. 879. Yelv. 1. Baſpool v. Long.

'life, remainder to *B.* in fee; *A.* ſuffers three proclamations to 'paſs without coming in to be admitted; yet it was held, that 'this ſhould not forfeit the eſtate of *B.* in remainder, for they 'are divided eſtates; and the cuſtom being to forfeit one eſtate 'only, ſhall be taken ſtrictly, and intended of an entire fee-ſim-'ple in poſſeſſion.

Moor, pl. 149. Cro. Jac. 437.

'And yet where copyholds were deviſable for three lives *ſucceſſivè*, whereof each to take in order as they were named; and 'the cuſtom was, that they could not cut timber; the firſt tenant 'for life cuts timber; this was held a forfeiture of all their 'eſtates; the reaſon whereof may be, that this was but one en-'tire eſtate in poſſeſſion at firſt, though the cuſtom after ſhares

Cro. Eliz. 598. [See Gilb. Ten. 246. 250. 305. Watkins's edit. 2 Ld. Raym. 999. 3 P. Wms. 10. note F.]

'and divides it to go in ſucceſſion; for it is held, that if a copy-'holder for life commit waſte, this ſhall be no forfeiture of the 'eſtate of him in remainder. Wherein this diverſity appears, 'that for the benefit of him in the remainder his eſtate is ac-'counted as one with the particular eſtate, and therefore one ad-'mittance goes to both; but as to any prejudice which he may 'receive by the act of the particular tenant, his remainder is ac-'counted as a ſeveral and divided eſtate, and ſhall not ſhare in it.'

"And ſo in ſeveral of the other caſes before mentioned."

---

☞ *AS the rule in* Shelley's *caſe is intimately connected with the doctrine in the preceding Treatiſe, and as a controverſy reſpecting the extent of the application of that rule has unhappily long divided the opinions of ſome of the greateſt Lawyers of* Weſtminſter-hall; *the Editor feels it a duty he owes to the Publick to direct the attention of the reader to a tract lately publiſhed by Mr.* HARGRAVE *in the* firſt Volume *of his* Collection of Law Tracts, *intitled,* "Obſervations concerning the Rule in *Shelley*'s Caſe, "chiefly with a View to the Application of that Rule "in Laſt Wills." *The controverſy is there fully ſtated; the errors of each of the contending parties are pointed out diſtinctly, but with delicacy; and the author's idea of the true principle of the rule, its ſpirit and uſe, is diſcloſed with perſpicuity, and maintained with admirable force and*

*cogency*

*cogency of reaſoning.—It may be added, that this idea of the rule has been fortified by the opinion of Lord* Thurlowe *in the caſe of* Jones *v.* Morgan (1 Br. Ch. Rep. 220.), *and by what is ſaid by Mr.* Fearne *in the later editions of his profound Eſſay on the learning of Contingent Remainders. It is to be hoped therefore, for the credit of the Profeſſion, and for the ſake of thoſe whoſe titles would become the ſubject of it, that the controverſy will henceforth be cloſed.*

---

*** *The long note upon the caſe of* Sympſon *v.* Southern, *in pages* 779, 780, 781 *of this volume, was communicated to the Editor by the ingenious Author of The Law of Deſcents, and is extracted from a Treatiſe on Copyholds, with the publication of which the Profeſſion will be ſhortly gratified.*

END OF THE FIFTH VOLUME.

PR
MVSEVM
BRITANNICV